NOTE: PUBLICATION OF NAMES OR IDENTIFYING PARTICULARS OF COMPLAINANTS PROHIBITED BY S 139 OF THE CRIMINAL JUSTICE ACT 1985

IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA463/2017
[2018] NZCA 99

BETWEEN	DAVID RAYMOND LEWIS Appellant
AND	CHIEF EXECUTIVE OF THE DEPARTMENT OF CORRECTIONS Respondent

Hearing: 27 February 2018

Court: Brown, Brewer and Collins JJ

Counsel: A J Bailey and E Huda for Appellant
I R Murray for Respondent

Judgment: 18 April 2018 at 11.30 am

JUDGMENT OF THE COURT

A The application to adduce new evidence is declined.

B The appeal is dismissed.

REASONS OF THE COURT

(Given by Brown J)

Introduction

[1] The appellant, Mr Lewis, has a lengthy history of sexually abusing children and possessing child pornography. In 2012 he was convicted on a number of serious charges of historical sexual offending on two victims during the periods 1976 to 1982

and 1994 to 1996. He was imprisoned for six and a half years on 25 May 2012. It was common ground that he was an eligible offender in terms of s 107C of the Parole Act 2002 (the Act).

[2] On 10 August 2017 Judge O'Driscoll in the District Court at Christchurch[1] made an Extended Supervision Order (ESO) against Mr Lewis for a period of seven years. Mr Lewis appeals from the judgment.

[3] There are two limbs to his appeal: first a want of jurisdiction because of an alleged deficiency in a report prepared in support of the application; second an erroneous conclusion in the judgment. In summary, his grounds of appeal are:

- The Judge was wrong to find that the health assessor's report made an assessment as to whether or not there was a high risk that Mr Lewis would commit a relevant sexual offence as required by s 107F(2A)(a)(ii) of the Act and hence the Judge had no jurisdiction to make an ESO.

- Even if the Judge had jurisdiction to make an ESO against Mr Lewis, the Judge was wrong to find that there was a high risk that he would commit a relevant sexual offence.

Statutory framework

[4] An application for an ESO under s 107F of the Act must be accompanied by a report of a health assessor, the content of which is specified in s 107F(2A).

> **107F Chief executive may apply for extended supervision order**
>
> …
>
> (2A) Every health assessor's report must address one or both of the following questions:
>
> (a) whether—
>
> (i) the offender displays each of the traits and behavioural characteristics specified in section 107IAA(1); and

[1] *Chief Executive of the Department of Corrections v Lewis* [2017] NZDC 16804.

(ii) there is a high risk that the offender will in future commit a relevant sexual offence:

(b) whether—

(i) the offender displays each of the behavioural characteristics specified in section 107IAA(2); and

(ii) there is a very high risk that the offender will in future commit a relevant violent offence.

[5] "Relevant sexual offences" are those listed in s 107B(2), commonly known as contact offending. They are to be contrasted with the term "relevant offence" which includes any of the offences specified in subs (2) (a relevant sexual offence), subs (2A) (a relevant violent offence) and subs (3) (certain offences under the Films, Videos, and Publications Classification Act 1993), referred to as non-contact offending.

[6] Section 107IAA(1) specifies the matters in respect of which the Court must be satisfied of when assessing risk. It states:

107IAA Matters court must be satisfied of when assessing risk

(1) A court may determine that there is a high risk that an eligible offender will commit a relevant sexual offence only if it is satisfied that the offender—

(a) displays an intense drive, desire, or urge to commit a relevant sexual offence; and

(b) has a predilection or proclivity for serious sexual offending; and

(c) has limited self-regulatory capacity; and

(d) displays either or both of the following:

(i) a lack of acceptance of responsibility or remorse for past offending:

(ii) an absence of understanding for or concern about the impact of his or her sexual offending on actual or potential victims.

The application and health assessor's report

[7] The grounds for the application for the ESO were that Mr Lewis has or has had a pervasive pattern of serious sexual offending and that there is a high risk that he will in future commit a relevant sexual offence. The application was made in reliance on

a report of Ms Katrina Falconer Beach, a registered clinical psychologist who had interviewed Mr Lewis on 27 September 2016 and 4 October 2016 for a total of two hours.

