

HIGH COURT OF AUSTRALIA

GLEESON J

KMD

APPLICANT

AND

CEO (DEPARTMENT OF HEALTH NT) & ORS

RESPONDENTS

[2024] HCASJ 40

Date of Judgment: 18 October 2024

D1 of 2024

ORDER

- 1. The applicant's interlocutory application filed on 9 September 2024 is dismissed.*

Representation

The applicant is represented by Legal Aid Commission of the Northern Territory

The first respondent is represented by Solicitor for the Northern Territory

Submitting appearances for the second and third respondents

1 GLEESON J. By interlocutory application filed on 9 September 2024, the applicant ("KMD") sought a stay of orders made by the Northern Territory Court of Criminal Appeal ("NTCCA") on 23 July 2024 until the determination of KMD's application for special leave to appeal from those orders to this Court and, if special leave be granted, until the determination of the appeal. In the alternative, KMD sought expedition of the hearing of the special leave application, and, if special leave be granted, a stay of the NTCCA orders until determination of the appeal or an order that the hearing of the appeal be expedited. The interlocutory application was supported by an affidavit of Jacob Henderson affirmed on 9 September 2024, and written submissions exhibited to the affidavit.

History of the application

2 The NTCCA orders set aside a non-custodial supervision order made on 5 July 2023 concerning KMD ("the NCSO"), pursuant to s 43ZA(1)(b) of the *Criminal Code Act 1983* (NT) ("the Code") and confirmed the previous custodial supervision order ("the CSO") affecting KMD.¹ As a result, KMD, who had been living in the community for more than one year under the NCSO, without any breach of the conditions of the NCSO, was imprisoned in the Darwin Correctional Centre on 23 July 2024. KMD has remained in custody at the Darwin Correctional Centre since that date.

3 The application for special leave to appeal had been filed on 12 August 2024, and the response of the Chief Executive Officer of the Department of Health ("the first respondent") to that application was filed on 5 September 2024. On 10 September 2024, the Registry informed the parties that, provided KMD filed and served any submissions in reply to the first respondent's response by no later than 12 September 2024, the Court would include her application for special leave to appeal in the list of applications to be considered at its next special leave meeting on 8 October 2024. KMD's submissions in reply were duly filed on 10 September 2024.

4 Notwithstanding the expedition of the Court's consideration of the special leave application, and as she was entitled to do, KMD pressed for an urgent determination of her application to stay the NTCCA orders, so that she could be released again into the community. Accordingly, on 12 September 2024, the Registry contacted the parties to identify a suitable date for a hearing of the interlocutory application, noting that I would also consider whether the application for a stay should be determined on the papers as permitted by r 13.03.1 of the *High Court Rules 2004* (Cth). On 20 September 2024, the parties informed the Registry that: (1) they had been unable to find an appropriate date prior to 8 October 2024

1 *The Chief Executive Officer Department of Health v KMD & Ors* [2024] NTCCA 8 at [197].

for a hearing; and (2) accordingly, KMD no longer pressed for determination of her application for a stay prior to the determination of the special leave application.

5 On 10 October 2024, KMD was granted special leave to appeal. The appeal has also been expedited, with a view to listing the appeal for hearing in February 2025. Accordingly, KMD has obtained the relief sought by the interlocutory application except to the extent that KMD sought a stay of the NTCCA orders until determination of the appeal. That aspect of the interlocutory application is opposed by the first respondent, who filed written submissions on the application dated 18 September 2024.

6 Ultimately, KMD did not oppose the making of a direction under r 13.03.1, unless I considered that I would be assisted by an oral hearing of the application. Having considered KMD's evidence and the parties' written submissions, I am satisfied that the application may be determined on the papers. Accordingly, pursuant to r 13.03.1, I direct that the application is to be determined without listing it for hearing.

