IN THE SUPREME COURT OF NEW ZEALAND SC 35/2016

BETWEEN **MICHAEL MARINO**
Appellant

AND **CHIEF EXECUTIVE OF THE DEPARTMENT OF CORRECTIONS**
Respondent

Hearing:	6 July 2016
Coram:	Elias CJ William Young J Glazebrook J Arnold J O'Regan J
Appearances:	D A Ewen and G K Edgeler for the Appellant B J Horsley, D J Perkins and T P Westaway for the Respondent

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CIVIL APPEAL

MR EWEN:

If it pleases the Court, counsel's name is Ewen, I appear for the appellant with Mr Edgeler.

ELIAS CJ:

Thank you Mr Ewen, Mr Edgeler.

MR HORSLEY:

May it please the Court. Horsley, Perkins and Westaway for the respondent.

ELIAS CJ:

Thank you Mr Horsley, Mr Perkins, Mr Westaway. Yes, Mr Ewen?

MR EWEN:

Thank you Your Honour. The appellant appeals the refusal of the appeal against an application for a writ of habeas corpus in relation to his detention following the imposition of a prison sentence.

In the leave judgment the Court requested submissions on the issue of mootness, given that Mr Marino was released in May. I have addressed that issue in my written submissions on the appeal, and can deal with the matter briefly, unless the Court wishes me to amplify on the matter. The short point is, in my submission the issue is not moot because the issue before the Court is the lawfulness of his detention. The inability of this Court to grant the writ simply goes to the availability of one particular remedy, and not the issue itself, and even if the appeal were truly moot, in my submission, by reason of the importance of this issue, and the issues raised yesterday, the Court ought to exercise its discretion to hear the appeal in any event, although following the authority of this Court in *R v Gordon Smith* [2008] NZSC 56; [2009] 1 NZLR 721 it would appear that the issue of mootness is properly addressed in the leave decision rather than the substantive judgment. Unless there are particular questions that the members of the Court may have on this issue I propose to move on to my substantive submissions.

ELIAS CJ:

Yes that's fine, thank you.

MR EWEN:

Thank you, Your Honour. This appeal in involves the consideration of the purpose and intent of section 90 of the Parole Act 2002, and to an extent section 91 of the Parole Act. These were issues that were, of course, touched on in yesterday's appeal, but weren't the direct focus of the matter. But in my submission all the problems and issues and anomalies identified yesterday, have their root cause in the interpretation of section 90, and the interpretation of section 90 is the key issue for the determination because if this Court allows the appeal and upholds the interpretation contended for by the appellant, on section 90 and 91, there are no anomalies. There are no inconsistencies. A cumulative sentence or a concurrent sentence of the same term will lead to exactly the same period of incarceration. But again, whilst yesterday there was a great deal of focus on the inconsistencies as between cumulative and concurrent sentencing, in my submission that is to slightly misstate the issue and the true comparator, and the reason that is important is, in my submission, section 90 of the Parole Act has one function and one function alone. That is to put a remand prisoner in the shoes of someone who is on bail up until the point of sentencing. That person is supposed to have all periods that they've spent in remand on those charges, taken into account. That means the total period of detention for that person would be exactly the same as someone who was on bail up until the point of sentencing. If Mr Marino had been on bail up until the point of sentencing, and Judge Spear had imposed the sentence that he did, constructed the way he did, Mr Marino would have been incarcerated for 11 months. If he had received cumulative terms from the remand period, again, he would have served 11 months. It is only because of the interpretation of section 90(2) that we end up with a situation where Mr Marino actually served 15 and a half months, which is by my calculations some 40 per cent increase in the total period of incarceration, versus either of the situation that he had been on bail or received cumulative terms. So if I am correct in my interpretation that I advance on the Court, all anomalies and inconsistencies simply fall away.

GLAZEBROOK J:

Will you come, it's probably more a question for the Crown, but does your interpretation create other anomalies, and I'm thinking what we were discussing yesterday about perhaps the two short-term sentences or whether there's any, and that's, I haven't looked at whether it creates that anomaly but it just might be something especially that the Crown needs to think about.

MR EWEN:

I have struggled, Ma'am, to look for an example where applying my calculation, my interpretation of section 90, leads to anything other than exactly the same outcome. In the Court of Appeal I put it to the Court that the Crown has not identified any counterfactual that leads to a different result, because in my submission it simply can't happen.

GLAZEBROOK J:

Okay.

MR EWEN:

The totality approach to sentencing that I advocate has taken care of the entire issue that the Court identifies as the reason here, upstream of the Parole Act calculations that need to be done. The only, the one thing that came out of yesterday is the potential *Goldberg v R* [2006] NZSC 58 situation. I haven't addressed the *Goldberg* implications because that goes further than I either need to or ought to in the course of this appeal, but even then *Goldberg* is probably encapsulated in my formula that would lead to the same result. The short answer to Your Honour's question is, no, I can't find any example.

GLAZEBROOK J:

You haven't identified anything.

MR EWEN:

No. I've set out in my written submissions section 85 of the Sentencing Act which in my submission when taken together with the provisions of the

Parole Act is the complete answer to the problem posed by *Taylor v Superintendent of Auckland Prison* [2003] 3 NZLR 752 (CA) and it's important because in my submission we really need to look at how Judge Spear got to that sentence of 22 months that was imposed on the charges of attempting to pervert the course of justice, because Judge Spear did not impose a term of 22 months' imprisonment on the attempts to pervert the course of justice. He imposed 22 months on the attempts to pervert the course of justice, and all the other offending because Judge Spear's sentence indication is, in my respectful submission, the acme of the sentence's art, it sets out absolutely clearly every step in the section 85(4) process. He identifies the attempts to pervert as the lead offending and identifies a starting point in respect of those charges of 18 months. Judge Spear then separately identifies the penalty that would be imposed on the assaults and breaches charges of 12 months. That takes him to, mental arithmetic and I are not friends, it took him to 30 months. Now, Judge Spear then stood back and did the totality analysis of 30 months, adding one on top of the other, offence totality. He reduces by six months, this is the point that arose yesterday on the two rape charges for Mr Booth, eight plus eight equals 16. Now eight plus eight does not equal 16 when on applies totality. He got to 30 months, added on a period to take into account the prior convictions for violence and then did the *Hessell v R* [2010] NZSC 135 discount, which took it back to 22 months. So the 22 months was not the culpability on the attempts to pervert individually or collectively. It was everything. And in my submission this forces the Crown into making a deeply unattractive submission, that Parliament intended a Judge to follow section 85(4) and inflate a sentence, over and above the gravity for that particular offending, to take into account other offending. But then when it came to the application of the Parole Act to allocate remand credit, to zero off remand time that accrued on that additional offending that justified the uplift in the sentence. What Parliament mandates is the inflation at one stage, they take away the corresponding reduction that would otherwise accrue, and that is what is given rise, but only when one is dealing with concurrently imposed sentences from custody to the anomalies and inconsistencies that have dogged this issue from, well pretty much since *Taylor* was decided in 2003.

Now as I said, it was mentioned by members of the Court yesterday in the first of a number of ironies in this particular case. The Crown actually advocated for cumulative sentences in Mr Marino's case but Judge Spear, and in my submission entirely correctly, observed that it didn't matter whether the Court, from a sentencing point of view, imposed terms cumulatively or concurrently. Totality was the star by which he had to navigate and totality mandated the same result regardless, because totality –

ARNOLD J:

On that, I mean it totality is the fundamental principle, as you describe, what is the role of concurrent and cumulative sentences. Why is that structure preserved if ultimately it's all about totality, however you put it together.

MR EWEN:

Because it, the architecture of the Sentencing and Parole Reform Bill was all designed to achieve a degree of consistency and transparency in that the culpability for particular offending should be discretely identified and if there is totally separate offending that may justify cumulative sentences. If they are in the round related, that may justify concurrent sentences. But in my submission, section 84 and section 85 do exactly what they say on the side of the tin. It is guidance for the construction of a sentence but it is not the mandating of hard and fast immutable rules that you must follow this path in respect of this kind of – sentencing is just too fluid a process and criminal culpability can arise in such a wide variety of circumstances.

ELIAS CJ:

But what you're asking is why have that, why have those options.

MR EWEN:

Well, again, and I think one of the reasons why remand calculation was taken out of the sentencing equation is to achieve transparency in the sentencing process, that one sentence could be for precedential value compared to another sentence in the terms of how future sentences ought to be imposed. You get to the guidelines and principles and purposes of sentencing, one of

which is consistency. So the different methods of structuring a sentence can allow for a transparent approach that you can find out what a starting point was for a particular offence and therefore on appellate review, for example, there will be that transparency so an appellate Court can make an ascertainment of was the starting point too high, was it within the range. But I would advocate that the Court of Appeal's judgment in *R v Xie* [2007] 2 NZLR 240 which, again, was mentioned yesterday makes it clear and it's anything but novel that all roads lead to Rome. How you get there is a matter of individual judicial assessment but it's the end result that counts, and section 85(4), it operates as a catch-all for all sentencing circumstances, even if you're dealing with different offending, and it is there to make sure that all offending is punished in the end result. It just gives a vehicle by which that result can be achieved.

The attempts to pervert charges in this case were, in my submission, nothing more than a vehicle. They were a vehicle for the end result. They weren't, in and of themselves, justifying a 22 month prison sentence. For a start, if one looked at Judge Spear's logic of 18 months on the attempts to pervert, there would, in my submission, be no reasoning principle to give the uplift for prior offending because that's in respect of violence offending. If Judge Spear imposed a standalone sentence on the attempts to pervert charges, it would be 18 months less *Hessell* credit. You're down to about 13 and a half months. So that's why I say that there has to be this if all offending is taken account of, if a sentence is imposed in accordance with section 85(4) of the Sentencing Act, not the last time I agree with what Mr Horsley said yesterday, that sentencing is for all practical purposes untouchable unless it's outside the range and on ordinary sentencing appellate principles it's either inadequate or excessive. Looking to matters of architecture, the Court was only invited to look at the matters of architecture alone yesterday because of the downstream consequences. That, in my submission, as I say, in partial agreement with what Mr Horsley said yesterday, is not something that necessarily is going to attract the attention of an appellate Court, nor should it, because the problem is elsewhere and the remedy to the problem is elsewhere.

The Court of Appeal in this case looked at the case with a particular focus on section 91(1) of the Parole Act, which sets out the definition of pre-sentence detention itself. Pre-sentence detention is any period spent in custody on the paragraph (a), (b) or (c) criteria in the proceedings leading up to the conviction or pending sentence of a prisoner. In my submission, the Court of Appeal fell into error when they individualised proceedings to each discrete charge in the sentence. That they derived from their reading of *Taylor*. That said, there can be no case in terms of proceeding. There's only a proceeding when a charge is filed in Court and remand credit begins with the remand in custody on that particular charge.

Now, I'm going to tackle that head-on because in my submission there is simply no warrant on the language of section 91 to merit the reading down of proceedings to each individualised charge. Proceedings, in my submission, ought to be given its ordinary meaning and ordinary sense in a Court proceeding and we can start when considering this case in simply looking at the Crown charge notice.

GLAZEBROOK J:
Are you challenging *Taylor*?

MR EWEN:
Yes and no, Your Honour.

GLAZEBROOK J:
Just to be absolutely clear, you don't need to, I don't think, but …

MR EWEN:
No, because my case is and always has been that *Taylor* was talking about something else entirely. *Taylor* was talking about cumulative sentences imposed in respect of different sentencings on different days and different charges and to the extent that the relatedness inquiry comes out of *Taylor*, in the context of *Taylor* it was necessary. The problem has been, in my

submission, that since *Taylor*, *Taylor* has been viewed as a case of general application and in my respectful submission it never was. It was talking about a particular set of circumstances but I intended to address *Taylor* a little later.

GLAZEBROOK J:
That's absolutely fine.

WILLIAM YOUNG J:
Is your argument subject to there being a single sentencing hearing?

MR EWEN:
Effectively yes, Your Honour, because when I'm saying proceedings, proceedings encompasses all the charges for which you are at sentencing in that hearing.

WILLIAM YOUNG J:
What happens if sentencing on one set of charges is deferred?

MR EWEN:
Then, again, that's where there will need to be a more subtle analysis of – in respect of the subsequent sentencing, there will need to be a subtle analysis of what remand time accrues but if those sentences are deferred in all likelihood, Your Honour, what the sentencing Court is going to do is first of all ask for the sentencing notes in respect of the other charges and make sure there's a totality-adjusted sentence in respect of both. One frequently encounters the situation –

WILLIAM YOUNG J:
No, I understand that but I just looked at your submission at paragraph 80, the submissions you took on the single sentencing hearing. Say the second Judge does what you've postulated, which I assume would normally be the case, that is, obtain the sentencing remarks from the first sentencing exercise and treat it as a re-sentencing, in effect. Would your argument break down then?

