IN THE COURT OF APPEAL OF NEW ZEALAND

CA57/2017
[2017] NZCA 66

BETWEEN	WAYNE THOMAS PATTERSON Appellant
AND	THE QUEEN Respondent

Hearing: 7 March 2017

Court: Wild, Miller and Cooper JJ

Counsel: D A Ewen and SWO Campbell for Appellant
K Laurenson and F G Biggs for Respondent

Judgment: 20 March 2017 at 2.00 pm

JUDGMENT OF THE COURT

A Leave to appeal is granted on the issue of whether a search power can be implied into the Sentencing Act 2002. Leave to appeal is otherwise declined.

B The appeal is dismissed.

REASONS OF THE COURT

(Given by Miller J)

Introduction

[1] Mr Patterson seeks leave to bring a second appeal against release conditions requiring that he (a) submit any electronic devices to a probation officer upon request for the purpose of monitoring compliance with release conditions and (b)

provide details of all bank accounts and money held by him at all times. He says that s 93 of the Sentencing Act 2002, under which the conditions were ultimately imposed, does not permit what amounts to a warrantless search, and that in any event the conditions are neither reasonable nor proportionate.

The release conditions, and how they came about

[2] Mr Patterson has a long history of fraud in New Zealand, Australia and the United States. In 2008 he was sentenced to eight years' imprisonment for beneficiary fraud on an industrial scale; he created 123 false identities and defrauded the state of $3,400,000. He served the full sentence, with an additional nine months for escape and attempted escape. At a parole hearing on 5 June 2013 he tendered forged letters of support from his brother and an employer. He was denied parole and the documents were referred for investigation.

[3] The forgeries resulted in Mr Patterson facing charges of (among other things) attempting to pervert the course of justice. He pleaded guilty and on 14 August 2015 was sentenced to two years' imprisonment. That carried with it the standard release conditions authorised by s 93(2)(a) of the Sentencing Act, but no special conditions were sought or imposed. The standard conditions are set out in the Parole Act 2002:[1]

> (a) the offender must report in person to a probation officer in the probation area in which the offender resides as soon as practicable, and not later than 72 hours, after release:
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> (b) the offender must report to a probation officer as and when required to do so by a probation officer, and must notify the probation officer of his or her residential address and the nature and place of his or her employment when asked to do so:
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> (c) the offender must not move to a new residential address in another probation area without the prior written consent of the probation officer:
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> (d) if consent is given under paragraph (c), the offender must report in person to a probation officer in the new probation area in which the offender is to reside as soon as practicable, and not later than 72 hours, after the offender's arrival in the new area:
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> (e) if an offender intends to change his or her residential address within a probation area, the offender must give the probation officer

[1] Parole Act 2002, s 14(1).

reasonable notice before moving from his or her residential address (unless notification is impossible in the circumstances) and must advise the probation officer of the new address:

(f) the offender must not reside at any address at which a probation officer has directed the offender not to reside:

(g) the offender must not engage, or continue to engage, in any employment or occupation in which the probation officer has directed the offender not to engage or continue to engage:

(h) the offender must not associate with any specified person, or with persons of any specified class, with whom the probation officer has, in writing, directed the offender not to associate:

(i) the offender must take part in a rehabilitative and reintegrative needs assessment if and when directed to do so by a probation officer.

[4] Before Mr Patterson's mandatory release date on 25 July 2016, Corrections moved for the special release conditions that are now in issue, invoking s 94 of the Sentencing Act, under which a probation officer may apply to the sentencing court, at any time while an offender is subject to conditions, for additional conditions that are permissible under s 93. The full suite of additional conditions sought by Corrections was:

(1) to set up a Real Me account and use this for all financial transactions that involve the New Zealand Government;

(2) not to leave the Wairarapa area as defined by a probation officer without written permission from a probation officer;

(3) not to access the Internet, or own, use or possess any electronic devices capable of accessing the Internet, communicating with other persons, or producing any form of documentation, whether electronic or printed, without approval from a probation officer;

(4) upon request, to submit any electronic devices to a probation officer or a nominated agent for the purposes of monitoring your compliance with your conditions;

(5) to gain approval from a probation officer prior to commencing any employment;

(6) to provide details of all bank accounts and other money held by yourself to the Department of Corrections at all times;

(7) to provide the Department of Corrections with the registration details of all motor vehicles owned or driven by yourself;

(8) to reside at [a given address], Carterton and not to move from the address without written permission from a probation officer;

(9) to inform your probation officer of any name changes or aliases that you intend to use for any purpose.