Facts and KMD's evidence

7 In 2013, KMD, who had no prior history of criminal offending, committed several serious violent offences, while operating under a delusional belief system. In May 2014, she was declared by the Court to be unfit to stand trial. In July 2014, following a special hearing, a jury found KMD not guilty by reason of mental impairment.² The jury's finding required the Supreme Court of the Northern Territory to either declare her liable to supervision, or order that she be released unconditionally.³

8 KMD was declared liable for supervision by Riley CJ, who made a custodial supervision order and, pursuant to s 43ZG of the Code, fixed a term of 16 years.⁴ The commencement of the CSO was backdated to the date of KMD's arrest on 7 May 2013 as she had been in custody since that date.⁵ In the absence of a secure facility for people held in custody pursuant to the supervision order scheme in Pt

2 *The Queen v KMD & Ors (No 5)* [2022] NTSC 69 at [2], [17].

3 *Criminal Code Act 1983* (NT), s 43X(2).

4 *Criminal Code Act 1983* (NT), ss 43Z(a), 43ZA(1)(a); *The Queen v KMD* [2015] NTSC 31 at [4]-[7], [35], [63].

5 *The Queen v KMD* [2015] NTSC 31 at [60].

3.

IIA of the Code, KMD was incarcerated at the Darwin Correctional Facility pursuant to the CSO.⁶

9 Until 12 July 2023, KMD remained in custody, that is, for approximately 10 years.

10 On 16 June 2023, a judge of the Supreme Court of the Northern Territory, Brownhill J, handed down a judgment in which her Honour indicated her intention to make a non-custodial supervision order concerning KMD, subject to further submissions from the parties on the terms of the order.⁷ In that judgment, Brownhill J determined, in accordance with s 43ZH(2)(a) of the Code, that she was not satisfied that the safety of the public would be seriously at risk if KMD were to be released.⁸ On 5 July 2023, her Honour revoked the CSO and made the NCSO, with effect from 12 July 2023.⁹ KMD was released from custody in accordance with the NCSO.

11 Also on 5 July 2023, the NTCCA refused the first respondent's application for a stay of the NCSO pending an appeal from Brownhill J's 5 July 2023 orders, finding that "[t]he Court is satisfied that sufficient safeguards are in place in the comprehensive NCSO to manage any risk, pending the appeal".¹⁰

12 The first respondent's appeal was heard by the NTCCA on 22 February 2024, following which the Court reserved its decision. Between 22 February and the NTCCA's decision on 23 July 2024, the first respondent did not apply for a stay of Brownhill J's orders. Further, in the period while KMD was in the community pursuant to the NCSO, neither the Northern Territory Police nor the Director of Public Prosecutions exercised the powers under s 43ZF of the Code, which were available if KMD was seen to present an increased level of risk.

13 Following periodic reviews pursuant to s 43ZH(1), Brownhill J varied the NCSO on 27 October 2023, and again on 6 March 2024. The first respondent did not dispute that during the periodic review hearings none of the respondents submitted that KMD's NCSO should be revoked.

6 *The Queen v KMD & Ors (No 5)* [2022] NTSC 69 at [21]-[22], [45].

7 *The King v KMD & Ors (No 6)* [2023] NTSC 51 at [214]-[215].

8 *The King v KMD & Ors (No 6)* [2023] NTSC 51 at [167].

9 *The Queen v KMD & Ors (No 5)* [2022] NTSC 69 and *The King v KMD & Ors (No 6)* [2023] NTSC 51.

10 *The Chief Executive Officer Department of Health v KMD & Ors* [2024] NTCCA 8 at [5].

14 On 17 June 2024, Brownhill J conducted a further review of KMD's NCSO and received evidence including from KMD's general practitioner, social worker, family members, employer and a new friend. KMD submits that the evidence showed that her conduct while in the community on the NCSO did not give rise to any issue or incident suggestive of risk. KMD also notes that the report of Matthew Chick, relied upon by the first respondent at the 17 June 2024 hearing, stated that "[t]here has been no evidence of any kind since the commencement of KMD's NCSO that she has in any way – real or implied – endangered any other person". Justice Brownhill reserved her decision on the periodic review on 17 June 2024 and made orders for the filing of further submissions.