MR EWEN:

I'm not sure that it would, Your Honour. I have encountered situations where Judges have split sentencing. The usual purpose for doing so is to try and avoid a prison sentence because if they sentenced on the lot in one hit they would go to jail but if they sentence on that, remand off for rehabilitative treatment et cetera and come back and get sentenced on the balance, that can sometimes mean the difference between a prison sentence and not a prison sentence. But not infrequently we find there's a wash-up sentencing.

WILLIAM YOUNG J:

Well, that may be because some of the charges have been defended.

MR EWEN:

Yes, although the usual practice when some of the charges have been defended and they do constitute a package –

WILLIAM YOUNG J:

Is to defer.

MR EWEN:

Is that the sentencing is deferred until the final outcome. Your Honour, I'm not trying to do what Einstein failed to do and come up with a grand unified theory here.

ELIAS CJ:

Well, we have to think about the anomalies that your argument might throw up and what's the answer to the position that was put by the Crown yesterday with the prisoner sentenced later for subsequent offending in prison? What happens there?

MR EWEN:

That gives rise to the issue of, is time spent with charges pending, remand time on the charges, or is the effect of the fact that they're a serving prisoner

to take that out of the equation and, Your Honour, I have the distinct feeling that is the subject of a discrete statutory provision, but I don't know. That is problematic, although in this case there is a very real possibility if Mr Marino had whacked a prison guard, been brought before the Court and got a month cumulative, it may have served to operate to bring in the remand credit that had been zeroed off by Judge Spear, the application of Judge Spear's sentencing, because then there is one –

WILLIAM YOUNG J:
Notional sentence.

MR EWEN:
One notional sentence which is a potential further anomaly here.

ELIAS CJ:
Well I just wonder whether that doesn't indicate that an entire solution is not simply, even if you're right, the interpretation of the Parole Act, but sentence structure is also something that needs to take account of the different effects of the Parole Act provisions.

MR EWEN:
Except, Your Honour, the place where that falls down. Here we have a situation where there would be a difference as between cumulative or concurrent but you can face the situation as Justice Collins was facing in *Brandon v Chief Executive of Department of Corrections* [2015] NZHC 1586; [2015] NZAR 1257, which is a habeas case of mine from last year, where there were seven charges on which Judge Barry imposed three years two months on each. In that case there wasn't, in the strict 85(4) sense, a lead sentence, they were all the lead sentence, and you get three years two months on each, but by the application of 90(2) as it is at the moment, a three year two month sentence was, according to Corrections, a four year seven and a half month sentence, because the charges had been laid in staggered tranches and each one, as far as Corrections were concerned, gave rise to a new JPD date. Now in the end in *Brandon* Justice Collins

determined that all the charges were related and therefore they met the *Taylor* test but again, and when it comes to the issue of administrative ease, I'm going to refer to the matter in more detail, it took Justice Collins hours of work poring through an incredibly thick District Court file, because it was from a big drugs operation the file was massive, and it took the Judge ages to work out whether these met the test for relatedness. It just gives rise to so many more complications than it solves.

If one construes proceedings leading up to the conviction and sentence as all charges comprised in that sentence, all charges on which sentence is imposed, then the anomalies fall away. In this case in particular, in exactly the same situation as Judge Rea's sentencing in *Te Aho v R* [2013] NZCA 47 which again the Court of Appeal dealt with as a sentence appeal issue, again Judge Rea's sentence was, as with Judge Spear's, lockstep with 85(4) of the Sentencing Act and that led to the inflation of Mr Te Aho's by 112 days. It's interesting that in that case counsel tried to get that issue back before the sentencing Judge, and Judge Rea, I think in all probability correctly, observed that he was functus officio at that stage. It did come up in passing yesterday, was there any way of getting this back in front of the sentencing Judge to correct the error as and when it arises. The answer to that is, only to the most limited possible degree because the only ability to rehear a sentence by the Judge at first instance comes from section 177 of the Criminal Procedure Act which is the re-enactment in modified form of 75 of the Summary Proceedings Act.

WILLIAM YOUNG J:
Is that re-hearing?

MR EWEN:
Re-hearing, but 177, unlike section 75, is limited to charges that have a maximum penalty of three years or less, so on a burglary charge, or an attempting to pervert charge, there can never be resort to 177, the Court is functus, there is no jurisdiction to re-hear. So Parliament has made no

mechanism for patching up the problem at sentencing level once the problem becomes apparent.

WILLIAM YOUNG J:
So there'd have to be an appeal.

MR EWEN:
There would have to be an appeal, and for all the reasons that were canvassed yesterday, I say first and foremost the Court is going to look at the appeal through the lens of manifest, excessive manifestly inadequate, subject of course to particular, Your Honour's comments about whether this is an area of principle because the Judge was –

ELIAS CJ:
Well it's an error –

MR EWEN:
If the Judge had been aware of the issue then –

ELIAS CJ:
It's an error on the face.

MR EWEN:
Yes.

ELIAS CJ:
It's not what he intended to do.

MR EWEN:
No, no, and I say with moral certainty I know exactly what Judge Spear intended the sentence to be, and it was one of 22 months.

GLAZEBROOK J:
I think what we were discussing mostly yesterday was not re-opening but actually dealing with it at sentencing and the Crown, despite the high point

position taken perhaps in the written submissions, did say well though it could be taken into account it just didn't have to be, so it was not an error not to.

MR EWEN:

Yes, and Your Honour the Chief Justice, you're exactly correct, that this is an issue that has gone almost entirely below the judicial radar, certainly District Court level, because after *Brandon*, as it come up in discussion with a number of District Court Judges, and they were completely unaware of how the Parole Act was being applied to the sentences that they had imposed. *Brandon* achieved some prominence last year but the issue has been live since Justice Courtney determined the writ application in *Maile v Manager, Mt Eden Correction Facility* [2012] NZAR 39 (HC). Now again Justice Courtney in that case actually issued the writ. I think that's the only example of a case where the writ has been issued. But again if my analysis were adopted to all the writ cases, since *Maile*, again in all cases the sentence would have been, as imposed by the Judge, and there would not bring the inflation of –

ARNOLD J:

Can I ask you just to walk me through this a little bit. You say that you interpret section 91(1) in the way you suggest, problems go away, and given the language of section 91(1)(c) the idea of a person facing a charge in the period, it seems to me that's quite a broad concept that you can bring into play. But you've still got the problem of section 90(2) and you said earlier, and it was said yesterday, that for example if you had an offence committed while incarcerated in prison –

MR EWEN:

Such as here.

ARNOLD J:

– and one month cumulative, then you get the lot, I don't think that's right actually. If you look at section 90(3) the offender has to be subject to two or more cumulative sentences, so you don't cure the problem simply by having one –

MR EWEN:

Well, no, in my submission two or more basically means any cumulative sentence because one sentence cumulative on one is two cumulative sentences.

ARNOLD J:

Right.

MR EWEN:

Because otherwise subsection (3) would be robbed of a meaning for cumulative sentences.

ARNOLD J:

Well I'm not sure that's right, because you can see what they might be getting at. Anyway, let's park there.

ELIAS CJ:

Sorry, I don't understand what they might be getting at, sorry, can you just explain.

ARNOLD J:

Well you can see the sense of where, no I suppose it's right actually, you'd have to say, if you've got one sentence, and you impose another cumulatively on it, are they, are there two cumulative sentences.

ELIAS CJ:

I think that's the way –

GLAZEBROOK J:

Each using it on the other.

ELIAS CJ:

Yes.

MR EWEN:

In my submission it has to be because otherwise you end up adding a further inconsistency that one plus one is not a notional single sentence, and Your Honour can have the situation that Justice Young posed yesterday, 18 months then 18 months. Unless those are two cumulative sentences, you'd have two short duration sentences, serve nine, then serve nine, instead of 18 months being a three year –

ARNOLD J:

The trouble is we're talking about a sequence where you have a number of concurrent sentences, and then a cumulative one popped on the end, and that's the sort of situation I'm thinking about, where you have a concurrent, is it really right to say that there are two cumulative sentences there.

MR EWEN:

In my submission there is concurrent sentences and one on top, so that's two cumulative sentences.

ARNOLD J:

Okay well –

MR EWEN:

And that would transform it from a subsection (2) case into a subsection (3) case because there's one notional single sentence.

ELIAS CJ:

Yes. The notional single sentence is sort of controlling, here, really, and makes it clear that they are talking about the sentence plus the additional sentence. Both are treated as cumulative sentences in this section, it seems to me.

ARNOLD J:
That certainly is quite an odd result. But anyway, the more significant point for present purposes is section 90(2) and so say you're right about the definition of pre-trial detention, how do you see subsection (2)(a) and (b) working?

MR EWEN:
Of section 90?

ARNOLD J:
Yes.

MR EWEN:
Again, Your Honour, I'd intended to deal with that under the legislative history but I might as well deal with it now because it is key. The wording of 90(2) is, on its face, for me problematic. I would say that given the approach that is mandated to interpretation the Court is basically required to strive to an interpretive outcome that avoids the inconsistency anyway. But when one looks at the legislative history of the Sentencing and Parole Reform Bill, in my submission it all becomes clear what the wording in subsection (2) was supposed to achieve.

I deal with the issue at paragraph 68 onwards on page 15 of my submissions. Because when the Bill was introduced, section 90 was clause 247 of the Sentencing and Parole Reform Bill and I'll read out how subsection (2) originally was drafted. When an offender is subject to two or more concurrent sentences, the pre-sentence detention, if any, that relates to each must be deducted from that sentence only.

Now, that would be great support for the Court of Appeal's analysis of subsection (2) that you individualise the proceedings to each particular charge and that charge alone and that, in my submission, is how they've gone about doing it. But in the Select Committee phase of the consideration of the Bill, the officials were alert and alive to this issue and wrote to the Chair of the Select Committee and I think I'm just going to read out exactly what they said.

"Clause 247(2) currently provides that if an offender is subject to two or more concurrent sentences the pre-sentence detention, if any, that relates to each sentence must be deducted from that sentence only. Officials consider that this is misleading as the period of pre-sentence detention may relate to and need to be deducted from more than one concurrent sentence. The inclusion of the phrase from that sentence only might suggest that if a certain period of pre-sentence detention relates to and is deducted from one concurrent sentence it should not also be deducted from another current sentence that it relates to. Officials proposed to reword the clause to provide a clear, two-step process of calculating the pre-sentence detention time in respect of every individual concurrent sentence and then deducting the amount of time relating to each sentence from that sentence."

ELIAS CJ:
Well, that's as clear as mud.

MR EWEN:
Again, in my submission what they are saying is yes, it's correct that you must, under subsection (2), look at each sentence on its own. We'll take the – and then you work out the pre-sentence detention under 91(a), (b) and (c) because in the diagram that I've provided in the case of the attempts to pervert the course of justice charge you've got 91(1)(a), any charge on which the offender was convicted, and then under subsection (b), any charge on which the prisoner is originally arrested, which is all the assaults and breaches of protection order charges. So what is for the purposes of doing the subsection (92) analysis, the lead offence is paragraph A. The other charges, the totality breaches and assaults, are paragraph B. In this case, I think paragraph C would be the other attempting, the earlier of the two attempting to pervert.

So if one looks at it that way, then (a), (b) and (c) all encompass the pre-sentence detention that is to be applied to the lead offence.

ELIAS CJ:

I've had perhaps a totally wrong thought and that is – and this is perhaps going back to what Justice Arnold was talking about – are they actually using concurrent sentences and cumulative sentences as a composite expression so that 90(2) is concerned with the case where an offender is subject to two lots of concurrent sentences?

MR EWEN:

You mean sentencings imposed on different days?

ELIAS CJ:

Well, they may be different days but two lots of concurrent sentences.

MR EWEN:

Yes. That's an argument that I ran in the Court of Appeal in this case to try and get around the vicissitudes of trying to persuade the Court of Appeal to dump all its authority on the point for the last 13 years. It got no traction at all and that's why in the Court of Appeal judgment there is Justice Miller's remarks that it required – that interpretation would require proceedings under 91 to mean something different from what it means under the Sentencing Act.

Now, that, in my submission, is nowhere near as problematic an act of interpretation as interpreting, as it presently is, and leading to the significant inflation of prison sentences, and in terms of the Court of Appeal's judgment in *Attorney General v Manga* (1998) 17 CRNZ 1 entirely permissible that it one place it might mean something slightly different.

ELIAS CJ:

Well, it's just that they're using the composite term here, concurrent sentences and cumulative sentences, and it does make some sense if that is – you can understand the policy behind this, that you can only take out the pre-sentence detention relating to that bunch, if you want to make it, of sentences and that also makes some sense with section 90(3), too.

MR EWEN:

To an extent, Ma'am, that addresses your question from earlier about what happens to a subsequent sentencing expressed to run concurrently. On that subsequent sentencing, yes, there must only be the pre-sentence allocation to that subsequent sentencing on the charges that probably accrue on that, although they may need at that stage to be a *Taylor*-related inquiry. That's where *Taylor* may have to kick in because sometimes you can lose, in the process of time, for example, remand time on charges that have been withdrawn, say. This is all information that is almost never going to be in front of the sentencing Court which is an additional reason why trying to address it through sentencing may cause additional complications but yes, Your Honour, that is the argument I ran in the Court of Appeal that two or more concurrent sentences may actually mean two or more sets of sentencings on different days in respect of different charges which is actually exactly what the Court of Appeal was dealing with in *Taylor* in the first place.