[8] Her report commenced by recording the consent process, comments on Mr Lewis's presentation and the variety of specific documents referred to and people consulted in the preparation of the report. It then recited Mr Lewis's pattern of previous offences including unsanctioned offending, sanctioned offending and the index offending. The treatment which had been provided to Mr Lewis since 2013 was also recorded.

[9] The report then proceeded to consider Mr Lewis's potential to reoffend. The evaluation of risk involved the application of a multi-method assessment strategy comprising:

- The Automated Sexual Recidivism Scale (ASRS), an actuarial risk measure developed for the Department of Corrections to assist in the prediction of an offender's risk of sexual offending;

- The Violence Risk Scale: Sexual Offender version (VRS:SO).

[10] The report noted that research suggests that on average the risk of sexual reoffending diminishes with the offender's advancing age. It was observed however that given Mr Lewis's most recent offending occurred when he was in his late 50s, his advancing age did not appear to have diminished his risk of sexual reoffending.

[11] The report proceeded to address each of the four specified factors in s 107IAA(1)(a) to (d). The report's conclusion was in the following terms:

> 41 Mr Lewis is a 71-year-old man who has an extensive history of sexually offending against children, over a 34 year period. He has a clear deviant sexual interest in prepubescent children, particularly males. He has demonstrated that he has an intense drive to offend against children and a proclivity and propensity to do so. While Mr Lewis has been able to regulate his behaviour in other spheres of his life, he has been unable to successfully regulate his deviant sexual behaviour, even while in the restrictive environment of a special treatment unit programme. Mr Lewis shows early signs of taking

> responsibility for his sexual offending and feeling remorse for his behaviour. He also shows early signs of understanding, and being concerned about, the effects of his offending on his victims however, these are recent developments for Mr Lewis. Mr Lewis has completed treatment through the KMSTU. Mr Lewis was regarded as making minimal change during the treatment programme and is only now being viewed as starting to gain insight into the factors contributing to his offending behaviour. Mr Lewis is assessed as being at *high* risk of further relevant sexual offending. Due to his deviant sexual interest, his limited insight, and his poor ability to sexual self-regulate, risk reduction for Mr Lewis is likely to be more successful when supported by external monitoring and managing of his behaviour.

The hearing and subsequent events

[12] At the hearing Mr Bailey cross-examined Ms Falconer Beach at some length about the contents of both her report and a prior report dated 17 February 2015 prepared for the Parole Board to which Ms Falconer Beach had made reference.

[13] After the hearing concluded Mr Bailey filed a memorandum which addressed the jurisdiction of the Court to make an ESO. It stated:

> 2 It will be recalled that Ms Falconer Beach said in evidence that her risk assessment of Mr Lewis, as set out in her written report dated 1 December 2016, was for all potential sexual re-offending. Similarly, the tests she utilised (the ASRS and VRS:SO) assessed Mr Lewis' risk of re-offending for all types of sexual offences.
>
> 3 In Ms Falconer Beach's report she used the terms "relevant sexual re-offending" (para 30), "relevant offending" (para 33) and "relevant sexual offending" (para 41).
>
> 4 However, it was plain from Ms Falconer Beach's evidence today that when she prepared her report she did not make an overall assessment as to Mr Lewis' future risk of committing a "relevant sexual offence" ***as defined in s 107B(2) of the Act***. Rather, she made an assessment about Mr Lewis' risk of reoffending for any type of sexual offence.

[14] After reciting 107F(2) and (2A) the memorandum continued:

> 6 Therefore, whilst Ms Falconer Beach has used the terms outlined at paragraph 3 above, her report does not in fact provide an opinion as to whether Mr Lewis is at a high risk of committing a ***relevant sexual offence*** (as defined by the Act).
>
> 7 Accordingly, given it is a pre-requisite that the Applicant **must** provide the Court with a report which addresses that question, the respondent submits that the Court does not have jurisdiction to make an ESO.