It will be seen that condition (3) prohibited use of the internet, while conditions (4) and (6) are those now under appeal.

[5] Judge Cameron granted the application, imposing all of the conditions. He was "quite satisfied that all of the special conditions … are properly designed to reduce the risk of this defendant reoffending in a dishonest way".[2] He relied on an affidavit of the probation officer, which explained why each condition was sought. For example, the first was sought to prevent Mr Patterson from creating false identities, and the second to prevent him from moving around New Zealand to pose as different people at Work and Income offices. Conditions (3) and (4) were sought because Mr Patterson previously used the internet to commit fraud on a large scale and needed access to devices capable of creating false documents. Condition (6) was sought because his past offending required that he set up separate bank accounts for each identity. Each of these three conditions was justified on the ground that it would limit his opportunity to reoffend in the same way.

[6] Mr Patterson appealed. Williams J held that the High Court had jurisdiction under the Criminal Procedure Act 2011 to entertain an appeal; that conclusion is not now in dispute. He held that special conditions must have a rational nexus to the purposes of s 93 and the Sentencing Act generally, and their impact on the offender's freedom must be proportional; that is not in dispute either.[3]

[7] The Judge rejected an argument that it is illegitimate to impose conditions designed for the prosecution of future offending, reasoning that risk of discovery is often the best form of prevention.[4] On the facts, most of the conditions were reasonably necessary and proportionate in light of Mr Patterson's "extraordinary recidivist proclivities".[5] However, he found that condition (3) was not proportionate; a ban on using the internet at all is draconian and demonstrably fails to facilitate

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2 *Department of Corrections v Patterson* [2016] NZDC 14672 at [8].
3 *Patterson v R* [2017] NZHC 49 [HC Judgment] at [38].
4 At [41].
5 At [42]–[43].

reintegration. Nor was it reasonably necessary, given that condition (4) allowed Corrections staff to monitor internet use at their discretion.[6]

The application for leave to appeal

[8] Mr Ewen, appearing for the applicant, contends condition (4) creates a power of random search that is subject to no requirement for reasonable cause, that the Sentencing Act does not authorise a court to create such a power, that a search conducted without reasonable cause is by definition contrary to s 21 of the New Zealand Bill of Rights Act 1990 (BORA), and that this is an important question, affecting not only sentencing courts but also the Parole Board, which has similar powers under the Parole Act.

[9] Counsel also contends that conditions (4) and (6) are not reasonable or proportional. He accepts that deterrence may be a relevant consideration, but a rational nexus is not enough; it must be clear that no other conditions, or the general law, will achieve deterrence. In this case, he submits, the Search and Surveillance Act 2012 achieves that purpose and so makes the conditions unnecessary.

The Court's jurisdiction to impose post-release conditions

[10] Mr Patterson's sentence was two years, so he was subject to s 93 of the Sentencing Act, which provides that:

> **93 Imposition of conditions on release of offender sentenced to imprisonment for short term**
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> …
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> (2) If a court sentences an offender to a term of imprisonment of more than 12 months but not more than 24 months,—
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> (a) the standard conditions apply to the offender until the sentence expiry date, unless the court specifies a different date; and sections 94, 95, and 96 apply as if the standard conditions had been imposed by order of the court; and
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> (b) the court may at the same time impose any special conditions on the offender and, if it does so, must specify when the conditions expire.

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6 At [44].

(2A) The court may specify that conditions imposed under this section expire on—

(a) the sentence expiry date; or

(b) the date that is a specified period before the sentence expiry date; or

(c) the date that is a specified period of up to 6 months after the sentence expiry date.

(2AB) If the court imposes special conditions on an offender, the special conditions may apply for as long as, but no longer than, the standard conditions apply to the offender.

…

[11] The section specifies that a special condition must not be imposed unless it is designed to reduce an offender's risk of reoffending, to facilitate or promote their rehabilitation and reintegration, or to provide for the reasonable concerns of their victims:

…

(3) A special condition must not be imposed unless it is designed to—

(a) reduce the risk of reoffending by the offender; or

(b) facilitate or promote the rehabilitation and reintegration of the offender; or

(c) provide for the reasonable concerns of victims of the offender.