ELIAS CJ:

That might be consistent with section 91 because it does refer to a notional single sentence and there'd be no need to perhaps include that reference.

MR EWEN:

That, again, in my submission solves all ills currently lying before the Court, that interpretation. I chose in this Court to simplify my argument simply because I got nowhere in the Court of Appeal with it.

ELIAS CJ:

Why? It's contrary to *Taylor*, is it, that implication?

MR EWEN:

Well, in my submission it's entirely consistent with *Taylor* that if two or more concurrent sentences in subsection (2) refers to different sets of sentencings imposed on different days, that is consistent with what *Taylor* was saying because *Taylor* was concerned with – and again it's instructive when dealing with *Taylor* to look at Justice Priestley's High Court judgment because there is

a table, tab 13, a table at page 3 which sets out exactly what Mr Taylor was trying to do in respect of four different sentencings in front of four different Judges. And I say despite Mr Taylor's many advancements in the law of New Zealand this was not his best day's work when he was trying to triple-dip. The Court of Appeal accepted, as it was bound to, that he was entitled to double-dip through to, by reason of rather poorly worded transitional provisions, as between two iterations of the Criminal Justice Act. But what Mr Taylor was trying to do, he was trying to get the remand credit that accrued on the final attempting to pervert the course of justice charge, that had already been taken care of upstream, not once, but twice, and of course the situation in *Taylor* is now regulated by subsection (3) of section 90 that, yes, you get the combined credit on all the charges in your notional single sentence, but you only get it once.

GLAZEBROOK J:
Is another way of looking at section 92 that you get your pre-sentence detention attached to each particular charge, but the you add it up?

MR EWEN:
Well you take the greater of, in my submission you wouldn't add them up, you just take the greatest –

GLAZEBROOK J:
You might do, or you might not because say going back to Mr Booth yesterday, you were there I think so it's not unfair to you.

MR EWEN:
Taking notes Ma'am.

GLAZEBROOK J:
What you had there, I think, was quite a long period of pre-sentence detention in respect of the male assaults female. Well it may be because if that had been the only charge, the only credit you would have got would have been the six months of the 10 months, because you would only have been sentenced

to six months had that been – so maybe you get your six months on that, and then add up the pre-sentence detention in respect of the other charges if there was – and that's what you get as your…

MR EWEN:

Well I think the Booth situation, as I apprehend it Ma'am, is the concurrent sentence imposed on the MAF was actually shorter than the remand credit that actually accrued. In that situation, on my analysis, the sentence in respect of the remand credit wouldn't matter because in respect of the lead charges of sexual violation it becomes 91(1)(b), any charge on which the prisoner was originally arrested. So, yes, in respect of the sentence of male assaults female, that disappeared into the ether.

GLAZEBROOK J:

But it is difficult to reconcile – well, I think as you said, it's slightly difficult to reconcile that with the wording.

MR EWEN:

The word of subsection (2) of section 90 is not helpful but in my submission, notwithstanding the Chief Justice's observation, that the official's advice is clear as mud, it's clear what the officials were trying to get out by reason of the change in the language of the sections. They were trying to avoid exactly the situation we face here today. That there is the individualisation to that charge, or its successor or predecessor in title, in the section 90 calculation, that's exactly what they were trying to avoid, but -

GLAZEBROOK J:

Are you saying subsection (2) is just a non-double-dip, or triple-dip provision effectively in the same was as subsection (3), is that…

MR EWEN:

Well, no, in my section, subsection (2) mandates the wide application of remand credit. That's what the officials were trying to achieve, but what they had in prescience they lacked in adroitness of legislative drafting, and that,

unfortunately is just something that New Zealand lawyers and Judges have to deal with. But when, irrespective of the language in the report, when you do the compare and contrast between the Bill's provision as they were, and the Bill's provision as they became, it is quite clear that the officials were trying to avoid exactly the interpretation that the Court of Appeal has adopted in *Maile*, and as adopted previously in *Te Aho*, *Booth v R* [2015] NZCA 603, *Kahui v R* [2013] NZCA 124, that's what they were trying to avoid. Subsection (2) can be read expansively on the basis that if you do the analysis that I suggest, that you take each charge and work out what the other charges of the sentence are in respect of (a), (b) and (c) of 91(1).

WILLIAM YOUNG J:
Well, you argue that the concurrent lead sentence is to be treated as a sentence imposed for all the offending that informed the totality of the sentence imposed.

MR EWEN:
Yes.

WILLIAM YOUNG J:
Which seems very sensible but, as you say, it's not easily congruent with section 90(2) which rather presupposes that where concurrent sentences are imposed there are separate sentences. That's the problem.

MR EWEN:
Yes, and as I said, the problem lies, in my submission, in the obliqueness of the language. It does not lie in the underlying intent of the provision because the underlying intent – what is section 90, therefore? I get back to practically the first thing I said. It is there to put a remand prisoner in the shoes of someone who's on bail up until the point of sentencing. No disadvantage is accrued by reason of a remand in custody prior to sentencing because section 90 is supposed to put you in exactly the same position. Now, that – if one takes that as the purpose and intent of section 90 as a starting point, then

the language of subsection (2) can be parsed in a way that leads to that result. It's not the most obvious result. I have to accept that.

GLAZEBROOK J:

Well, I suppose your other argument that is equally strong, if not stronger, is there is no conceivable policy reason for having a difference.

MR EWEN:

Which was Your Honour's observation yesterday which I respectfully endorse. It's neither hyperbole nor rhetoric to ask what is the justification for a different answer. The Court of Appeal give their suggested justification for that and that's to make sure no one gets two for the price of one, in the vernacular, because they adopt a passage of Justice Courtney's judgment in *Maile* saying that, well, how can you possibly get remand credit for an offence that hasn't even been committed yet? That is an argument whose force lies solely in the manner of its description rather than any underlying legal problem because, as I say, my submission is that issue has been taken care of by section 85 anyway. It doesn't matter when the offending was committed so long as it has been incorporated into a totality-based sentence.

GLAZEBROOK J:

But that doesn't explain why you get a credit if it's a cumulative sentence and not a concurrent one because you are getting credit for an offence that hasn't been committed if it's cumulative in many cases. In fact, you're quite likely to have because the whole idea of a cumulative sentence is they aren't related.

MR EWEN:

Exactly, Ma'am, and as I say if one takes as a starting point my hypothesis that it's there to put the person in the shoes of someone who's got no remand time to accrue at all, Mr Marino should have done 11 months in total, no longer, but more importantly no less, and again, I haven't identified a single situation where this calculation leads to less time in custody than the face value of the sentence imposed by the Judge.

ELIAS CJ:

Can I go back to sections 90 and 91 because under section 90(1) a sentence of imprisonment including a notional single sentence, well, it's a notional single sentence under the statute if it is a cumulative sentence, isn't it?

MR EWEN:

Yes, I think that's section 75.

ELIAS CJ:

Yes. So a sentence of imprisonment for the purposes of section 90(1) clearly is a sentence in respect of – includes a sentence in respect of more than one offence.

MR EWEN:

Yes.

ELIAS CJ:

On its face. So why – with that background, I don't see why we're bothering for the purposes of the Parole Act to be going back into the interstices of sentencing which is already been achieved and surely subsections (2) and (3) are properly directed at where you have a concurrent sentence and a cumulative sentence irrespective of whether there are a number of charges on which people are being sentenced in that concurrent sentence and cumulative sentence so it only bites, 2 and 3 only bite where you have two lots.

MR EWEN:

Where there's multiple offending that has to be taken care of, yes.

ELIAS CJ:

Well, no, well you have two lots of sentences. I mean I don't think it's about charges. If you look at section 91(1) that seems to be quite clear because pre-sentence detention, it doesn't matter, it's any charge on which you were eventually convicted, any other charge on which you were originally arrested,

all of that's been taken care of in a sentencing process and is sorted out in the wash. What this does is simply stop you double-dipping.

WILLIAM YOUNG J:

Well would it be double-dipping. Say these sentences have been imposed on different days, so that there were, say, two sets of concurrent sentences, one in relation to the complainant B, and one in relation to complainant F, and I'm assuming that there'd been more than one conviction in relation to F. Say the charges said, well –

ELIAS CJ:

That's why you need to calculate the amount of pre-sentence detention applicable to each sentence.

MR EWEN:

The problem –

WILLIAM YOUNG J:

Say there'd been two trials, or two, I mean that's one of, why I raised the issue before, I can't really see that it can come down to whether there's a single sentencing exercise or not.

ELIAS CJ:

But that's not the end of it because you still have to calculate what's applicable to each sentence. But the sentence it the conglomerate sentence in each particular case. it just seems to me it seems to make sense.

MR EWEN:

Your Honour, if I can just make sure that I've got Your Honour's point. If what Your Honour is saying that all the constituent charges, and all the constituent sentences form a single set of proceedings leading to the pending, the conviction and pending sentence for the purposes of section 91(1) –

ELIAS CJ:

Well I'm just trying to, look, I can't see proceeding in section 90.

MR EWEN:

No it's 91(1) defines what is pre-sentence detention and it has to be (a), (b) and (c) in respect of the proceedings –

ELIAS CJ:

I see.

MR EWEN:

– leading to the conviction and pending sentence. So first of all it has to be within the definition of "proceedings" and that's where I fell over in the Court of Appeal because the Court of Appeal said there were, in Mr Marino's case, I think about 12 different sets of proceedings instead of one unified whole. That is quite hard to square with a Crown charge notice, which has a single CRI number, and had it gone to trial it would have gone to trial as one trial. So in my submission the Court of Appeal's analysis that each charge is its own individual set of proceedings, just does not square –

WILLIAM YOUNG J:

I would be inclined to read "proceedings" as encompassing everything that's in (a), (b) and (c).

MR EWEN:

Yes. And when one encompasses everything that's in (a), (b) and (c) that possibly takes care of the *Goldberg* problem also. The remand in custody in say a joint trial where you get acquitted on the charge that has the most remand time accruing on it, is actually still encompassed within section 91(1), because it's part of the proceedings. It didn't, itself, end up in a conviction but under 91(1) it doesn't have to, it just has to be part of the proceedings leading to the conviction and pending sentence.

WILLIAM YOUNG J:
But it's not in relation to the sentence though, isn't that the problem?

MR EWEN:
Well except, Your Honour, 91(1) defines what pre-sentence detention is. Section 90 applies it. So in the –

WILLIAM YOUNG J:
But it seems to be applicable to each sentence, whatever that means, so it can hardly be treated as being applicable to a charge on which a defendant has been acquitted.

MR EWEN:
Well, in that case the acquitted charge is never going to be 91(1)(a), but it may well be 91(b) or 91(c) in respect of another charge in which there has to be a pre-sentence detention allocation.

GLAZEBROOK J:
It certainly reads that way.

WILLIAM YOUNG J:
I agree that it's pre-sentence detention. Where I struggle with is whether it's referable to the sentence that's imposed.

MR EWEN:
Well, as I say, when one is doing the section 92 calculation, in my submission, the proper approach is to take that particular sentence that you're looking at as a 91(1)(a), any charge on which the prisoner was convicted.

WILLIAM YOUNG J:
It can hardly be a sentence on the charges on which the defendant has been acquitted.

MR EWEN:

Yes, but again, 91(1) doesn't require a sentence. 91(1) just requires a remand in custody, so in respect of a charge on which one was acquitted, for the purposes of doing the 90(2) calculation the charge on which that person was acquitted, if they're all on the same trial, is likely to be 91(1)(b) or (c). It can never be (a) because there is no conviction but it's comprised in the same set of proceedings they all went to trial together.

WILLIAM YOUNG J:

I'm just postulating that the set of pre-sentence detentions isn't the same as the set of pre-sentence detentions which have to be set off against a sentence.

GLAZEBROOK J:

It just seems odd to have the other parts of the definition.

WILLIAM YOUNG J:

Yes, because it might be referable.

GLAZEBROOK J:

Well, not – no, because any other charge on which the person was originally arrested, that could just be dealing, I suppose, with grievous bodily harm was in the end became male assaults female, so effectively you were convicted but it wasn't of – or else it became murder when it had been GBH.

MR EWEN:

And that is to look at 91(1)(b) through the narrow *Taylor* lens that it's that and nothing else.

GLAZEBROOK J:

Yes, exactly.

MR EWEN:

And in my submission that's one of the reasons one ends up with these anomalies, that you have to jump through the *Taylor* hoops in order to work out if they're related or not in order to apply that section. It's not warranted on the language on the section, in my submission.

GLAZEBROOK J:

It means as soon as you're convicted that's the end of it, anyway, because it's no longer pre-sentence detention as soon as you're convicted, so you're arrested.

MR EWEN:

No, Your Honour, it's pre-sentence detention up until the point of sentence because under the Act the sentence only commences on the date of its imposition.

