NEW ZEALAND
PAROLE BOARD

Application for Home Detention and Parole
Under the Parole Act 2002

Peter Mana McNAMARA

Hearing:	16 November 2007 at (withheld)
Date of Decision:	12 December 2007
Members of the Board:	Judge J R Callander
	Ms W Ball
	Ms A Timms
Counsel for the Offender:	Mr Bott

DECISION OF THE BOARD

Our Statutory Powers

[1] To avoid misunderstanding we wish to re-emphasise for both the offender and his victim the basis upon which we as a Parole Board must reach our decision.

[2} The Parole Board is a creation of statute – The Parole Act 2002. We act only as that statute commands, permits or prohibits. We are bound to comply with what Parliament has said in that Act and have no powers beyond those set out therein. We must, as best we can, make our decisions in accordance with the principles and purposes defined for us in the Act.

[3] The relevant parts of Section 7 of the Act are now set out. We have emboldened the crucial concepts:

> *When making decisions about, or in any way relating to, the release of an offender,* ***the paramount consideration*** *for the Board in every case* ***is the safety of the community****.*

We ***must*** take these additional principles as a guide when we make a decision:

> *Offenders* ***must not be detained any longer than is consistent with the safety of the community****, and that they must not be subject to release conditions or detention conditions that are more onerous, or last longer, than is consistent with the safety of the community*

When we are required to assess whether an offender poses an "***undue risk",*** we must consider:

> *the likelihood of further offending; and*
> *the nature and seriousness of any likely further offending*

Section 28 of the Act says that we may give a direction to release an offender on parole only if we are ***satisfied on reasonable grounds*** that the offender, if released,

> *will* ***not pose an undue risk*** *to the safety of the community or any person or class of persons within the term of the sentence, having regard to the following:*
>
> > *the* ***support and supervision*** *available to the offender following release.*
> > *the public interest in the* ***reintegration*** *of the offender into society as a law-abiding citizen.*
> > *decisions must be made on the basis of* ***all the relevant information that is available*** *to the Board at the time*
> > *the rights of victims are to be upheld, and victims' submissions and any restorative justice outcomes are to be given due weight.*

[4] Because circumstances differ, each parole decision differs. The application of these principles will vary as according to:

- The personal history and character of the offender;
- The nature and gravity of the crime or crimes committed;
- The impact of those crimes on society in general or victims in particular;
- The available community resources and support;

- The perceived likely response of the offender to rehabilitative and reintegrative proposals;
- The credibility of the offender and any sponsors at interview, and the creditability of the documentation and other information presented to us.

No risk to public safety:

[5] We turn now to the salient features emerging from Mr McNamara's parole and home detention applications. In so doing we reflect upon the careful, considered and well researched oral and written submissions of Mr Bott as counsel. We will refer to them in this decision.

[6] In most parole or home detention decisions the critical issue is whether release will pose an undue risk to public safety. In this case, the Board is satisfied that Mr McNamara poses no risk. His history, his assessment by the two psychologists, the earlier home detention decisions by the Board, and the review decision of our chairperson, all unequivocally establish that important fact..

Victim submissions:

[7] The only factor negatively affecting Mr McNamara's parole assessment is the submissions we have received both in writing and in person from the victim. She is opposed to his release at this point in his sentence. Her submissions must be given due weight and not sidelined. She presented as an intelligent and lucid woman who has been sorely wronged and has consequently experienced serious emotional trauma.

Two irrelevant submissions:

[8] While her general submissions are of real importance, two aspects of her submissions must be disregarded. We understand her concerns about the recent trial of R v Mangnus & Turney, and the sentence of those men for attempting to pervert the course of justice. We also learned of the unusual circumstances of Mr McNamara's semen being taken from the prison. Both these issues can have no bearing on our decision.

[9] The semen issue has no bearing on the offender's risk to the public or upon any of the other statutory considerations

Nothing in the information provided to us establishes that Mr McNamara was behind the making of the false affidavit the subject of R v Mangnus & Turney. This affidavit referred to the alleged inconsistent behaviour shown by the victim to one of the accused at a "Crowded House" concert only days after the rape. The affidavit was sworn by Paul Turney on the instigation of Rene Mangnus and was proffered to the Court of Appeal on the appeal by Mr Hales, a co-offender. The Court of Appeal rejected the affidavit. At the subsequent trial the jury clearly accepted the testimony of the victim that she was not at the concert, and that the affidavit was falsely intended to pervert the course of justice.