15 On 23 July 2024, the NTCCA allowed the first respondent's appeal, set aside the NCSO, and confirmed the previous CSO.¹¹ The findings of the NTCCA (by majority) included that: (1) it was not reasonably open to Brownhill J to find that the safety of the public would not be seriously at risk if KMD were placed on an NCSO; (2) the position regarding KMD's mental condition and risk assessment had not fundamentally changed since previous periodic reviews conducted by Hiley J commencing on 12 May 2016, 21 February 2017 and 9 November 2020; and (3) it was not reasonably open to Brownhill J to formulate an NCSO the terms of which did not provide for KMD to be the subject of monitoring and, at least, counselling on a regular basis by a psychiatrist and/or psychologist approved by the Forensic Mental Health Team within the Top End Mental Health Service.¹²

16 KMD's solicitor sought an urgent interim stay of the NTCCA orders on the afternoon of 23 July 2024. The NTCCA did not hear the application or make any interim orders. On 2 August 2024, KMD filed a stay application supported by an affidavit made by Mr Henderson. The NTCCA heard that application on 8 August 2024 and, at the conclusion of the hearing, refused the stay application.

KMD's submissions in support of a stay

17 KMD submitted, in respect of the proposed grounds of appeal, that: (1) the approach of the NTCCA to the standard of appellate review in relation to the decision of Brownhill J was inconsistent with decisions of this Court in respect of decisions under similar statutes; and (2) the NTCCA denied KMD procedural fairness; or (3) the NTCCA otherwise fell into error, by determining to set aside the NCSO and confirm the CSO without receiving further evidence as to KMD's

11 *The Chief Executive Officer Department of Health v KMD* [2024] NTCCA 8 at [197].

12 *The Chief Executive Officer Department of Health v KMD* [2024] NTCCA 8 at [194]-[195].

5.

progress while released in the community on the NCSO — notwithstanding an indication at the hearing of the appeal that it would do so.

18 KMD acknowledged that a "key area of uncertainty" in Brownhill J's judgments concerns whether and how KMD's conduct while detained could inform her potential future conduct in the community. However, she submitted that the evidence adduced before Brownhill J on 17 June 2024 concerning her conduct while living in the community under the NCSO since July 2023 is strongly supportive of a conclusion that she does not pose any material risk to the community if the NTCCA orders are stayed, thus re-enlivening the NCSO, pending the hearing of the appeal to this Court. KMD argued that she has shown by her conduct during her first "and surely, being the first, the most difficult" year in the community on the NCSO that her conduct demonstrated compliance with conditions and that she did not pose a risk of endangerment to the community of any kind.

19 As to other discretionary considerations in favour of a stay, KMD noted that: (1) the involuntary detention of a citizen in custody, other than as an incident of the "exclusively judicial function of adjudging and punishing criminal guilt" is inherently exceptional;¹³ (2) Darwin Correctional Centre houses convicted persons serving sentences of imprisonment and that she is not such a person; (3) being incarcerated by reason of mental impairment, in the same way as a prisoner who has been sentenced to imprisonment, but without any definite endpoint, is itself a form of prejudice that should be weighed in favour of a stay; (4) if she succeeds on her appeal, the appellant's intermediate loss of her liberty and imprisonment in Darwin Correction Centre would be relevantly irremediable; and (5) the fruits of her efforts, while living in the community from mid-2023 to mid-2024 will have been "entirely lost" by the detrimental impact of a further period of incarceration.

20 Finally, the applicant observed that Pt IIA of the Code is protective and not punitive. In circumstances where she has established by her conduct on the NCSO that she is capable of living a meaningful and useful life in the community, without any evidence of endangerment to herself or others, it is in the interests of justice that she be allowed to continue to do so, pending determination of her appeal.

Consideration

21 The Court has the power to stay orders that are or may become the subject of its appellate jurisdiction as an aspect of its authority to do all that is necessary to effectuate the grant of appellate jurisdiction conferred by s 73 of the

13 *NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs* (2023) 97 ALJR 1005 at [28].