GLAZEBROOK J:

No, I understand that but on the definition of pre-sentence detention you can argue it finishes as soon as there's been a conviction.

WILLIAM YOUNG J:

No, because it says leading to the conviction or pending sentence, the beginning of section 91(1).

MR EWEN:

91(1), yes. Again, when one is doing the calculation –

GLAZEBROOK J:

Well, leading or pending sentence.

MR EWEN:

I'm not really sure to this date what is added by the word "pending".

GLAZEBROOK J:

Well, sometimes, of course, you're remanded in custody as soon as you're convicted and not before, so it's presumably dealing with that type of detention.

MR EWEN:

Also I suppose the other way of viewing the word "pending" is that the sentence commences on the point that the Judge pronounces sentence and anything else up until that point, the sentence is pending. But you're in custody in that time so hence the word "pending" but I didn't really think it added much.

ELIAS CJ:

Well, it is pending sentence.

MR EWEN:

Yes. It's the disjunction between conviction or pending sentence.

WILLIAM YOUNG J:

Well, normally one would assume – this is going back before sentence.

MR EWEN:

Yes, this is everything before sentence. The stumbling block for me is –

GLAZEBROOK J:

But that's not what it actually says, though, because the pending sentence is often, you are often remanded in custody pending sentence having been on bail up until the time of conviction, or alternatively you've been in custody and then you remain in custody. You're not normally given bail having been in custody on remand but it's probably not a big point, anyway.

WILLIAM YOUNG J:

Well, it could read, couldn't it, "At any stage during the proceedings prior to sentence."

MR EWEN:

Yes and I think nothing is lost by taking out "conviction or" but again I'm not sure that the – the focus certainly in the Court of Appeal and in the Court of Appeal's judgments is, what were the proceedings? The Court does not need too much work on my part to persuade it that proceedings is broader than that. Proceedings is everything that led up to – if it's a trial everything that you go to trial on in one trial sitting is undeniably one set of proceedings and it just becomes odd and perplexing and deeply problematic if you adopt a different interpretation when you're looking, not to do anything with the assessment of criminal culpability, but simply working out how long the sentence is.

ELIAS CJ:

But the important thing, surely, in section 91(1) is that you don't have to parcel out what proportion of the pre-trial detention arose out of a charge on which you were originally arrested but not convicted and all of those other things, making it clear that the sentence is the sentence that's imposed, whether it's cumulative or concurrent, and that you don't go back into what's the lead sentence and how you sort of parcel it up. That's it. And then the only adjustments you have to make are in the case of somebody who is unfortunate enough to be sentenced to another concurrent sentence or cumulative sentence.

MR EWEN:

Your Honour, if you take the view that two or more concurrent sentences 90(2) means two or more sets of sentencings imposed in different days, in respect of different charges, à la *Taylor*, then I've got very little more to say because that's the argument I advanced to the Court of Appeal and it would work too.

ELIAS CJ:

Well what did they say about that in the Court of Appeal, I don't remember.

MR EWEN:

Well, that it faced insurmountable difficulties Your Honour.

ELIAS CJ:

Well what were they? Can I just see the Court of Appeal…

MR EWEN:

It's in the case on appeal, tab 7, paragraph 24, "The appellant's argument that "proceedings" mandates a single pre-sentence detention calculation for all offences sentenced at the same time confronts insurmountable difficulties." This is page 22 on the case on appeal, "(a) It requires that the term 'concurrent sentences' have a different meaning in s 90 than it does in the Sentencing Act." It requires, "(b) it requires concurrent sentences to be treated as a single notional sentence." And this is, Your Honour the Chief Justice's situation at paragraph (c) –

WILLIAM YOUNG J:

Just pause there. The Judge there is really addressing the composite argument, not just what section 91(1) means.

MR EWEN:

Well this is the, the Court analysing that my argument in the Court of Appeal that two or more concurrent sentences means two or more sentences imposed on different days in respect of different charges.

ELIAS CJ:

Well I don't know, I mean in a way you don't need to talk about the temporal thing, it's just that they are different sentences, different concurrent sentences, different cumulative sentences.

MR EWEN:

As I apprehend where Your Honour is coming from that would appear to be the argument that I made in the Court of Appeal which they torpedoed below

the waterline. And the last point, paragraph (d), was the two for the price of one argument, that in my submission is just obviated by section 85.

GLAZEBROOK J:
That does happen because if it's cumulative you do get the credit so why would you get the credit presumably I'm not, I don't think I've got that wrong, because if that's one notable single sentence, and it was later, well you do get the credit, so why don't you with a concurrent.

MR EWEN:
Yes, and as I say it's been taken care of upstream by a sentencing that conforms to section 85. If it conforms to section 85 then the problem they identify in (d) just simply doesn't exist. I say it's –

WILLIAM YOUNG J:
Does that assume a particular sentencing approach?

MR EWEN:
Your Honour, no, it doesn't, it's just this argument that has moved Judges in the High Court and the Court of Appeal. The notion that someone might get two for the price of one. Someone might get, have earned remand credit, and I have difficulty with the concept of earning remand credit, in respect of an offence that hasn't been committed because it is, on the face of it, a counterintuitive proposition, that you should get an allowance or remand time for something you haven't done yet, and that's the entire force of the Crown's argument. But, because it's been completely taken care of by the sentencing Judge in a sentence that packaged all culpability, no matter when committed –

WILLIAM YOUNG J:
Okay, but just say the Judge had said, "In reality the assault is so dwarfed by the significance of the other offending that I propose to convict and discharge you on that charge."

MR EWEN:

A la *Kahui*.

WILLIAM YOUNG J:

Was that *Kahui*?

MR EWEN:

Yes. In *Kahui* Mr Bailey tried to add in a five month prison sentence on what had been a conviction and discharge because it would have added in remand credit that ended up being zeroed off.

WILLIAM YOUNG J:

Right, okay. Well, say the Judge had said that in this case. How would that have worked? On that basis it would have been as though your client had been acquitted.

MR EWEN:

I cannot say that a conviction and discharge is a sentence because that submission would be beggared by, I think, section 108 of the Sentencing Act which says the Court may, instead of imposing sentence, convict and discharge. I cannot say that that is a sentence so under 91(1) it is a charge on which the prisoner was convicted.

WILLIAM YOUNG J:

I don't have any problem with it being under section 91(1). But what I would have a problem with or might have a problem with is whether there is a sentence referable to it from which it can be deducted.

MR EWEN:

Your Honour, in my submission this is where one has to exercise care. It doesn't require – section 90 doesn't require another sentence to have remand credit. It just requires that in respect of this sentence, say the major charge, that it forms part of the – the charge that led to the conviction and discharge is part of the proceedings that led to the conviction or pending

sentence in respect of the sentence that you're looking at because if it falls within (a), (b) or (c) of those proceedings it is pre-sentence detention in respect of all the charges you're dealing with section 92 analysis of.

ARNOLD J:

Well, if you look at the *Booth* case yesterday, the facts were that there was the assault. He was in detention then for about 10 months and then the other things all come to the fore and so on. It was the rapes that were the lead charge, one of them in particular. So when the Judge constructed the sentence on the totality principle it's eight years plus three years something for the second rate plus three months for the assault. That's the sentence on rape number 1, 11 years nine months. Then the concurrent sentences are eight years on the count 2 rape and six months on the assault.

Now, the 10 months that was spent in custody only in relation to the assault, your argument is that the full amount of that is taken into account.

MR EWEN:

Because the male assaults female charge was comprised in the proceedings leading to the conviction and pending sentence of Mr Booth after trial on the lot. Therefore in respect of when one looks at the pre-sentence detention allocation that must be done in respect of the lead charge under section 90(2). One looks at the lead charge as subsection (1)(a) of 91, a charge on which he was eventually convicted, and the male assaults female charge, the relationship between that and the rape is that's paragraph B, any charge on which he was originally arrested and in that way the elevation by Judge MacAskill to take into account the male assaults female is taken into account in the remand credit allocation, the pre-sentence detention credit, when the prison officer comes to do the PSD allocation in respect of the lead charge.

ARNOLD J:

It is slightly unattractive, though, that in respect of an offence for which he got an effective sentence, an additional component of three months, he ends up getting 10 months' credit, pre-detention credit.

MR EWEN:

It may be there is something that may have attracted a moral question mark but again, Your Honour, I invite you to consider what will Mr Booth's total period of incarceration be if that 10 months is allowed in? Assuming he doesn't get parole, and he doesn't look like the best of candidates, it will be 11 years, nine months. Now it is not, in my submission, a matter of fortuity or happy coincidence that this calculation, the way I'm putting it to the Court, leads to the time incarceration being exactly the same as the sentence. It is the manifestation of the legislative intent.

ELIAS CJ:

On that, why should the Court be concerned with it, because the Sentencing Act specifically says that eligibility for parole is not the business of the Courts, so why isn't it simply, why are we trying to talk about just desserts here. Isn't the legislative scheme that the legislature has determined what credit is to be given and it's not for us to try to work out whether it's warranted.

MR EWEN:

Well dealing with the parole point, Your Honour, and in a sentence or two dealing with the Crown's suggestion that this can be dealt with by early reference, either by the chair of a Parole Board, or by the Minister. Parole for the purposes of this appeal is a complete irrelevance, because parole has got nothing to do with sentence duration. What the Court has to –

ELIAS CJ:

Sorry, I should have talked about release, rather than parole, the discretionary.

MR EWEN:

Well, and again the function of the Parole Act, section 90, is to allocate the remand time to put the person in the same shoes as a bailed prisoner. It's got nothing to do with punishment. Nothing to do with subjective evaluation of when a –

WILLIAM YOUNG J:

It must have a bit to do with punishment.

MR EWEN:

Well, that's the Sentencing Act Your Honour.

WILLIAM YOUNG J:

To ensure a quality of punishment.

MR EWEN:

Well, yes, that's my point exactly. The Sentencing Act takes care of the punishment. The Parole Act just makes sure that all is equal as between people who should be notionally in the same position. It is, in my submission, a matter of utmost concern for this Court, to work out how long a prison sentence should be, because that is what this case is about when cut down to its basics because you have two different potentials for how long a prison, exactly the same prison sentence should be, depending on the construction of this provision and I say without any discernible purpose for there to be a different outcome as between bailed, cumulative or concurrent, and that, I think probably neatly brings me to, given that we're dealing with issues of interpretation, the lens through which this Court should view a not especially helpfully worded piece of legislation, because this is not the first time the New Zealand Courts have been troubled with badly worded parole legislation, because that's what the Court of Appeal was faced with in spades in *Attorney General v Manga* where the Crown's argument was the literal interpretation of the statute would lead in cases of recall to remand time being zeroed off, and that got absolutely no reaction with the Court of Appeal whatsoever. All members of the Court, Justices Henry, Thomas and Tipping,

gave separate judgments but were all frankly damning of the literal interpretation of a statute, when the literal interpretation operated to inflate the prison sentence in excess of the time that the sentencing Judge imposed. In Justice Tipping's judgment in particular, Justice Tipping was animated by the fact that there was nothing in the legislative materials that indicated when the amendments, and the consideration came through that there was any intention that they were to have this effect. And here, in my submission, I haven't really gone through the *R v Coward and Hall* CA182/87, 18 December 1987 decision in the Court of Appeal about their interpretation of the policy underlying remand credit, but in short it was, yes, remand credit has to be applied generously to avoid the very mischief we have here, that you end up losing the entitlement to parole eligibility or omission of sentence, if one concurrent sentence is masked by another, and it ought also to be remembered that the *Taylor* decision is not, as the Court of Appeal would have had it in *Te Aho*, or rather section 90 is not the legislative endorsement of the *Taylor* decision that the Court of Appeal appeared to say it was in *Te Aho* because section 90 was on the statute book before *Taylor* was even argued. None of the Courts have had the benefit of the officials' advice about what they were trying to achieve with section 90 and it was new because, of course, the difference between – the cardinal difference between the Criminal Justice Acts and the Parole Act is the transfer of responsibility from the judiciary under the Criminal Justice Act either to deduct remand time from the sentence as is the first case in *Taylor* or then take it into account by endorsing it on the back of the warrant of commitment as is the second application the credit in *Taylor*, that's why he was entitled to double-dip. That responsibility went from the judiciary to the Chief Executive and, in effect, the receiving officers in the prisons the length and breadth of the country. They're the ones who are actually tasked with the job of calculating because it's done on receipt in the prison when the prisoner returns on sentence.

There is simply nothing in the legislative materials that indicates this kind of massive shift in policy but only in respect of concurrent sentences that Justice Tipping indicated the absence of which militated strongly against the Crown's argument that the literal interpretation of a statute, when it had this

effect, ought to be adopted. In my submission, even if the Court were to come to the conclusion that the literal interpretation of section 90(2) is to do the slice and dice of remand time as the Crown advocate, the Court must strive to come to an interpretation that resists that because of the consequences that it leads to. It does lead to the significant anomalies and inconsistencies as between two different kinds of sentence.

ELIAS CJ:

It also leads to huge complexity for the Chief Executive, doesn't it?