[15] Mr Bailey concluded by emphasising it was essential that a health assessor's report actually addresses the question which the Court was required to determine, that had not happened, and the Court should not disregard that important prerequisite.

[16] It appears that Mr Bailey's memorandum was the subject of several email exchanges within the Department of Corrections which culminated in Ms Falconer Beach sending a letter dated 31 July 2017 to Judge O'Driscoll. The letter was addressed in the judgment as follows:[2]

> [85] While I received a letter from Ms Falconer Beach in response to Mr Bailey's written submissions after I had reserved my decision, the letter does not add anything to what Ms Falconer Beach had already given in evidence so I do not see the letter as providing me with any new evidence that needed to be given in court or which should be the subject of any cross-examination. I do not take the contents into account in reaching my decision in relation to the making of the ESO.

The District Court judgment

[17] After reviewing Mr Lewis's history of offending, the health assessor's report, the parties' submissions and the legislation, the judgment proceeded to consider the s 107IAA(1) factors. The jurisdiction argument concerning the sufficiency of the health assessor's report was addressed in this way:

> [19] As I understand Mr Bailey's submissions relating to the Court not having jurisdiction to impose an ESO, it is due to the Health Assessor referring in the report to Mr Lewis having a "high risk that he will engage in relevant offending within 10 years of release" and "he is at high risk of further relevant sexual offending", rather than the health assessor making an assessment that Mr Lewis is at high risk that he will commit a "relevant sexual offence".
>
> …
>
> [84] The criticism advanced by Mr Bailey that the Health Assessor's opinion of Mr Lewis's risk of future offending being based on Mr Lewis committing a future "sexual offence" as opposed to a future "relevant sexual offence" is not made out. The submission is the Court has no jurisdiction to make an ESO because Ms Falconer Beach did not make an overall assessment as to Mr Lewis's future risk of committing a "relevant sexual offence" as defined in s l07B(2); rather her assessment was based on the risk of reoffending for any type of sexual offence.
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> …

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2 *Chief Executive of the Department of Corrections v Lewis*, above n 1.

> [86] I accept there is a difference in the legislation between the terms "relevant offence": s 107B(1) and "relevant sexual offence"; s l07B(2) and of course a more wide ranging number of charges that would be encompassed by the term "sexual offending".
>
> [87] Ms Falconer Beach has commented in her report that in her opinion Mr Lewis is at high risk that he will engage in "relevant" offending within 10 years of release: see para[33].
>
> [88] At page 9 of her report she has a heading *"Risk Issues Relevant To Parole Act 2002, sl07IAA*".
>
> [89] The conclusion at para [41] states that "Mr Lewis is assessed as being at *high* risk of further relevant sexual offending".
>
> [90] I also note at para [33] of Ms Falconer Beach's report that she details the types of offending that Mr Lewis is at high risk of committing. These offences include manual or oral masturbation of the victims, forced masturbation of Mr Lewis by the victims "and the prospect of rape and sodomy cannot be discounted". These are relevant sexual offences which the Health Assessor has clearly directed her mind to.
>
> [91] I am satisfied that the risk of committing a future sexual offence that the Health Assessor has referred to relates to relevant sexual offending as defined by s 107B(2). I accept Ms Falconer Beach has referred to specific sexual offences that are not "relevant sexual offences", but she has also referred to sexual offences that Mr Lewis may commit that are relevant sexual offences.
>
> [92] I am accordingly satisfied that it is appropriate to make an order for an ESO as sought by the Department.

[18] The Judge was satisfied that all of the qualifying criteria set out in s 107IAA were satisfied. He accepted the evidence from Ms Falconer Beach that there is no specific tool available to assess the risk of an offender committing a specific sexual offence such as a relevant sexual offence, but said that that did not mean that the health assessor could not take the tools into account in providing an opinion to the Court.[3] He observed that the assessment of risk is not determined on a simple analysis of statistics or on raw statistical information.[4] In the Judge's view the health assessor's opinion that Mr Lewis was at risk of committing a further relevant sexual offence was a clinical consideration taking into account all of the relevant factors set out in s 107F(2A).[5]

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3 At [79].
4 At [83].
5 At [83].