[10] It would be improper for us to speculate on Mr McNamara's role in this. In the absence of proven facts, the inferences do not logically, properly or reasonably point to Mr McNamara himself as a party to the criminal acts of Messrs Mangnus and Turney in attempting to pervert the course of justice by creating and filing the false affidavit. His partner (withheld) played a role in this but no criminal charges were laid against her. Clearly, Mr McNamara knew of the search for evidence about the concert but nothing shows he knew the ensuing affidavit was falsely designed to pervert the course of justice.

[11] It is not our function to conduct enquiries into such matters: we are not a court of enquiry. We must decide only upon proper "information" presented to us. While it is appropriate and necessary for us, in the exercise of our discretion to grant parole, to consider the criminal or inappropriate misconduct of a serving prisoner there is no evidential basis for us to do so in the present case. Such conduct is only of value, in the exercise of our discretion, if it tends to show that Mr McNamara poses a risk to the public safety. In the absence of compelling evidence of relevant misconduct, we must put aside that part of the submission. We reject that part of the victim's submission.

The meaning of "due weight"

[12] "Due weight" means appropriate weight. It means that we must give full, proper and careful consideration to the pleas, contentions and proposals put to us by the victim. Clearly, we must weigh and consider her heartfelt concerns together with the other principles to which we have referred. These include the injunction that we must not detain Mr McNamara any longer than is consistent with the safety of the community. We have listened to her concerns and anxiously weighed them in reaching our decision ─ not just as to whether a release on parole should be directed─ but also as to the actual date of that release and the special conditions to apply thereto.

[13] Where there is no risk to the safety of the community, a fair and careful consideration of the victim's submissions does not mean that the Board must decline release for a time. The weight of a victim's concerns may properly be reflected in the number and nature of special conditions of release to be imposed. These may provide a measure of protection for the victim, or allow the victim to see that programmes of rehabilitation are being imposed to ensure that the offender is less likely to commit further future crimes. Postponement of the actual date of release may be necessary in order to give the victim time to understand and adjust to both the fact of the offender's release and the nature of the special conditions imposed.

[14] It is impossible to be formulaic in such matters. It is not a matter of precedent but of practicalities. We deal with real victims, aggrieved victims, ─ people whose lives have been stunned into acute and abiding distress by the wanton criminality of others. We understand these concerns. Accordingly, we have paid particular attention to the views of Mr McNamara's victim. She is upset that the man sentenced for a crime that has laid waste to her life, should be released after serving a mere third of the imposed sentence. She said in her written submissions:

> *[The judge] did not tell McNamara to go to jail for two and a half years for what he'd done; he told him to go to jail for seven years. The sentence had a process and was a measure of the crime committed and although I don't necessarily agree that he must serve the entire sentence - I do however feel very strongly that a grant of parole will vindicate him of a crime second only to murder, and give a message to the rest of serving inmates that in fact parole will be granted ....*

[15] On 1 October 2007, Parliament flagged a future law change that will alter this perception. There will be no parole until at least two thirds of the sentence has been served. However, that future change has no relevance to the present parole application.

Reconciling disparate "justice" perceptions:

[16] Our law says the cries of victims must be heard: first by the sentencing judge and then, in more muted form, by the Parole Board. However, as with all things in life it is a question of balance and fairness. What is seen to be "due weight" must be reasonable in all the circumstances. The rights of both offender and victim must be weighed in balance, and with moderation. "Justice", in circumstances like these, is hard to achieve. Very frequently, either the victim or offender believes the decision is unjust or unfair. Justice for the criminal may not be seen as justice for the victim, and vice versa. Often each has an irreconcilably different view of the landscape we call justice. One person's justice is another person's injustice; often never the twain shall meet. Just as legislators try to reconcile the often irreconcilable, so do those whose coalface task it is to administer justice or consider release on parole.