MR EWEN:

Your Honour, this is where I think I can use the *Brandon* example as the best typifier of this because what happened in *Brandon* – and it's clear from Justice Collins' decision – is in that case the prison officer was so confused about whether these seven charges were related or not he was on the phone to the officer in charge of the case to get his steer on whether these charges were related or not.

ELIAS CJ:

Well, it can't be what section 90 means. They cannot have intended to get the Chief Executive to reconsider questions of culpability and the relatedness.

MR EWEN:

Yes and if they had intended that perverse outcome it would have required significantly more detailed legislation than we've got. It is to place at a relatively low level in the criminal justice hierarchy a task that Justice Collins said in his judgment it took him hours to pore though the District Court file to work out whether these charges were related or not. The massive administrative complexity of the relatedness inquiry in charges such as – this is a really simple one but *Brandon* is a great example of this can be an incredibly taxing exercise for the brain of a judge, let alone a prison officer and that is pretty good evidence that Parliament didn't intend that outcome, whereas done my way in terms of how to administer this, the only thing the receiving officer ever needs is the warrant of commitment on sentence. From

taking the warrant of commitment on sentence which says which charges have received which sentences, all the prison officer needs to do was apply that to their own custody records from IOMS, which is the Corrections database, because on IOMS they have the record of time spent in custody. They then relate that to the warrant of commitment and it becomes a matter of simple arithmetic to apply one to the other, taking the (a), (b), (c) in subsection (1) of 91.

GLAZEBROOK J:
Well, you have quite a strong argument on section 91, don't you?

MR EWEN:
I like to think so, Ma'am.

GLAZEBROOK J:
Well, proceedings means what it means in any sense. You just get a job lot of pre-sentence detention, in fact, whether you were acquitted, whether the charges changed, whatever it matters because why have (a), (b) and (c) if you only get it related to a particular charge? You then go to 91 and it says when you're sentenced the pre-sentence detention is taken off the detention. Why are you going to interpret 92 and 93 to mean something different from that in circumstances where it's quite clear what you get?

MR EWEN:
The interpretation currently given to 92 fundamentally conflicts with the title of the section and its manifest intent because if a section whose sole purpose is designed to give an allocation towards pre-sentence detention that puts the person in the same shoes as a bailed prisoner when it has precisely the opposite effect, and in this case inflates Mr Marino's sentence by 40%, that must, in my respectful submission, be the best evidence that that is simply not how the section is supposed to be interpreted.

Now, I know the Crown will come back and say, "Oh, well, 91(1)(b) is there to give effect to the *Taylor* relatedness charge."

GLAZEBROOK J:

How do you know that that happened? That's the thing.

MR EWEN:

Well, not without a great deal of kicking and screaming.

GLAZEBROOK J:

I mean, the prison officer would have to say, "Oh, well, actually they were originally charged with GBH. That's what they were arrested on, but then the victim died so the murder charge was then brought in and then they actually got convicted on manslaughter," and they have to go and work out whether – and that just can't be the intention.

MR EWEN:

Your Honour, I simply don't think that the Court of Appeal appreciated the complexity of the exercise they were mandating in the *Taylor* relatedness inquiry. It just doesn't seem to have been before them to realise just exactly what this was going to involve. Certainly it's my understanding, and I can say I've had discussions with the Crown on this point, I can put it no higher than following discussions with senior Corrections officers who do escort duty over the road who have been tasked with this calculation. Prior to *Taylor* they were basically doing it my way. That's how *Coward and Hall* suggested it be done. You work out what the remand credit is, apply it across the board to the greatest extent because that leads to the sentence served being exactly the same as the period in custody.

ELIAS CJ:

We should take the adjournment. What do you want to cover that you haven't covered?

MR EWEN:

I'm going to review matters, Ma'am, but I think probably the only additional issue that I need to cover is the issue of arbitrariness because that potentially

creates in section 22 considerations and Bill of Rights interpretations of the section. But I think I hadn't stuck to the roadmap that I handed up but I think I've pretty much covered most of the points that I needed to make.

ELIAS CJ:
That's fine. We'll take the adjournment now, thank you.

COURT ADJOURNS: 11.33 AM
COURT RESUMES: 11.53 AM

MR EWEN:
Now Your Honour in relation to a point you raised earlier about the effect of when – a matter you raised relatively early in the piece, Ma'am, the situation where one is sentenced to imprisonment and then there's another sentencing in a future, and I indicated that I thought there was a legislative provision that meant the time that you were serving as a prisoner is not pre-sentence detention. I'm grateful for Mr Edgeler, he's fossicked out subsection (5) of section 91 of the Parole Act, "Detention that would, under subsection (2) or subsection (3), be pre-sentence detention, is not pre-sentence detention for the purposes of subsection (1) if the offender was, during that detention – (a) under legal custody in accordance with Corrections Act 2004 and serving a sentence of imprisonment; or (b)," and extradition offender, and that doesn't apply, so that means that once your sentence, it's no longer pre-sentence detention for potentially for future sentencings.

I want to touch briefly on some outstanding *Booth* issues about what it would actually require for this to be dealt with as part of sentencing, and the complication in the sentencing exercise, because everything that I said before the adjournment about the complicated nature of the *Taylor* enquiry, the relatedness enquiry, would actually have to be done as part of sentencing. There would, in effect, have to be a *Booth* annexed to any sentencing memorandum working out what was and what was pre-sentence detention. If it was pre-sentence detention it couldn't be taken account of there, but would have to be taken account of over there. That, in my submission, is –

well I did a sentencing in the District Court in Porirua before Judge Hastings. I gave him a copy of the Court of Appeal's judgment in *Marino* because there was a case where there was a laying of charges in tranches for offending that pre-dated the remand in custody, but wasn't laid until after he'd been remanded in custody, and Judge Hastings response to this was to hold up his notes and say, "This took me all night Mr Ewen." And I rather wondered if I could subpoena his notes for the purposes of this appeal. It adds a massive level of judicial complexity and time and resources for all parties, Crown, defence and the judiciary, to try and deal with this as part of sentencing because they're incredibly complex, interconnected enquiry would have to be made as part of the sentencing exercise itself, and it would be almost impossible to do that, in my submission, without treading on the toes of section 82 because if one were, for example, to impose cumulative sentences because pre-sentence detention in respect of one charge would not be taken into account on another, one has just taken into account pre-sentence detention in fixing the length of a component part of that cumulative sentence which in my submission is exactly what section 82 says the courts must not do.

I don't propose to address my friend's submissions from yesterday and today in relation to early parole because, as I say, in my submission, parole is really not a consideration here. It is sentence length and sentence length is never affected by parole eligibility. If you're on parole the sentence is still running in the background pretty much by definition and what we are concerned with her is what is the length of the sentence, and not whether at what stage one is released from it.

I think I can now turn finally to, in my submission, the Bill of Rights implications to this construction of section 90 in particular because in my submission, given the nature of the judicial proceedings date, and that it is only running from the date a charge is laid, means that in cases such as here arbitrary determinants have been factored into what is the effective commencement date of a sentence. I say effective because a sentence under the Act only commences once it's imposed, but in effect we are dealing with

when does it start. Because in this case it is reasonably clear on the agreed chronology that the police were seized of the evidence giving rise to the last attempting to pervert the course of justice charge, at a relatively early stage. Pretty much at, not too far in time away from the date of the commission of the offence itself. But it only raises its head when there is the second iteration of the Crown charge notice filed for the District Court at Hamilton. The police have known about, and constructively the Crown have known about the existence of the facts giving rise to this charge for some time, but it is the Crown solicitor for Hamilton who chose, at a later date, to add this charge in. There is no rhyme nor particular reason for the date of the Crown charge notice and if you cannot ascertain a rationale basis for it being done on that date, by reference to the offending itself, then an arbitrary commencement date has been added into the process. This was, caused even greater consternation in *Brandon* where the charges were laid on successive dates over a period of about, almost a year, in fact I think it was actually longer than that, because in that case it was a big drugs operation and as everybody knows, big drugs operations terminate on a specific date, way before any analysis of the evidence has been done, because they have weeks and sometimes months worth of intercepts to trawl through to work out the specific charges that end up being laid, and it means the date of laying the charges is determinant on what resources, and over what period of time, the police and the Crown choose to investigate their case. Now sometimes that can be a quick exercise, because it doesn't require much time. Sometimes that can be a lengthy exercise because it requires a great deal of time. Sometimes it's a lengthy exercise because police resources are being devoted to other investigations. It may be that it is quite straightforward but it's just something that they haven't got around to yet, and on the analysis, the JPD analysis that it only starts from the date the charge is laid, leads to, in my submission, an entirely arbitrary element being factored into a crucial determinant, from Corrections' point of view, of when they will begin remand time. If arbitrary determinants are used to determine the effective commencement date in my submission that gives rise to significant questions of arbitrary detention and a Bill of Rights infringement.

Now Justice Simon France in his High Court judgment in this case says that, yes, it must be able to be done by easily determined dates, and with which proposition I wholeheartedly agree, because it has to be a simple exercise, but it cannot be an arbitrary exercise. If the Court determines that the commencement date, the JPD, navigating from commencement date alone, is arbitrary, then of course that freights in a *R v Hansen* [2007] NZSC 7 analysis to the interpretation of section 90, and in my submission, and I don't need to trouble the Court with *Hansen*, but in my submission there is simply no way that the interpretation contended by for the Crown would survive a *Hansen* analysis particularly when, as several members of the Court have pointed out, there is a great struggle for working out what the policy imperative is behind concurrent, cumulative sentences leading to different results. So I don't put forward the Bill of Rights argument as a makeweight but I think I've made most of the points that I need to make anyway. It is an additional hurdle, in my submission, that the Crown must jump to show that the date of laying of a charge is not arbitrary. They cannot do that because, particularly in this case and in others, there is no basis upon which one can differentiate between the date of a commission of offence, and the date that a prosecutor at one degree removed, namely the Crown once the Crown has resumed responsibility, chooses to lay a charge. Not even the first Crown charge notice they filed I think it was, at least the first if not second amendment to the Crown charge notice. That being arbitrary again, in my submission, the interpretation contended for by the Crown fails.

Unless I can assist any members of the Court, those are my submissions.

ELIAS CJ:

Thank you Mr Ewen. Yes Mr Horsley.

MR HORSLEY:

Thank you Your Honours. The easiest way I think again to commence the Crown's submissions is to largely again follow my learned friend's submissions and I suppose the critical thing to commence with here is that this is a habeas corpus appeal, in essence. My learned friend started with a

discussion around whether that appeal was moot. In my submission, it clearly is. The corpus has been habeased. The proceedings in that sense are at an end, albeit that the Crown accepts that this matter does raise an issue of more general importance that does warrant this Court continuing with this particular appeal and not the least because it arises in a tangential sense in the *Booth* case but also in a number of Court of Appeal decisions which talk about the need for some clarity in this area. So that is a concession by the Crown that we are not arguing the mootness in that sense of the –

ELIAS CJ:

Well, you're really only talking about process anyway, with habeas corpus. The Court, being seized of it, can transform the proceeding, give directions and deal with it as if it were an application for declaratory judgment. So I don't – I mean, I appreciate what the Crown's position on this but it isn't really a jurisdictional impediment at all.

MR HORSLEY:

It could have been, Your Honour, but in this case in terms of the declaration we would still argue that a declaration of unlawful detention is not one that this Court should be making, particularly seeing as that declaration was not part of the original.

ELIAS CJ:

Well, how do you want us to clarify the Act? Make a declaration as to the meaning of the Act?

MR HORSLEY:

No, I think it's just simply – well, yes. When I say no, I mean yes, I think that is exactly what is needed here.

WILLIAM YOUNG J:

So what should – assume we're with Mr Ewen, what order should we make, if any?

MR HORSLEY:

Not an order that Mr Marino was unlawfully detained. I think that's potentially a subject for separate proceedings if, in fact, civil remedies are sought for an unlawful detention. Clearly this decision may have an impact on that, but there is a lot more argument around whether in fact that detention was lawful at the time.

WILLIAM YOUNG J:

By reference to what sort of argument would there be?

MR HORSLEY:

Only by reference of, well, in this case we're saying that the Corrections applied the law as it stood.

GLAZEBROOK J:

Well, sorry, but unless we make our decision prospective and there're major issues on that then Corrections hasn't been applying the law if our decision says that they were doing so wrongly.

MR HORSLEY:

It's something we'll have to live with, obviously.

GLAZEBROOK J:

Well, unless you're arguing that we should make it prospective rather than retrospective.

ELIAS CJ:

I didn't understand that you were doing that. You just don't want a specific declaration in respect of the appellant, is that right?

MR HORSLEY:

Correct, Your Honour.

ELIAS CJ:

But you accept that the proceedings – that it would be open to us to make a declaration as to the meaning of the legislation which, after all, is open to us under the Declaratory Judgments Act.

MR HORSLEY:

Yes, Your Honour, and in accordance with normal principle if you state the law to be that it is deemed to have been that forever.

ELIAS CJ:

Yes.