[12] "Special conditions" is defined to include "without limitation" conditions "of a kind" described in s 15(3) of the Parole Act.[7]

[13] Section 15(3) of the Parole Act provides that:

15 Special conditions

(3) The kinds of conditions that may be imposed as special conditions include, without limitation,—

(a) conditions relating to the offender's place of residence (which may include a condition that the offender reside at a particular place), or his or her finances or earnings:

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7 Sentencing Act, s 93(2B).

(ab) residential restrictions:

(b) conditions requiring the offender to participate in a programme (as defined in section 16) to reduce the risk of further offending by the offender through the rehabilitation and reintegration of the offender:

(c) conditions that the offender not associate with any person, persons, or class of persons:

(d) conditions requiring the offender to take prescription medication:

(e) conditions prohibiting the offender from entering or remaining in specified places or areas, at specified times, or at all times:

(f) conditions requiring the offender to submit to the electronic monitoring of compliance with any release conditions or conditions of an extended supervision order, imposed under paragraph (ab) or (e), that relate to the whereabouts of the offender:

(g) an intensive monitoring condition, which must, and may only, be imposed if a court orders (under section 107IAC) the imposition of an intensive monitoring condition.

Can a search be authorised under the Sentencing Act?

[14] We accept that this first ground of appeal raises a question of general public importance that justifies leave to bring a second appeal. The question is whether s 93(2)(b) of the Sentencing Act authorises a court to confer a power of search upon a probation officer. It is not now in dispute that condition (4) creates a power of search. We assume without deciding, it being unnecessary on the view we take, that condition (6) also does so.

[15] On its face the legislation confers a broad discretion to impose any condition designed to reduce the offender's reoffending risk. It fixes no express limit to the type or content of conditions; on the contrary, they include without limitation those of a kind described in s 15(3) of the Parole Act. The power is expressly limited only by the requirement that such condition be designed to serve one or more of the purposes in s 93(3), meaning that the condition must exhibit a rational nexus with one of those purposes.

[16] However, it is settled that the power is also subject to implicit limits. To begin with, s 93(3) indicates that any such condition must be tailored to the offender's circumstances; it must address his particular risk of reoffending, or prospects of rehabilitation, or victims. As this Court put it in *R v Jannsen*:[8]

> [15] The discretion must also be exercised consistently with the principles in s 8 of the Sentencing Act, the first five of which (those in paragraphs (a) – (e)) require that any condition imposed relate explicably to what has been described succinctly as "the precise criminality": *R v Meroiti* CA392/99 26 October 1999 at [6], quoting *R v Duffy* (1994) 15 Cr App (s) 667 at 681. And that must include an assessment of the effect of the offence on any victim: s 8(f).

[17] The "least restrictive sentence" principle also applies to special conditions imposed under s 93:[9]

> [16] The remaining purposes of sentence are no less germane. The sentence imposed must be the least restrictive outcome appropriate: s 8(g). It must also be tailored to the offender. Account must be taken of any factor personal to the offender that would make a usual sentence disproportionately severe: s 8(h). One of the purposes of conditions on release is, moreover, to rehabilitate and to assist the offender to reintegrate. Personal, family, whanau, community and cultural factors can be no less relevant: s 8(i).
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> [17] Finally, because the special conditions able to be imposed derive in the main from those set out in s 15(3) of the Parole Act 2002, the principle in s 7(2) of that Act that guides the Parole Board has an implicit and helpful place. Any condition imposed ought not to be "more onerous, or last longer, than is consistent with the safety of the community".

[18] Against this background, we agree with Williams J that any given condition must exhibit a rational nexus to the s 93(3) purposes, and that when considered with other conditions to be imposed it must be reasonably necessary and proportional.[10] To achieve these things is to ensure, in the present case, that the power of search is not unreasonable and so does not without more contravene s 21 of BORA.[11]

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8 *R v Jannsen* [2007] NZCA 450 at [15].

9 At [16]–[17].

10 HC Judgment, above n 3, at [38].

11 *Cropp v Judicial Committee* [2008] NZSC 46, [2008] 3 NZLR 774 at [33] [*Cropp*]; and *Hamed v R* [2011] NZSC 101, [2012] 2 NZLR 305 at [162] per Blanchard J. It follows from these authorities that, if ss 5 and 21 of BORA fulfil the same function in determining the reasonableness of a search, this proportionality analysis will cover the same ground as that covered by a stand-alone s 21 inquiry.