The paramount principle of community safety and its effect.

[17] Given Mr McNamara's lack of risk, can we legitimately require him to serve longer than one third of his sentence in order to reflect the distress and suffering unquestionably caused to the victim? Or, as Mr Bott contends, has that already been assessed by the sentencing judge in fixing the term of the sentence of imprisonment?

[18] While the safety of the community is the paramount or chief concern, it is not the only concern. As our Board chairperson Judge Carruthers said in his review of the decision declining Mr McNamara Home Detention, there is a divergence of opinion within the Board on the effect victim submissions and/or personal deterrence should have. We agree that guidance from the High Court on the interrelationship between and weight to be given to the guiding principles would be of great help. At

present, there is no such authoritative guidance pointing to how we should exercise our discretion.

[19] S 8(f) of the Sentencing Act 2002 requires a sentencing judge to take into account any information it has concerning the effect of the offending on the victim. Appeal courts makes it clear that while such information must be taken into account it is but one of a number of factors to be considered in fixing the sentence. We believe that is also the proper approach to be taken under the Parole Act.

The legal submissions of the offender's counsel

[20] In reaching our decision, we have had the advantage of reading and reflecting upon the legal arguments advanced by Mr Bott in his submissions on the review and on the current application. We see no point in reiterating those arguments in detail, but certain points raised by him are of importance.

[21] We accept that principles of general deterrence are not for us. The Court of Appeal in ***Reid & Others v NZ Parole Board*** (2006) CRNZ 743 makes that clear. This is not a re-sentencing of the offender. The court made other observations of relevance to our present concerns. It said as follows. The italicised emphasis is ours.

> *[35] Our analysis of the parliamentary history provides at least some support for the plaintiffs' position. As to this, it is perhaps simplest to refer to the Report of the Justice and Electoral Committee on the Sentencing and Parole Reform Bill. In that Report, the Committee made a number of comments the most significant of which we emphasise….*
> *Then, at 30 in the context of the participation of victims and parole procedures:*
>
> > *"Some of us are satisfied that these provisions in general will allow victims of offending an opportunity to participate in, and be heard in, parole hearings if they so desire. It must be stated however that the purpose of a victim's input must to be assist the Board in making a decision. The focus therefore should be assessing the risk to the safety of the community and not merely a restating of the harm done".*
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> *Then, addressing specifically eligibility for parole at 32:*

> *"Most of us are of the view the safety of the community should be the central issue in a parole decision and that the defendant should not be detained in custody longer, or be subject to conditions that last longer or are more onerous, than is consistent with the safety of the community. The portion of the sentence prior to parole eligibility should be considered the part that must be served in order to maintain the integrity of the sentence. After that, offenders should continue to be detained if they pose an undue risk to the safety of the community for at least during the period when they would otherwise have been serving the sentence imposed on them"*
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> .
>
> *[37] As is apparent from what we have said, we see this case as closely balanced. We are, however, of the opinion that the plaintiffs' argument should be accepted essentially for the following reasons.*
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> *(a) If the issue fell to be determined solely by reference to the current form of the parole and sentencing legislation the most obvious interpretation of the relevant sections is along the lines contended for by the plaintiffs. This is because the phrase "safety of the community" most obviously refers to the sort of safety which is compromised by re-offending.*
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> *(b) The arguments to the contrary very largely depend on legislative history and particularly the absence of any clear legislative repudiation of Hawkins. These are powerful considerations but, in the end, not of controlling significance primarily because the general legislative scheme is so different from that considered in Hawkins. This is particularly so in terms of the ability of sentencing courts to allow for deterrence considerations on sentence (either by declining leave to apply for home detention or by imposing MPIs) and the absence of any provision in the Parole Act which corresponds to s 104(c) of the Criminal Justice Act.*
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> *(c) Although evidence of legislative intention is exiguous, our impression is that Parliament did proceed on the basis that parole board panels would not re-engage in what looked like exercises in re-sentencing.*

Denial of guilt

[22] Mr McNamara's denial of offending was a major plank in the submissions made by Mr Bott. However, protestations of innocence are not for our consideration. We are bound by the clear findings of a court of first instance (the jury decision and conviction) ─ confirmed on appeal – that he did rape the victim. It is not for us to deflect from that conviction or reconsider those findings. Our role is to determine whether, on the proper statutory criteria, we should direct a release on either home detention or parole.