MR HORSLEY:

But again, probably the –

GLAZEBROOK J:

So the declaration would just be the legislation means whatever we say it means.

MR HORSLEY:

Yes, Your Honour.

GLAZEBROOK J:

And then whatever the consequences of that would be for another day and another proceeding.

MR HORSLEY:

Correct. Thank you, Your Honour. The Crown's position is that the interpretation issue is one that is, in fact, relatively straightforward. It is consistent with the numerous Court of Appeal decisions that have gone in the past, including *Taylor* and *Te Aho* and Marino and we say that *Taylor* in particular does have broader application, that it's not simply confined to its facts of a remand prisoner facing other charges, looking to triple-dip, because the critical thing about the *Taylor* interpretation of section 82, which was the

precursor to sections 90/91, is that the Court there was very clear about the fact that pre-sentence detention for the purposes of concurrent sentences applied to the sentence on the charge. Singular. So irrespective of, and how that's been interpreted, or at least followed up on, is that irrespective of broad definitions of "proceedings" ie does a person face multiple charges, the interpretation of section 91 is that, in combination with section 90, is that when you are calculating pre-sentence detention on any of those individual charges for which the person was sentenced, it is an individual calculation, and it is based upon pre-sentence detention that relates directly to that charge.

GLAZEBROOK J:
Have we got an analysis of any differences between those sections?

MR HORSLEY:
There is no real difference between section 82 as looked at by *Taylor* and –

GLAZEBROOK J:
But there's quite a lot else in the Parole Act, isn't there, around that?

MR HORSLEY:
There's more in the sense of…

GLAZEBROOK J:
Because I must say I haven't focused specifically on the difference. I just assumed they were the same but now I'm wondering whether that's the case when you're actually not just looking at the section itself but what's around it.

MR HORSLEY:
Yes, there's no material difference in terms of the wording. The section 82 section had the same provisions that we see, and this is in particular in relation to –

GLAZEBROOK J:
Is there somewhere easy we can look at it?

MR HORSLEY:

Yes, I think we've got it –

GLAZEBROOK J:

It's presumably in *Taylor*, is it?

MR HORSLEY:

It is stated in *Taylor*, and I thought – *Taylor* yourself, Your Honours, is in the applicant's bundle at tab 12, and from memory they did – it might have actually been paraphrased, sorry, by Justice –

GLAZEBROOK J:

They've got something in paragraph 6.

MR HORSLEY:

Yes, yes, so that is, yes so section 81 repeated at section, at paragraph 6, is effectively what we have now in 91(1) and again Justice Baragwanath paraphrases that at paragraph 15 of the *Taylor* judgment and talks about the eventualities that arise in relation to an initial charge, and that is the paragraph that has been picked up on. It directly reflects the three stages that are defined in section 81, the original arrest, periods that the person faced at any time subsequent to an arrest, and prior to conviction, and in 91(1)(a) those are categories (a), (b) and (c) of the meaning of pre-sentence detention for the purposes of proceedings, are the same, any charge on which the person was eventually convicted, any other charge on which the person was originally arrested, or any charge that the person faced at any time between his or her arrest, and before conviction, and that latter category is the category that the Court said related to related offending effectively. So all of, or in fact all of that offending is the, I was going to say myriad, but it's not, it's effectively the three ways that you have related offending on a particular charge and perhaps to pick up on Your Honour Justice Glazebrook's point about how charges can change during the course of a proceeding, and you talked about arrest on an original assault charge, that would be the charge under (b) which a person was originally arrested on. Then charged with that charge being upgraded to

murder when the person died, that would be, depending on the outcome, either a charge on which the person was eventually convicted, or potentially a charge that the person faced at a time between the arrest and before conviction because, in fact, what may well have happened to that original assault charge, is it goes assault, murder, and finally a conviction for manslaughter. So those are the three categories of changes that can happen to a single charge, and the Crown's position there is that consistent with *Taylor*, *Te Aho* et cetera, that this definition of pre-sentence detention, and the use of the word "proceedings" there, is only talking about the proceedings in relation to a single charge as it follows its course from arrest to conviction.

GLAZEBROOK J:
Well how's the prison officer going to know that?

MR HORSLEY:
Pardon?

GLAZEBROOK J:
How's the prison officer who's calculating, totting this up, to know that, how are they to know it's not a totally separate murder charge from the original assault charge?

MR HORSLEY:
Yes, and that is a difficult issue. Of course under section 92 of the Act there is a procedure for recording the length of pre-sentence detention, and that requires the receiving officers to prepare a schedule and a copy of the record showing their calculation as to pre-sentence detention applicable to the charges on which the person has been, is now a prisoner. There is the ability for the prisoner to review that and under section 92(4) if the offender is dissatisfied with the outcome of the review, the –

GLAZEBROOK J:
I'm asking how is the prisoner officer to know that the conviction on manslaughter is actually related to the assault charge on which they are

originally arrested which was then upgraded to murder and then was acquitted.

MR HORSLEY:
Well sometimes it will follow –

GLAZEBROOK J:
Won't they, I mean they just get a warrant saying, here's the sentence and its' on this charge, don't they?

MR HORSLEY:
Well, no, they've got all of the records, of course, because they're maintaining –

GLAZEBROOK J:
Well, yes, but you're not really expecting them to trawl through them, are you, and go well, oh, actually this was exactly the same offender and – how are they to know?

MR HORSLEY:
Regrettably they do that anyway because they have to do that for the purposes of calculating the remand periods and so they will have records of the person coming into their custody on remand on the assault charge, and they will follow the, either the CRNs through, or in some cases they may have to revert back to the actual sentencing notes or –

WILLIAM YOUNG J:
Well they do get the sentencing remarks, don't they?

MR HORSLEY:
Yes they do. Yes they do. Or in extreme cases, where it's very difficult, and *Brandon* is a very good example of that, in that case there had been a concern expressed about the relatedness of those charges. In fact, under section 92(4) the proper process is that if the calculation is challenged, it

actually goes back to the Court that imposed the sentence for that Court to review the calculation, and that is where the sentencing Judge will, in essence, have to make the same findings that Justice Collins did –

GLAZEBROOK J:
Where is that sorry?

MR HORSLEY:
Section 92(4), Your Honour. Now, I'm not suggesting that there isn't administrative hazards and/or –

ELIAS CJ:
I'm not sure that actually goes back to the sentencing Judge. That's an appeal. But it just goes to the level of Court that – it seems to me – that impose the sentence.

MR HORSLEY:
That may be the case, Your Honour, but as I understood it, it is usually referred back to the sentencing Judge. But you're right.

GLAZEBROOK J:
It is a different exercise because you are reviewing calculations that are made under the particular Act.

MR HORSLEY:
Well, it is the exact exercise so they – in terms of the question you asked me about following a charge through –

GLAZEBROOK J:
Well, I just would have thought that this should be really simple for the prisons because there are real difficulties if you make it incredibly complicated, and it's dangerous for arbitrary detention, for letting people out too early, and one would have thought that Parliament would want this to be pretty easily calculated and not with this sort of complexity that we're talking about which is

why they say, “Well, in the same proceedings you don’t have to worry whether it was this particular charge you were acquitted on or this one or this one. You just do a job lot of the detention and then take it off and that’s all you have to do. It’s an arithmetical issue and it just puts everybody in the same position. You don’t have to fiddle around worrying about anything to do with any of this.” Perhaps the only complexity is whether it’s the same proceedings or not.

MR HORSLEY:

Yes. To break that down, Your Honour, I am sure that both Corrections and Parliament would support the idea of simplicity around this. Parole eligibility, calculations of remand periods, have been notoriously difficult and that’s not just under this Act. I am quite sure and, in fact, I’ve had that from Corrections officers to say, “Yes, anything that makes our life easier in terms of calculating these periods would be great.” But the question that remains is, does taking it in, as Your Honour’s described it, as a job lot actually fit with the Act and does it lead to other consequences? So –

GLAZEBROOK J:

Well, we need that. Certainly the issue that I would like some more help on from the Crown in terms of it leading to other issues.

MR HORSLEY:

Yes. Well, I will talk to that as well. I suppose the primary submission from the Crown has to remain that in fact the statutory interpretation exercise that’s been undergone by the Courts in the past is a correct one. That is, as I’ve just submitted, that section 91(1) in terms of pre-sentence detention does directly address the pre-sentence detention scenarios that apply to the development of a single charge running through the Courts and that that is consistent with –

GLAZEBROOK J:

What does “proceedings” mean, then? Why does proceedings mean a single charge?

MR HORSLEY:

Well, under the Interpretation Act proceedings can mean proceeding –

GLAZEBROOK J:

Well, it can but they say proceedings. Nobody would ever say proceedings, that if you're facing – well, say, for instance, in relation to a single charge of rape you were facing proceedings in relation to – which sometimes happens – indecent assault, sexual violation and rape, so you're facing three charges in relation to what's essentially the same incident. Therefore you're facing a proceeding in relation to the sexual violation and you treat them all as three separate proceedings. It would actually be quite an odd …

ARNOLD J:

It's also odd because you say, well, proceedings means proceeding because of the Interpretation Act.

MR HORSLEY:

Yes, Your Honour.

ARNOLD J:

But so does conviction mean convictions and you have to explain why 91(1)(a) says any charge rather than the charge, because on your view of it there can only be one – the conviction will be on the charge, won't it? So if that is right it would say "the charge" on which the person was eventually convicted but, in fact, it says "any" and that contemplates that there might be more than one in the proceedings, doesn't it, just as a matter of…

MR HORSLEY:

Well there might be. So in the instance of a – and *Brandon* I think is a very good example of that, Your Honour. My learned friend talked about the conclusion of a drug operation. There may only be a single holding charge which is intended to just hold that person whilst multiple charges are laid.

ARNOLD J:

Right.

MR HORSLEY:

They are related proceedings and so if the person is charged with –

GLAZEBROOK J:

Where do you get related proceedings from?

ELIAS CJ:

Taylor.

MR HORSLEY:

From *Taylor*.

GLAZEBROOK J:

No, I understand that. I just wanted to know where it was in the statute because I can't see it there personally but –

MR HORSLEY:

Because it's talking about the charge on which you were arrested and effectively these are the three categories of related charges that come through, and so that is what they're talking about by "the proceedings". The proceedings means those charges that are related directly to the purpose for which you were arrested.

ARNOLD J:

I don't understand why in *Booth* the assault charge doesn't fit within the plain wording of 92(1)(c) but it's not related, is it, to the rape charges, though you argued it was for other purposes but not in this sense?

MR HORSLEY:

Well, it's not, Sir, and that's exactly why the pre-sentence detention –

ARNOLD J:

But why isn't it a charge that the person faced between arrest and before conviction? In other words he was answerable for it in that period?

MR HORSLEY:

Yes.

ARNOLD J:

And it's during the proceedings because it was all dealt with together.

MR HORSLEY:

Well, that comes back to whether the proceedings, Your Honour, is everything that you're dealing with at trial or whether, in fact, the proceedings is talking about –

ELIAS CJ:

Each charge.

MR HORSLEY:

– each charge as it goes through.

ELIAS CJ:

Instead of any charge.

GLAZEBROOK J:

But then why do you have related charges out of that? It's either each charge or it's any charge. It's not any related charge.

MR HORSLEY:

Because the relatedness is to the actual – well, if I go back to my example of the murder.

GLAZEBROOK J:

No, no. Go back to my example of one incident of a serious sexual assault which leads to three different charges, or four different charges being laid. So over an hour's period there are four different sexual assaults and the Crown chooses, as it is entitled to do, to lay four separate charges in respect of that.

MR HORSLEY:

So that would be –

GLAZEBROOK J:

In relation to the same victim within an hour of each other. Well, sequentially in an hour.

MR HORSLEY:

Yes, and so that would be covered by the relatedness discussion which is that –

GLAZEBROOK J:

But where do you get it from the section?

MR HORSLEY:

Because the charge, itself, has to be the part of the proceedings which has led to the conviction and the charge can change, so you're talking about –

GLAZEBROOK J:

Well, no. The charge hasn't changed. There are four separate charges.

MR HORSLEY:

Well, four separate is, if laid at the same time, all have pre-sentence detention running.

WILLIAM YOUNG J:

Yes, but assume that there's a charge of sexual violation.

MR HORSLEY:

Yes.

WILLIAM YOUNG J:

Shortly before trial, I don't know what you'd file now. It was once an indictment or a charging sheet.

MR HORSLEY:

Yes.

WILLIAM YOUNG J:

Three other counts are laid.

MR HORSLEY:

Yes.

WILLIAM YOUNG J:

That is, right on the eve of trial. The unfortunate defendant is acquitted on the first charge but convicted on the other three. He's been in custody for 18 months, gets sentenced to eight years' imprisonment and Corrections says, "Sorry, your pre-sentence detention doesn't count because it was referable to a charge on which you were acquitted. So your sentence starts on the day of your convictions."

MR HORSLEY:

And the answer to that is that if those other charges are directly referable to the charge with which the person first faced, then they are –

WILLIAM YOUNG J:

What's the language in section 90? So would you say it's pre-sentence detention for the purpose of section 91(1) or would you say it's not or would you say if it is it's not referable to a sentence and, therefore, doesn't fall to be deducted by section 90(2)?