[19] The Judge's assessment that the appropriate length of the ESO should be seven years was based on five factors:[6]

- the age of Mr Lewis when he last offended in a serious way against children in 1995 and 1996;
- his interest in objectionable material in 2003;
- his then age, 71;
- the indication that he may be making changes in the last two years since he completed treatment;
- he would be subject to the provisions relating to being placed on the Child Protection Register which should at least in theory reduce the risk of reoffending.

Mr Lewis's application to adduce fresh evidence on appeal

[20] Following the hearing, counsel for Mr Lewis sent a request to the Department of Corrections under the Privacy Act 1993 seeking copies of emails exchanged relating to the ESO application in respect of Mr Lewis. A number of emails which involved at least seven participants were provided by the Department in response. These were attached to and referred to in Mr Bailey's written submissions.

[21] The Department's submissions drew attention to the fact that Mr Lewis had not followed the proper rules of procedure for adducing new evidence on appeal. Consequently, one week before the appeal hearing Mr Bailey filed an application to adduce as fresh evidence the emails attached to his written submissions on the grounds that the emails were fresh, credible and cogent.[7]

[22] The application stated that the cogency of the emails was their consistency with the submission for Mr Lewis that Ms Falconer Beach was not aware of what "relevant

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6 At [96].
7 *Lundy v R* [2013] UKPC 28, [2014] 2 NZLR 273.

sexual offences" were when she prepared her report and therefore the emails contradicted the respondent's submission that the report was directed at Mr Lewis's risk of committing a relevant sexual offence. Indeed in his written submissions Mr Bailey suggested that the emails and Ms Falconer Beach's subsequent letter, which the Judge declined to read, could only be viewed as an attempted cover-up by Ms Falconer Beach and the Department.

[23] Although the emails were new, the same could not be said of the letter which, presumably for that reason, was not the subject of the application to adduce fresh evidence. In the main, the emails were authored by persons who had not been witnesses. The Department's submissions challenged their admissibility. However, the fact that the proposed evidence was hearsay did not mean that it could not be received having regard to the broad power to receive evidence on appeal conferred by s 107H(2) of the Act.

[24] Nevertheless we do not find the exchanges in the emails among the seven participants informative on the issues advanced on the appeal and analysed below. We agree with Mr Murray's submission that the proposed fresh evidence is not cogent in that it does not undermine either Ms Falconer Beach's conclusions or the Judge's decision. We decline the application to adduce the emails as fresh evidence.

First ground of appeal: lack of jurisdiction because of deficient report

[25] Mr Bailey commenced by contending that the Judge had misunderstood his submission on this point, taking issue with the description of his argument at [19] of the judgment.[8] In the circumstances we record his criticism verbatim:

> This was not correct. Counsel's issue was not so much with the precise phrases used by the Health Assessor in her report, but her oral evidence that her report was only directed at assessing the appellant's risk of committing ***any*** sexual offence. Whether the mandatory requirements of s 107F(2A)(a)(ii) was, in fact, complied with, rather than the phrases used in her report was the important point.

[26] Mr Bailey's written submission reiterated that Ms Falconer Beach had acknowledged in her evidence the non-specific nature of the type of risk addressed in

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8 At [17] above.

her report, an acknowledgment which the Judge was said to have ignored. Reference was made in particular to the following two passages from the cross-examination of Ms Falconer Beach:

> Q. Sure and what have you tried to make an assessment of when you've prepared your extended supervision order report for this case?
>
> A. The risk of Mr Lewis sexually re-offending.
>
> Q. What type of sexual re-offending?
>
> A. None of the risk measures identify what kind of sexual re-offending might occur. So they can only ever identify whether or not, or the likelihood of any sexual offending occurring.
>
> Q. And is that what you've done in this case, tried to identify the risks of any sexual offending occurring?
>
> A. That's as far as we can go. I did put in my report the kinds of sexual re-offending that we would think might occur based on his history.
>
> Q. But your ultimate assessment in this case is in terms of all types of possible …?
>
> A. The risk measures do not identify specific things.
>
> …
>
> Q. Are you specifically aware of the risk that a Judge needs to assess when determining whether the Judge should make an extended supervision order in terms of what type of offending?
>
> A. Yes.
>
> Q. Referring to Mr Lewis' criminal history, which ones come under the umbrella of an extended supervision order potential risk of reoffending?
>
> A. Certainly the most recent four. The first one alone would put him in the category of being able to be assessed for an ES Order.
>
> Q. Sorry?
>
> A. The one that happened in January '95.
>
> Q. No, I'm accepting Mr Lewis is eligible to have an extended supervision order made against him.
>
> A. Mhm.

> Q. But when determining whether one should, a Judge is required to make an assessment of the risk of Mr Lewis committing specific future sexual offences and I'm asking you if you're aware which ones would qualify when determining and focusing on that risk of reoffending.
>
> A. I'm not exactly sure which ones a Judge is required to take into account.
>
> Q. Right. I'm not so much criticising you for that. I just want to confirm that when you talk about risk and high-risk you're talking about all sexual offending?
>
> A. Yes.

[27] In our view Mr Bailey's argument conflated Ms Falconer Beach's entirely fair responses to questions put to her about the capability of the various risk assessment tools with her expression of opinion on the ultimate risk criterion. By contrast that distinction was recognised by the Judge.[9]

[28] Ms Falconer Beach's acknowledgment that there was no specific tool available to assess the risk of an offender committing a specific sexual offence was apparent in the first passage of cross-examination relied on by Mr Bailey.[10] That extract followed a discussion of several of the risk assessment tools, namely the STABLE-2007 and the RoC*RoI tools in addition to the ASRS and VRS:SO. Ms Falconer Beach's answers simply related to the risk measures identified by such tools. We refer in particular to her second, third and fourth answers in that first extract.

[29] The point was also apparent from her affirmative response to the final question in the second extract. The references to "risk" and "high-risk" in Mr Bailey's question related to the various categories of risk about which he had questioned Ms Falconer Beach in the course of the cross-examination which preceded the first extract quoted above.

[30] The conflation occurred when Mr Bailey sought to translate Ms Falconer Beach's acknowledgments about the limitations of the assessment tools into a criticism that her report failed to address the requirement that Mr Lewis must

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9 At [18] above.
10 At [26] above.

be shown to have a high risk of committing a specific relevant sexual offence. We do not consider that criticism is valid. Ms Falconer Beach's report did proceed to express the view at both paragraphs 33 and 41 that there was a high risk that Mr Lewis would engage in relevant sexual offending.

[31] Paragraph 33, referred to by the Judge at [90], stated:

> 33 It is considered that there is a *high* risk that Mr Lewis will engage in relevant offending within 10 years of release. Should Mr Lewis sexually re-offend, it would most likely occur in the context of grooming prepubescent children with whom he has repeated contact, including family members and children outside of his family. Mr Lewis is more likely to sexually offend against prepubescent males than females. Offending is likely to take the form of Mr Lewis exposing himself to his victims; manual or oral masturbation of the victims, forced masturbation of Mr Lewis by the victims, and the prospect of rape or sodomy cannot be discounted. Signs that Mr Lewis's risk of sexually re-offending is increasing include: Mr Lewis isolating himself from adults he knows; engaging in seemingly harmless contact with children, which may include offering them money or gifts; accessing child pornography images on the internet; befriending the parents of a prepubescent child to ensure access to the child; and presenting as being sexually preoccupied. If Mr Lewis experiences a disruption to his daily routine, such as no longer being able to engage in a valued adult activity, he is more likely to sexually re-offend against children.

[32] Mr Bailey criticised the Judge's reference at [91][11] to "may", arguing this was not sufficient to justify making an ESO against Mr Lewis. In our view the Judge's use of the word "may" simply reflected the fact that prospective offending was being considered. Paragraph 33 of the report clearly expresses the view that contact offending in the future was likely.