The need for parity and consistency

[23] Mr Bott was on much firmer ground when he raised the issue of consistency in Parole Board decisions. He referred us to an earlier decision of our Board involving historic sexual offending, denial of guilt, exemplary conduct, minimal risk, and victim opposition. In that parole decision, the Board released the offender on parole without objection. Consistency of approach in the way we assess offenders is not only desirable but imperative to avoid unfairness and injustice, or even the appearance of such. Just as consistency is seen as an important factor in the sentencing of an offender (see s(8)(c) Sentencing Act 2002) so should it be in the decision to release on parole or home detention. However, no two cases are identical. While certain general similarities may be present, and may superficially suggest consistency or uniformity, a careful focus on the specifics of a case often reveals important or compelling differences. In exercising our discretion, issues as to the credibility of the offender or the creditability of the reports, testimonials, or submissions may weigh heavily against the temptation of seeing cases alike when they are in reality very different. In reaching our decision in Mr McNamara's case, we have borne this in mind.

[24] An Australian researcher, Mr Matt Black, refers to the need for parity in his paper ***Victim Submissions to Parole Boards: The Agenda for Research:, Australian Institute of Criminology, May 2003.***

> *If victim submissions are likely to have a large impact on parole decisions, disparity may arise between offenders whose victims make submissions and those whose victims do not. The mere presence of a victim submission seems small justification for treating an offender more harshly. It was noted that the parole board studied by Parsonage et al. (1992) subsequently reassessed its guidelines to clarify how victim submissions should be used (Bernat et al. 1994).*

[25] We accept the argument that there is a clear risk of disparity in parole decisions for inmates with similar offending and backgrounds depending upon the reaction and response of the victim. Some victims have a personality profile that enables them to cope with trauma far more successfully than others. Some victims,

for many and varied reasons, do not register as victims or make submissions. Mr Bott asks why an offender who is not confronted by victim submissions should have a better chance at early parole release than a similar offender (like Mr McNamara) who is.

[26] While Mr Bott did not refer to this in his submissions, Mr Black, in the paper just mentioned, referred to the United States study by ***Parsonage, Bernat and Helfgott*** (1992) who conducted a pilot study into the effect of victim submissions upon parole decisions. Mr Black reports this highly instructive study as follows:

> *The authors studied parole data from 1989 in the state of Pennsylvania and divided the 3,559 parole decisions into two groups: cases in which a victim impact statement was present and cases in which one was not. The authors then randomly selected 100 cases from each group. Various data were collated, including offence variables (such as type, seriousness and plea) and offender variables (such as ethnicity, gender, occupation and education).*
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> *The study found that parole was refused in 43 per cent of the victim impact statement cases and seven per cent of the non-statement cases. This contrasted with the board's own decision-making guidelines that suggested parole should have been denied to 10 per cent of the victim impact statement cases and seven per cent of the non-statement cases.*
>
> *In summary, the presence of a victim impact statement had a significant impact on the parole outcome across all types of offence, offender and victim. Apparently, the mere presence of a victim impact statement predisposed the board towards denying parole.*

This study reinforces the need for careful attention to the need for consistency, parity, and giving due, but not undue, weight to victim submissions.

The "due weight" to be given to victim submissions:

[27] Mr Black also noted:

> *The Tasmania Parole Board's (2001) view is that "in nearly all cases it would be wrong to refuse parole solely because of the objection of a victim" However, it does see victim submissions as "relevant to the sort of conditions which would be imposed on [a] parole order". For example, the board commonly imposes freedom of movement restrictions in order to ensure the offender does not come into contact with the victim.*

[28] Mr Bott also refers to the report of Mr Chris Webster, Chairperson of the Parole Board of Tasmania in the ***Annual Report of the Parole Board for the Year Ended 30th January 2005,*** pp 4-5.