MR HORSLEY:

If in those circumstances – and I think it's, to use Justice Glazebrook's example, of a particular sexual assault that takes place and it is effectively one incident, then to use your combination of that example if initially the person is charged with an indecent assault –

GLAZEBROOK J:

No, there you've been charged with rape. Three charges later are added indecent assault, sexual violation. Two.

WILLIAM YOUNG J:

The original charge of rape remains but there are other charges referable to other aspects of what happened. Acquitted on the original charge, convicted on the other three.

MR HORSLEY:

Then those are related proceedings.

WILLIAM YOUNG J:

Just taking it through section 91(1), is it pre-sentence detention on the charges in respect of which he was found guilty.

MR HORSLEY:

Sir, that will be – that's right. It will be any charge on which the person was eventually convicted.

GLAZEBROOK J:

So you just add a related charge on that?

WILLIAM YOUNG J:

It's not a charge on which he was convicted because the pre-sentence detention, we're assuming the additional charges are laid right on the eve of trial.

MR HORSLEY:

But that detention related directly to the charge on which he was eventually convicted.

GLAZEBROOK J:

No, it's not related to rape.

WILLIAM YOUNG J:

Do you get "referable" out of "relates"?

MR HORSLEY:

Exactly, Your Honour, and this is the exact application that *Taylor*, *Te Aho*, there's the exercise that Justice Collins went through in *Brandon* to try to work out which other directly-related offending, and it is in my submission the whole purpose of section 91(1) which is that people should be given credit for being arrested for a particular incident and then no matter what that manifests in, in terms of the eventual conviction or even the charges that happened along the way, whenever you are remanded in custody for a particular incident then you're entitled for any charges that arose out of that incident.

ELIAS CJ:

But the relates in section 91 – sorry, I hadn't understood you turning it back to that and maybe you're not, maybe I've mistaken you, that "relates" relates to a period, the period at any stage during the proceedings leading to the conviction or pending sentence. It's nothing to do with relating to the charges or any of them.

MR HORSLEY:

Well, no, it's the detention that relates to any of those subsequent things.

GLAZEBROOK J:

No, it's where the period relates to.

O'REGAN J:

The period of detention.

MR HORSLEY:

The period of detention.

GLAZEBROOK J:

Yes, well, it relates to any charge that the person faced at any time between his or her arrest and before conviction, so you have to add in which relates to any related charge that the person faced at any time between his or her arrest and before conviction.

MR HORSLEY:

No, I'm sorry, I didn't …

GLAZEBROOK J:

Well, "relates" isn't because relates is just relating to any charge but you'd have to say it relates to any related charge, wouldn't you?

MR HORSLEY:

So you're credited for the –

GLAZEBROOK J:

So you're really sort of saying you look at the charge on which you're convicted and then the other two have to be charges that are related to the one on which you were convicted but "relates" relates to all three, A, B and C, not just to A.

MR HORSLEY:

Yes. That's right.

GLAZEBROOK J:

Well, then, how on the language do you get "related" in there?

MR HORSLEY:

Because you're talking about whether a period of –

GLAZEBROOK J:

No, I don't care what we're talking about. I want to know where you get, how you get there on the language of the section.

MR HORSLEY:

In the language of the section it talks about a period of detention, so you are talking there in the section about proceedings that have detention attached to them. Those proceedings aren't just the charge for which you were originally arrested on. It's the manifestation of the various ways that a charge proceeds through the system.

GLAZEBROOK J:

So where do we get that on the language of the section?

MR HORSLEY:

(a), (b), (c). They are the three ways that you can have a single proceeding change or the proceedings themselves can change as they go through the system.

GLAZEBROOK J:

On the language where does it say that?

MR HORSLEY:

So pre-sentence detention is detention – well, let's call it just detention that occurs at any stage during the proceedings which leads to the conviction or sentence. Then it is whether that period relates to and then the three categories of how that detention in the proceedings can change determining what parts of the charges eventually end up resulting in the conviction. So you might be engaged in a proceeding which has an initial charge, ie the rape. That charge might end up in you eventually being convicted of an indecent assault or you might actually have the rape charge dropped and a

different charge that relates to the very same proceedings or Act in place for some time before you are eventually convicted of something else. All of those scenarios relate directly to the proceeding for which you were first charged, the charge itself, the initial period in remand. Otherwise section 91 has no point.

GLAZEBROOK J:
Section 91 or 91(1)?

MR HORSLEY:
91(1) in particular but 91(1) will have –

GLAZEBROOK J:
Well, why doesn't it have a point in terms of it saying any detention on any of those things before what it says? Pre-sentence detention is detention on any of these things, whether you were arrested, charged, or anything that happens before a conviction.

MR HORSLEY:
Because there's no need for that. You just simply say that pre-sentence detention is any time that you were remanded in custody.

GLAZEBROOK J:
Well, no because it's limited to the proceedings. It's not limited to a charge, though.

MR HORSLEY:
Exactly, Your Honour. So once you limit it to the proceedings you're limiting it to a charge and you're referencing the pre-sentence detention back to the particular charge, not just any remand in custody but a remand in custody that relates to the particular proceedings for which you are undergoing trial on that charge.

That then fits with the section 90(2) which of course requires the Court to establish – well, not the Court in this case. It will be Corrections but requires that there be a calculation that the amount of pre-sentence detention applicable to each sentence, and we have separate sentences imposed, of course, on every concurrent charge.

ELIAS CJ:
Unless sentence refers to concurrent sentences in the initial words of subsection (2).

MR HORSLEY:
Sorry, Your Honour?

ELIAS CJ:
Well, if sentencing A, in (2) to each sentence is a reference back to concurrent sentences in the initial words of subsection (2) it may not be in respect of each charge.

MR HORSLEY:
I'm sorry, I don't follow that.

ARNOLD J:
I wonder if you could go back to *Booth* again and take the sentence on the first rape, 11 years nine months.

MR HORSLEY:
Yes, Sir.

ARNOLD J:
That was eight years plus an addition of three plus the three months to reflect totality.

MR HORSLEY:
Yes Sir.

ARNOLD J:
Now that's a sentence for the purpose of 2A, 11 years nine months. That's –

MR HORSLEY:
Yes it is.

ARNOLD J:
Right, and you would say you'd calculate the pre-trial detention in relation to that simply by reference to the rape, the one r – the fact that the two doesn't matter because the pre-detention is the same for both of them. But you would just take account of the pre-sentence, the detention in relation to the particular count?

MR HORSLEY:
Yes.

ARNOLD J:
Right.

MR HORSLEY:
Yes.

ARNOLD J:
Now why shouldn't you take it into account for the components of the sentence because if the totality principle is going to be applied to increase the sentence by three and a half years for count number 2 in the rape and the three months for the assaulting, why isn't that taken into account in the calculation in respect of that sentence?

MR HORSLEY:
Because the totality exercise is a different one from the calculations for pre-sentence detention purposes.

ARNOLD J:

But, I mean, isn't that the point, that if you treat it as a different exercise, completely independent, it does skewer the application of credit for pre-trial detention?

MR HORSLEY:

Yes. So that's a different point again, and I have to accept that there are, on very rare occasions, anomalies which are caused by the imposition of concurrent sentences as opposed to cumulative sentences, and that is because of how pre-sentence detention is calculated. Those anomalies only can arise if a person spends time in custody for an offence which does not become the lead offence and in circumstances where, whilst that person is in custody on that first offence, or has spent time in custody, a second offence is charged or that person commits a second offence which becomes the more serious one. It's rare but it does –

ELIAS CJ:

So that's *Booth*?

MR HORSLEY:

That is *Booth*. That's exactly *Booth*. It's also *Marino* because in that case Marino's initial offending was violent offending which wasn't seen as serious, in fact, as the attempts to pervert the course of justice, offending for which he did not commit until he was already on a remand in custody.

GLAZEBROOK J:

Of course, the trouble is that can be quite a – it's not necessarily obvious which is going to be taken as the lead offence. Different Judges might decide that violence was actually worse than perverting the course of justice for instance, and one couldn't really quibble with a view that a hurt to a person might actually be, although, of course, so intertwined because you're actually trying to get off the violence side of it and intimidation but –

MR HORSLEY:

Yes, well, depending on the nature of the offending –

GLAZEBROOK J:

– so it really could be quite arbitrary which one is picked and then you might be inflating.

MR HORSLEY:

I would disagree with the first part of that statement in the sense that it's not often arbitrary as to which offence you pick as the lead offence. Usually that's done –

GLAZEBROOK J:

But there may be differences of opinion in terms of between different judges as to which is picked and for what reason.

MR HORSLEY:

Yes, although if one has done a sentencing exercise which is well considered, they are required to, in fact, pick the most serious offence and then raise that for purposes of totality. So we would hope that you would see a consistent approach in that. So to the extent that arbitrariness comes into it, it's not, in my submission, in that aspect of it, but I do submit, or accept, rather, that what can happen is that in those limited circumstances where somebody has offended after being on remand and/or charged with other serious offending whilst on remand there is an anomaly that can be created if concurrent sentences are imposed when that subsequent charge becomes the lead offence.

ELIAS CJ:

So in those cases if the anomaly is not to rule, Judges will be in error if they don't structure their sentences cumulatively, surely.

MR HORSLEY:

Well, this is the discussion from yesterday, Your Honour.

ELIAS CJ:

I know, but you can't have it both ways. You can't both have no error in sentencing and no error in interpretation of section 20, it seems to me. Maybe you lose both ways.

MR HORSLEY:

If I was going to pick one – in terms of a belt and braces approach, I think the bigger risk is, quite frankly, is in interpreting section 91(1) in the broad fashion.

GLAZEBROOK J:

Explain why, please. That is really the issue. Are there going to be anomalies? Are there anomalies that are going to be introduced?

MR HORSLEY:

Well, the biggest and most significant one appears to be – even on my learned friend's acknowledgement – that this is only going to help you if you've got sentencing that all happens on one day. So it's only in that sentence –

WILLIAM YOUNG J:

Wouldn't it apply if there's sentencing in relation to a set of proceedings within the meaning of section 91?

MR HORSLEY:

So what would that set of proceedings be?

WILLIAM YOUNG J:

Well, it could be quite broad but it could encompass –

ELIAS CJ:

A number of charges.

WILLIAM YOUNG J:

It could encompass unrelated offending and charges that become separate at an early stage and follow different courses.

MR HORSLEY:

This is where we've suddenly made the Corrections officers' jobs even harder because what you're saying then is that proceedings are anything –

WILLIAM YOUNG J:

Well, there'll be a problem for the Corrections officer to determine whether concurrent sentences imposed are in respect of a single set of proceedings or different sets of proceedings which is probably reasonably similar to the problems they now face with relatedness.

MR HORSLEY:

Well, relatedness, at least, Your Honour, has the ability for that review to take place and for it to go back to the sentencing Court.

WILLIAM YOUNG J:

Couldn't this review, the same thing happen if proceedings – I mean, there's actually a number of ideas here but let's say 90(2) is construed in a way that doesn't help you. That's not an answer to the argument. Then the application of the calculation in any particular case would always be subject to an appeal back to the sentencing Court.

MR HORSLEY:

So let's perhaps to extrapolate on that, what about the situation of a man who is remanded in custody on charges that are before both the District Court and other charges that are before the High Court? Are they related proceedings? What is the sentencing Court?

WILLIAM YOUNG J:

I wouldn't use the words "related proceedings". Can I just put it as I understand the arguments you face? The first is if proceedings leading to

conviction or pending sentence in section 91(1) encompass all charges that are laid from whoa to go and are within the three subsections.

MR HORSLEY:
Yes.

WILLIAM YOUNG J:
So you start with the first charge and you finish with the sentence that's imposed. Anything that comes up in the middle is within the concept of proceedings. Then secondly in relation to section 90(2) either a sentence – any sentence in relation to proceedings so defined is a sentence for the purposes of section 90(2) so in this – so in these cases *Booth*, the overall lead cumulative sentence that's the sentence or, alternatively, and this could also apply here, that it applies in this case because the sentence imposed is broadly referable to charges which inform the totality of the sentence that's imposed.

MR HORSLEY:
Sir, just on that latter point, I'm a little bit more confused because if we use the *Booth* example, section 90(2) is requiring you to take hold of each of those individual concurrent sentences.

WILLIAM YOUNG J:
Well, the argument – that section 90(2) is what you would rely on. What I think the Chief Justice has suggested is that it really only would apply, it's only two or more concurrent sentences if there are two or more separate sets of proceedings which result in concurrent sentences. So in the case of *Booth* she'd say there's only one sentence, one set of concurrent sentences.

MR HORSLEY:
And by analysis would that mean that you do not have to calculate as required under subsection 2 the amount of pre-sentence detention that applies?

WILLIAM YOUNG J:

Yes, that's right, yes. So that's the response.

ELIAS CJ:

That's the simple.