[33] Mr Bailey also appeared to suggest that Ms Falconer Beach did not understand what qualified as a relevant sexual offence. We do not consider that the evidence read in its entirety supports that contention. In that regard we note the following extract from re-examination:

> Q. In paragraph 33 of your report which has referred to the risk –
>
> **WITNESS REFERRED TO REPORT - PARAGRAPH 33**

[11] At [17] above.

Q. – it is considered there's a high-risk that Mr Lewis will engage in relevant offending within 10 years of release. Now you've sort of been asked about this but what I want you to confirm or not is when you're talking about relevant offending, are you meaning sexual offending?

A. Yes.

Q. You do go on there and expand and talk about sexual offending and I think possibly what was being put to you in part in cross-examination is that maybe there's only a chance that Mr Lewis will, you know, offend via the internet, the non-contact type offending. Now your paragraph 3 appears to be contrary to that, am I right – ah, 33 sorry.

A. Yes.

Q. And you may not be aware that there is a definition of what a relevant sexual offence is –

A. Yes.

Q. – are you aware of that and the type of offending which – the risk of high offending is to be a relevant sexual offence –

A. Yes.

Q. – and that's generally a contact offence?

A. Yes.

Q. In your view then, looking at everything that you have, is that still a high-risk of relevant contact sexual offending?

A. Yes.

[34] We agree with Mr Murray's submission that the combination of the report and Ms Falconer Beach's oral evidence provided a clear platform for the finding that there was a high risk of Mr Lewis committing a relevant sexual offence in the future. The challenge to the Judge's jurisdiction to make an ESO fails.

Second ground of appeal: an erroneous conclusion

[35] Mr Bailey submitted that, if Mr Lewis's risk of committing non-relevant sexual offences was isolated and deducted from his overall risk of sexual reoffending, the only logical conclusion was that he was not at high risk of committing a relevant sexual offence. In support of that submission he drew attention to several matters:

- Most of Mr Lewis's sexual-related convictions were for offences which do not qualify as relevant sexual offences.

- Mr Lewis had not committed a relevant sexual offence since 1995, some 22 years prior to the ESO hearing.

- Pursuant to the VRS-SO testing tool his risk of reoffending for all sexual offences was less than high, and only just above the nominal average for all sexual offenders.

- The report for the Parole Board in February 2015[12] concluded that, if Mr Lewis reoffended, it would most likely take the form of his accessing sexual abuse images on a computer, which is non-contact offending.

[36] Mr Murray submitted that the Judge had identified the correct legal tests and applied them to the facts of the case. Mr Lewis is an eligible offender with a pervasive pattern of serious sexual offending. The Judge found the various statutory criteria established and, assisted by the report writer but applying independent judgment, found the necessary risk established.

[37] While Mr Lewis had suggested arguments (which the Judge did not accept) that might have led a different judge to reach a different conclusion on risk, it had not been shown that the Judge was wrong in the conclusions he reached. Mr Murray drew attention to an analogous example where an ESO imposed in a case of historical contact offending was upheld by the Supreme Court.[13] The appellant unsuccessfully argued that non-contact offences should not be considered as part of the pervasive pattern of sexual offending.

[38] In an appeal under s 107R of the Act, Part 6 of the Criminal Procedure Act 2011 applies, with necessary modifications, as if the appeal were an appeal against sentence.[14] We can discern no error either in the Judge's decision-making process or

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12 See [12] above.
13 *Holland v Chief Executive of the Department of Corrections* [2017] NZSC 161.
14 See Criminal Procedure Act 2011, s 250(2) and (3).

in his conclusion that an ESO should be made in the case of Mr Lewis. In the circumstances of the case we would not have reached a different conclusion.

Result

[39] The application to adduce new evidence is declined.

[40] The appeal is dismissed.

Solicitors:
Patient & Williams, Christchurch for Appellant
Crown Law Office, Wellington for Respondent