> *The Board considers it would be wrong and contrary to the requirements of the Act to refuse parole solely because of the objection of a victim or relative; such objections are relevant in the overall decision making process and are certainly relevant to the sort of conditions which would be imposed on any parole order that might be made. For instance the Board almost always imposes limits on the freedom of movement of parolees in order to eliminate or at least reduce the risk of the prisoner coming into contact with a victim of his criminal behaviour.*

[29] We agree with the logic and propriety of both these comments. It is wrong in principle and in law to argue that “due weight" should override the paramount concerns of the safety of the community. That would give a victim a power of “veto" to delay parole. Acquiescing to a victim's call for “sentence Integrity” requiring “more time to be served” would make the Board a de-facto sentencing Court, in effect imposing a second stage informal "non-parole period." We are also mindful that, in this case, the sentencing judge imposed no minimum parole period.

The “paramountcy” argument

[30] By way of analogy Mr Bott referred to the approach taken by the courts in child custody cases. S 23 of **the Guardianship Act 1968** says that in custody matters the court shall regard the welfare of the child as “the first and paramount consideration.” He referred to a much-cited passage in the House of Lords case of ***J v C*** [1970] AC 668, 710-711 where Lord MacDermott observed that that phrase:

> *· · · must mean more than that the child's welfare is to be treated as the top Item in a list of items relevant to the matter in question. I think they connote a process whereby, when all the relevant facts, relationships, claims and wishes of parents, risks, choices and other circumstances are taken into account and weighed, the course to be followed will be that which is most in the interests of the child's welfare as that term has now to be understood. That is the first consideration because it is of first importance and the paramount consideration because it rules upon or determines the course to be followed.*

[31] This statement was approved by our Court of Appeal in ***D v S*** [2002] NZFLR] 116, a majority (4:1) decision on the approach to be taken to child relocation cases. At para 32 of the decision (pp127-128) the court said:

> *Third, all aspects of welfare must be taken into account. As this Court said in* ***G v G*** *[1978] 2 NZLR 444, 447: An overall view must be taken. Undue emphasis must not be given to material, moral or religious considerations, or for that matter any other factor. An aspects of welfare must be taken into account and that will include consideration of the child's physical and mental and emotional wellbeing and the development in the child of standards and expectations of behaviour within our society.*
>
> *(33] The Court must weigh all relevant factors in the balance in determining what will be in the best interests of the child. It is necessarily a predictive assessment. It is a decision about the future. It is not a reward for past behaviour. There is no room for a priori assumptions.... There is no room for a priori assumptions. The reason is, as the Principal Family Court Judge, Judge Mahony, said in* ***VP v PM*** *(1998) 16 FRNZ 621, 625-626:*
>
> > *The expression, "welfare of the child" embodies the most central and pervading principle in family law concerning children. It is not defined in the statute because case by case the elements of welfare to be taken into account will vary, depending on the circumstances of particular children within their families and of families themselves, circumstances which vary enormously across a very wide range of factors which Family Courts are asked to take into account.*

[32] We agree with Mr Bott that it is sensible to take a similar approach when considering the safety of the community as a paramount consideration under the Parole Act. Just as the “welfare of the child” is the most “central and pervading principle” in family law, so is “the safety of the community” in parole law. Lord MacDermott’s words apply equally to a consideration of release on parole because “that is the first consideration because it is of first importance and the paramount consideration because it rules upon or determines the course to be followed.” In exercising our discretion to decide whether or not to direct parole this must be the main focus.

[33] “Due weight” cannot mean that opposition by the victim supplants and overshadows the paramount public safety principle. The Court of Appeal decision in

J v A is a powerful argument that the paramountcy principle must also govern the way we assess any release on parole. As Mr Bott argues – "due weight" does not mean giving undue weight to the views of the victim.