MR HORSLEY:

Yes, okay. So to come back to a point I think Your Honour made yesterday, if you don't make that calculation on the remaining rape charge or the remaining assault charge and there is a successful appeal against that lead sentence, what has happened then?

ELIAS CJ:

Well, it doesn't matter.

GLAZEBROOK J:

Well you just go to the next sentence down. So you have an 11 years nine months, and then you have an eight years. The 11 years nine months one goes and you calculate it on the eight years because that's –

MR HORSLEY:

So you then do a different –

GLAZEBROOK J:

Well, you have to do a different one because the 11 years nine months is gone but that's the case whenever you have a successful appeal.

MR HORSLEY:

So the real purpose of having the requirement calculated separately on each concurrent sentence that is imposed is so that Corrections and the prisoners, themselves, knows when they have hit the sentence end date and parole eligibility date for the purposes of each of those sections. Sometimes – or each of those charges.

ELIAS CJ:

Well, but is it each of those charges? That's the question.

MR HORSLEY:

Well it needs to be because don't forget concurrent sentences can be imposed on a sentence that you're already serving.

ELIAS CJ:

No, I understand that.

MR HORSLEY:

So once that happens –

ELIAS CJ:

I think that is really what section 90(2) is directed at, those sort of proceedings.

WILLIAM YOUNG J:

Can you tell me what other references there are in the statutes to single notional sentence?

MR HORSLEY:

In the interpretation section under section 4 I think there's a reference. There's –

WILLIAM YOUNG J:

Is it only really significant for calculation of time served and thus parole eligibility and sentence release date?

ARNOLD J:

75 sets it out.

GLAZEBROOK J:

75, whether it's a long term sentence or a short term sentence the non-parole and the release date it says.

MR HORSLEY:

So in terms of the notional single sentence, that only does apply to cumulative sentences of course. So that is the way that they administratively can deal with cumulative sentences.

WILLIAM YOUNG J:

Yes, so it equates the total effect of the cumulative sentence to a single concurrent sentence.

MR HORSLEY:

Correct.

ELIAS CJ:

Yes.

GLAZEBROOK J:

Which would in itself suggest that they were meant to be dealt with in exactly the same manner because why would you effectively turn three cumulative sentences into the same effect as a concurrent sentence if, in fact, by section 90(2), you're making a concurrent sentence have a totally different affect from your notional cumulative – notional single sentence.

MR HORSLEY:

And that's a tidy argument when you're thinking about sentencing on a single day but it's not one that works for all situations and so –

GLAZEBROOK J:

Well, no, but you don't sentence on a single day with cumulative sentences often because that's the very reason they're made cumulative because there's

a totally separate and unrelated offending, especially say if you get into a fight in jail, for instance.

ELIAS CJ:
You can, in fact, can't you, impose a concurrent sentence later?

GLAZEBROOK J:
Yes you can.

MR HORSLEY:
Yes you can.

ELIAS CJ:
Yes.

MR HORSLEY:
Sorry, I might have misunderstood you, Your Honour, but if you saying why do we have this –

GLAZEBROOK J:
No, you were saying it doesn't deal with the cumulative sentence that – but maybe you meant, sorry, a concurrent sentence you impose later but maybe you meant cumulative.

MR HORSLEY:
Well, both, actually because –

GLAZEBROOK J:
Well, no, but why would you have for cumulative sentences turn them into one concurrent sentence and then for concurrent sentences have a totally different regime from what you are notionally turning three cumulative sentences into? What's the policy rationale, any possible policy rationale for that?

MR HORSLEY:

Because if you automatically convert concurrent sentences into a single notional sentence you will have ramifications for the end date of your sentencing. So if, for instance -

ELIAS CJ:

But that's really what we're talking about.

MR HORSLEY:

Take *Nahu v New Zealand Police* [2015] NZHC 54. *Nahu* was a very good example of that where the Judge did impose a cumulative sentence and in fact it linked itself to a result which the Judge never intended.

WILLIAM YOUNG J:

Yes but what would be wrong with treating a cumulative sentence as a single notional sentence?

MR HORSLEY:

An accumulative sentence.

WILLIAM YOUNG J:

Sorry. In other words –

ELIAS CJ:

Well, effectively it is.

MR HORSLEY:

It is.

WILLIAM YOUNG J:

So you're treating – so what the exercise is, is treating cumulative sentences in their totality as if they were a single, concurrent sentence.

MR HORSLEY:

That's right.

WILLIAM YOUNG J:

So why would there be a different outcome in terms of parole eligibility and a sentence release date depending on how the sentence was structured? I mean, that's the policy question that's been put to you. There's no obvious answer, I think, is there?

MR HORSLEY:

No, the anomaly that's created by this situation has no obvious policy answer to it.

WILLIAM YOUNG J:

All right. Would there be an anomaly created if, as it were, that anomaly was squashed by treating the sentences imposed in these cases as a single sentence from which the total pre-sentence detention as served should be deducted? Now, leave aside whether it conflicts with section 90(2) because maybe it does, maybe it doesn't. But leave that aside. Would there be any problems in terms of administration? You may want to think about it.

ELIAS CJ:

Mr Horsley, I was wondering – I haven't discussed this with my colleagues but this is a very important case and what the Court is putting to you is not really the way the case has been developed. I really wonder whether the Crown needs to consider its position a bit further on this because there is an anomaly. As you've heard, certainly I think that there is unfairness in result in the cases that we're considering and it just has to be fixed if it can be. If it's impossible then we just have to say to the legislature, "You really need to look at this." But what has been put to you seems to be something that makes sense. What is against it is, in fact, court decisions which may have put the Department of Corrections wrong. I just really wonder whether the Crown would like to consider the interpretation point and if you need more time we'll give it to you.

MR HORSLEY:

Can I come back to you after the lunch adjournment, Your Honour?

ELIAS CJ:

Yes, that's why I'm raising it before lunch.

GLAZEBROOK J:

But also I would like to know whether we would be creating difficulties if we decide on the interpretation that we're putting to you now because there's no point in fixing up one problem to create other problems. If there is a possible policy rationale for the difference then it might be related to the anomaly that we would create by fixing it up and if there aren't any …

MR HORSLEY:

I'll come back to you after the luncheon adjournment.

ELIAS CJ:

Yes, we'll take the adjournment now, thank you.

COURT ADJOURNS: 12.59 PM

COURT RESUMES: 2.19 PM

ELIAS CJ:

Yes Mr Horsley.

MR HORSLEY:

Well, I might be able to free up some time this afternoon, Your Honour. We have had a discussion, both among counsel, as in Crown counsel, sorry, and Corrections about the issues that have arisen today. It is the Crown's position that the interpretation of section 91(1) as it presently stands is correct, but that's not a complete answer to this, obviously, and certainly if the interpretation is to be broadened out, then it is very important that this Court has before it full information about the ramifications of a broadening of that

current interpretation. We would like some time to be able to explore those issues, to be able to get back to the Court with, at least, a memorandum from us as to the likely issues that would come out of the broadening of the interpretation but also some possible solutions around fixing the anomaly, whether that be legislative or otherwise, and obviously those things will take some time.

ELIAS CJ:

Well, depending, of course, on what is said, that may not be something that the appellant wishes us to take, kicking it away because there are present issues for the appellant.

MR HORSLEY:

Well, the appellant has no present issues.

ELIAS CJ:

Well, consequential issues.

GLAZEBROOK J:

It may be for other people who are in a situation and the trouble is probably the worst people are the short-term sentences as it is not for the current appellant because it's become moot in so far as the release but there may be other people in his position.

MR HORSLEY:

Yes, Your Honour and that's –

GLAZEBROOK J:

It's not so bad for Mr Booth because I suspect it's quite a while before that is going to be of any particular moment to him.

MR HORSLEY:

Correct, correct, so there's – yes, Mr Booth's situation, irrespective of the outcome, will not change substantively for him for quite some time. We had

thought about the issue of both sentences that have recently been passed and also appeals and/or sentences that are coming up.

A proposition that I would like to raise with you is that through the Solicitor-General's general oversight of prosecutions under the Criminal Procedure Act, that we, Crown Law that is, issue a memorandum to all Crown solicitors and prosecutors drawing their attention to this issue and advising them of the consequences of cumulative versus concurrent sentences in these sorts of situations and that they should have an obligation to draw that to the sentencing Judge's attention. Corrections can assist with that as well in identifying those cases and that, to some extent, I think, at least, it's probably the wrong expression but, buys us some time to get back to this Court with a more substantive answer to any anomalies that might arise and/or to address some of the issues that you have raised with me this morning.

ELIAS CJ:

I'm not sure about that because what's happened is that a present issue has been identified which, as you say, is affecting cases in the system. I just wonder whether – and you're maintaining an interpretation that the present interpretation this Court is seized of the question whether that interpretation is correct. I'm really wondering whether we don't have to proceed to determine that matter because it must be of substantial public importance.

GLAZEBROOK J:

I wouldn't have thought it would take long to work out the ramifications because what I'm suggesting by ramifications is looking at the statute and seeing if there's anything that arises out of the statute that would create a difficulty. I must say I have difficulty in seeing why it would because –

ELIAS CJ:

No, I wasn't addressing that. I was addressing the suggestion that the whole thing could have been parked while consideration is given to a legislative solution. That's the issue.

Certainly in terms of identifying any further argument you want to put to us to be sure that you have adequately addressed it and have flushed out any consequences, which is what Justice Glazebrook is rightly concerned about, I would have thought can be done relatively promptly.

MR HORSLEY:

Yes. Yes, I'm sure that aspect of it can be.

GLAZEBROOK J:

So a week?

MR HORSLEY:

I thought you said a week, Your Honour. Perhaps a little longer than that would be appreciated. If it's exclusively directed to that issue then I think that an adjournment of, say, three weeks would be appropriate.

GLAZEBROOK J:

I just can't see why you'd need three weeks. It's a statute matter, isn't it?

MR HORSLEY:

It will be the statutory consequences of it, definitely. I'm away for a week, which is one of the difficulties. That's why I say a week is a problem for that.

ELIAS CJ:

Well, perhaps what we should do is hear the appeal out, give you an opportunity to put in a further memorandum addressing some of these issues so that in, say, a couple of weeks' time if you need more time you can indicate that.

MR HORSLEY:

Yes Your Honour, although I think we would probably – if we are going to provide examples of anomalies given the complexity of this argument in the legislation.

ELIAS CJ:

But it's really logical anomalies, isn't it, through reading the statute and working out what the implications are. It's really the argument that you would have been prepared to meet had the argument that seems to have been glanced at in the Court of Appeal actually been dealt with.

MR HORSLEY:

Of course, to be fair to the Court of Appeal the nature of the habeas application was that it was coming before them fairly quickly so this is probably the first opportunity to actually develop that part of the argument substantively, anyway. I think it would be best, Your Honours, with respect, if we came back for a further oral hearing on that.

ELIAS CJ:

Yes, I think it probably would be useful, too, although that wouldn't preclude your putting in a memorandum identifying the sort of issues that you – if you discover any.

MR HORSLEY:

No, and I think we would certainly appreciate that opportunity to do that and I think that's only fair.

ELIAS CJ:

You were thinking three weeks, were you?

MR HORSLEY:

If we were to reconvene in three weeks, I think we can certainly manage that.

ELIAS CJ:

Mr Horsley, what I'm concerned about is judges are sentencing people on this and it's one thing to say to the Crown solicitors, draw it to their attention, but –

WILLIAM YOUNG J:

Perhaps what's more significant is people are not being released on this basis.

ELIAS CJ:
That's true, yes.

GLAZEBROOK J:
Especially the short sentences because I think it probably isn't going to matter terribly much with people who are on the longer ones.

O'REGAN J:
If we decide the case the way that's been indicated, it won't matter how people are sentenced.

ELIAS CJ:
Is there anything more that you want to say?

MR HORSLEY:
Not on that issue.

ELIAS CJ:
We will take a short adjournment and consider what we will do.

COURT ADJOURNS: 2.29 PM
COURT RESUMES: 2.35 PM

ELIAS CJ:
Mr Horsley, what we'd like to do – although I'm conscious of foisting this a bit on counsel – we'd like to have a resumed hearing on the 26th of July.

MR HORSLEY:
Yes, Your Honour.

MR EWEN:

I'm available. I'm away the week before but my position is more a case of can the Crown identify anomalies resulting from, which I think I shouldn't need a great deal of time to respond to.

ELIAS CJ:

If you need it, you can put something in later if it's required. We'd be assisted by a further oral hearing on the matter. Mr Horsley, on that basis you should file a memorandum or submissions, probably, indicating any changed position and also addressing the question of anomalies in the interpretation that the Court has been discussing with you. If that memorandum could be by 4.00 pm on the 22nd of July, that's the Friday.

MR HORSLEY:

Yes, Your Honour, we could manage that.

ELIAS CJ:

Excellent. All right, well, thank you, counsel. It is a difficult case and we do need to be sure in this matter, so I think that is the right course for us to be taking. We'll adjourn the hearing until the 26th of July.

COURT ADJOURNS PART-HEARD UNTIL 26 JULY 2016