[19] This is the settled view. Mr Ewen sought to contest it so far as it concerns searches, arguing that the statutory language does not extend to a power of search. He did not dispute that a search power may reduce the offender's reoffending risk; there is a rational nexus, as he put it. Rather, he argued that express language is needed to authorise an otherwise unlawful act, citing *ex parte Sims* and *B v Auckland District Law Society*.[12] In the alternative, he argued that express language is needed to authorise an unreasonable search, contending that because the search power in this case is investigative in nature, aimed at detecting offending, and does not require that the probation officer have reasonable cause to suspect an offence, it is almost by definition unreasonable.

[20] We begin by noting that a distinction must be drawn between a decision to confer a power of search under s 93 and a probation officer's exercise of that power on any given occasion. We are here concerned with the former decision, which authorises a probation officer to search and does not require that the officer first have reasonable grounds to suspect an offence. As Ms Laurenson properly accepted, a decision to confer such a power of search does not preclude a claim that a given search made pursuant to it was for other reasons unreasonable.

[21] We next note that all BORA-protected rights are subject to such limits as may be demonstrably justified in a free and democratic society. As this Court noted in *R v Jannsen*, the appellant's BORA rights must be considered when imposing special conditions but justification for any restriction on those rights may be found in the Sentencing Act.[13] So, for example, the s 21 right to be secure against unreasonable search and seizure must be taken into account in this case, but the statutory purposes may justify a search that might otherwise be unreasonable.

[22] The justification in this case rests on the need to reintegrate and rehabilitate offenders in the period following their release from prison. It is achieved partly by preventing them from reoffending while they re-establish themselves in the community. Section 93 adopts the plainly reasonable premise that such offenders

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12 *R v Secretary of State for the Home Department Ex parte Simms* [2000] 2 AC 115 (HL) at 132 per Lord Hoffmann; and *B v Auckland District Law Society* [2003] UKPC 38, [2004] 1 NZLR 326 at [58]–[59].

13 *R v Jannsen*, above n 8, at [17].

form a class whose members may be at risk of reoffending and in need of rehabilitation. Hence the legislation expressly contemplates, for example, conditions about place of residence, finances, and non-association, all of which entail significant impositions on liberty.

[23] It follows that it is not correct to say that the search power in this case is necessarily unreasonable because it does not require that the probation officer have reasonable cause to suspect an offence. The power is not addressed to the community at large, for whom a search must comply with the Search and Surveillance Act. As an offender sentenced to imprisonment, Mr Patterson falls into a class of persons who may present a materially greater risk of reoffending and for whom s 21 rights may justifiably be subject to further limitation.

[24] Further, the processes required under s 93 must also be taken into account when assessing the reasonableness of a condition authorising a search. The power is conferred following a judicial assessment of the offender's risk of offending in the post-release period. The court must have decided that in the offender's circumstances such a power is reasonably likely to reduce the risk of reoffending, and that any infringement of the offender's rights is proportionate to the reduction in the risk of reoffending. The court having had reasonable grounds to believe that a search power would justifiably reduce reoffending risk, a search conducted pursuant to the power thus conferred is not, without more, unreasonable.

[25] Mr Ewen resisted this conclusion, pointing out that if an offender is suspected of reoffending the authorities may invoke search powers under the Search and Surveillance Act. We accept that the Act is available, and further that a court considering a search power under s 93 must take it into account. The offender is obviously known to the authorities and his activities are being monitored or supervised under other release conditions. The court must have reason to believe that in all the circumstances a specific power of search will reduce reoffending risk sufficiently to justify the associated limitation on the offender's s 21 right. However, this is merely to establish that Search and Surveillance Act powers are a relevant consideration under s 93. It does not follow that a more intrusive or specific power of search can never be justified under s 93.

[26] For these reasons, we conclude that a power of search such as that found in condition (4) is not beyond a court's powers under s 93. This ground of appeal fails on the merits.

Conditions not proportional in this case?

[27] Mr Ewen contended that conditions (4) and (6) are not reasonably necessary or proportional in the circumstances of this case. However, this ground of appeal raises no question of general importance justifying leave, nor can it be said that the courts below exceeded the limits of discretion in reaching the conclusion that they did. The conditions are plainly connected to Mr Patterson's very high reoffending risk.

Decision

[28] We grant leave to appeal on the first question, whether a search may be authorised under s 93(3). We dismiss the appeal.

[29] We refuse leave to appeal on the second question, whether conditions (4) and (6) were reasonable and proportional in the circumstances of this case.

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