[34] Last year, the Chief Justice of New South Wales addressed a Conference of Parole Authorities.[1] He made the following valuable observations that we respectfully adopt:

> *Both in sentencing and in parole decision-making it is necessary to ensure, on the one hand, that offenders do not have a sense of grievance that they have drawn a particularly harsh judge or harsh parole decision and, on the other hand, that victims do not feel a sense of grievance because an offender has drawn a particularly lenient judge or an indulgent parole decision.*

Chief Justice Spigelman also referred to the need for consistency that we have addressed in para 23 of this decision:

> *That principle has two quite distinct dimensions: first, similar cases should be treated similarly and, secondly, relevant differences should lead to different results. Both judges and parole authorities are required by law to take other considerations into account. The principle of equality of justice – that like be treated the same and unlike be treated differently – requires this to be so.*

And as to the need to consider all the applicable and sometimes conflicting principles:

> *As a manifestation of the gravity of the offence, the impact on victims is only one of many considerations required to be taken into account in the sentencing process. As I have emphasised these considerations quite frequently conflict or, at least, point in different directions: some suggesting a higher sentence, others a lower sentence. The same kind of conflict between essentially incommensurable objectives must arise in the parole decision-making process.*

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[1] Spigelman, CJ, Sydney, Australia, 10 May

He concludes by acknowledging the very problems we experience here in New Zealand

> *A parole authority will, perfectly properly, manifest the same divergence of view that appears in the judiciary with respect to these matters. That is perfectly understandable in the absence of definite legislative guidelines about the weight to be given to particular matters involved in a difficult decision making process.…The core of the problem is the reconciliation of conflicting and incommensurable purposes to be served by criminal punishment. Asking whether retribution is entitled to more weight than rehabilitation in a particular case is, to adapt an analogy of one United States judge, like asking "whether a particular line is longer than a particular rock is heavy" What is required is an overall judgment based on experience. We must not be distracted from this task by the transient pressures of short-term unpopularity with the outcome of such decisions.*

[36] Weighing the competing factors presented to us, and giving earnest thought to the submissions made to us by the victim, we believe we must give primary weight to the absence of risk to the public safety along with the other factors in favour of Mr McNamara's release.

[37] We see no merit in the release being to home detention or residential restrictions. There is no risk to the community and therefore no point in the added limitations inherent in those release options. While home detention gives opportunity for rehabilitative programmes not available in the prison setting, given his denial of guilt, no such conditions have been recommended to us for Mr McNamara. There are no concerns about Mr McNamara's reintegration back into society.

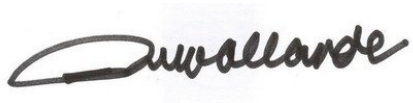
[38] The Board is satisfied that Mr McNamara's release on parole at this stage of his sentence is justified and proper in terms of ss 7 and 28 of the Parole Act. We direct that he be released on parole for twelve months on all the standard conditions of parole prescribed by S 14 of the Act. We also impose the following special conditions are also imposed:

1. To reside only at your family home in (withheld) or such other address as may be approved by Community Probation & Psychological Services.

2. Not to associate or communicate, directly or indirectly, whether in person or through the agency of others, with the victim of your offending
3. Not to be interviewed by any person, nor provide any written, oral or electronic information in any way relating to your trial, conviction, sentence, imprisonment, appeal or parole. This prohibition will not apply to any interview or information given to your solicitor, counsel, or the employee of such solicitor or counsel relating to future legal proceedings or legal advice
4. To undertake any counselling, treatment, or programme which addresses your offending needs, or to improve your understanding of the impact your offending has had upon your victim (such as the Sycamore Tree Programme)─ as directed by Community Probation & Psychological Services.

[39] The Board's Manager of Administrative Services will release our decision at a date and time designed to ensure that Mr McNamara and his victim are informed before the release of this decision to the public.

[40] To allow time for the victim to assimilate this decision and adjust to its effect, Mr McNamara will be released on Tuesday 22 January 2008.



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Judge J R Callander
Panel Convenor

Review

You may apply for a review of the Board's decision under section 67(1). The only grounds under which you may make an application for review are that the Board, in making its decision:

Failed to comply with procedures in the Parole Act 2002; or

Made an error of law; or

Failed to comply with Board policy resulting in unfairness to the offender; or

Based its decision on erroneous or irrelevant information that was material to the decision reached; or

Acted without jurisdiction.

To apply for a review you must write to the Board within 28 days of its decision giving reasons why you believe one or more of the above grounds apply in your case.

Reviews are considered on the papers only; there is no hearing in respect of your Review Application.