Constitution.¹⁴ A stay that is necessary "to preserve the subject matter of the litigation" that is the subject of the appeal, or to avoid practical difficulties in terms of the relief which this court could grant falls within the scope of that power.¹⁵ Special leave to appeal having been granted, in my view, KMD is not required to demonstrate exceptional circumstances to warrant a stay of the NTCCA orders.¹⁶ However, and although the deprivation of liberty is an inherently serious matter, that circumstance alone is not sufficient to warrant a stay and applies in every case where a period in custody depends on the success of the appeal.

22 Having been granted special leave to appeal, KMD has demonstrated that she has reasonable prospects of success on the appeal. However, if she ultimately does succeed there may be a dispute about whether KMD should be released into the community on the terms of the NCSO having regard to the passage of time and changes in circumstances since the NCSO was made. For example, the condition requiring that KMD reside at a particular address with two family members can no longer be complied with, as that residence has since been put to a different purpose.

23 In those circumstances and for the following reasons, KMD's application should be dismissed. Most importantly, KMD has not demonstrated that a stay of the NTCCA's orders is necessary to effectuate the exercise of this Court's appellate jurisdiction. The subject matter of the proposed appeal is the legality of the NCSO. KMD's capacity to prosecute her appeal and to obtain the benefits of a successful appeal is unaffected by whether or not she remains in custody pending the determination of the appeal. Further, the nature of a supervision order under Pt IIA of the Code and the term of the order in KMD's case mean that her proceeding is unlike an appeal against a sentencing order or conviction in which the whole or substantial portion of the custodial portion of a sentence will be served prior to the determination of the appeal, such that the applicant's continued detention would render the appeal nugatory.¹⁷

24 Secondly, pending the determination of KMD's appeal in this Court, there are extant findings by the NTCCA that the basis for Brownhill J's decision to make

14 *United Mexican States v Cabal* (2001) 209 CLR 165 at 180-181 [37]; cf *Beljajev v Director of Public Prosecutions* (1991) 173 CLR 28 at 30-31, citing *Chamberlain v The Queen [No 1]* (1983) 153 CLR 514 and *Narain v Director of Public Prosecutions* (1987) 61 ALJR 317; *Obeid v The Queen* (2016) 90 ALJR 447 at 449-450 [12].

15 *Re Moore; Ex parte Pillar* (1991) 65 ALJR 683 at 685, citing *Jennings Construction Ltd v Burgundy Royale Investments Pty Ltd* (1981) 161 CLR 681.

16 *Smith v New South Wales Bar Association* (1991) 66 ALJR 219 at 220F.

17 Cf. *United Mexican States v Cabal* (2001) 209 CLR 165 at 182 [41].

7.

the NCSO was flawed because it was not reasonably open to her to conclude that KMD would not pose a serious risk to the safety of the public if placed on a non-custodial supervision order; and because it was not reasonably open to Brownhill J to make the NCSO in the terms in which it was made because the NCSO did not provide for KMD to be the subject of monitoring and, at least, counselling on a regular basis by a psychiatrist and/or psychologist. It is not clear from the proposed notice of appeal whether those findings will be in issue on the appeal. In any event, while those findings subsist,¹⁸ this Court does not have an appropriate basis to cause KMD to be released from custody on the particular terms of the NCSO.

25 Thirdly, the effect of the proposed stay would be to require KMD's release into the community in circumstances where there is an issue between the parties concerning the risk to public safety if KMD were released. This Court is not in a position to resolve that factual issue.

Conclusion

26 Prayer 1 of the interlocutory application should be refused. Noting that the hearing of the appeal was expedited on 8 October 2024, prayer 2 of the interlocutory application should also be refused.

27 Accordingly, the interlocutory application is dismissed.

18 *Smith v New South Wales Bar Association* (1991) 66 ALJR 219 at 220F; *Rahme v Commonwealth Bank of Australia* (1993) 68 ALJR 53 at 54C-F.