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IN THE SUPREME COURT OF NEW ZEALAND SC10/2016

EDWARD THOMAS BOOTH

Appellant

v

THE QUEEN

Respondent

Hearing:	5 July 2016
Coram:	Elias CJ William Young J Glazebrook J Arnold J O'Regan J
Appearances:	A J Bailey and K Paima for the Appellant B J Horsley and J E L Carruthers for the Respondent

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CRIMINAL APPEAL

MR BAILEY:

May it please the Court, counsel's name is Bailey. I appear for the appellant along with Mr Paima.

ELIAS CJ:

Thank you Mr Bailey and Mr Paima.

MR HORSLEY:

May it please the Court, Horsley and Carruthers for the respondent.

ELIAS CJ:

Thank you Mr Horsley and Mr Carruthers. Yes, Mr Bailey.

MR BAILEY:

Thank you.

May it please the Court, the question that this appeal raises for determination is whether or not this Court should intervene to ensure what the appellant submits would be a fair and equitable outcome, and in all probability one that the sentencing Judge intended or whether there is sufficient reasons to resist that course and dismiss the appeal against sentence.

In the appellant's submission, it's important to remember first and foremost in determining this appeal that it's concerning the appellant's situation that has resulted to him, and the focus therefore should not be on hypothetical situations and possibilities. The reason that submission is made is because in the respondent's written submissions there is a number of ifs, buts or, in some cases, rather than focusing on the position for Mr Booth, the appellant.

The appellant's written submissions hopefully make clear that there are a number of reasons that are being offered to this Court why appellate intervention is appropriate rather than just one reason alone.

The written submissions begin – or the substantive written submissions – with a discussion about whether cumulative or concurrent sentences were appropriate or more appropriate to the appellant's situation. There was, of course, ultimately three offences for which the appellant was convicted at trial and therefore three offences for which the trial Judge or sentencing Judge had to sentence the appellant on. Those three offences are set out in paragraph 11 of the appellant's written submissions.

Now, there was what was ultimately deemed the lead offence of sexual violation by rape, another sexual offence, sexual violation by way of unlawful sexual connection and then, of course, the male assaults female which concerned a different complainant to, different victim.

There is no doubt that the Judge was correct in the appellant's submission in imposing concurrent sentences for the two sexual offences. Otherwise the total sentence would have been one approaching 20 years if cumulative sentences were imposed which reflected the seriousness on a standalone basis of those offences.

So in terms of the issue as to whether or not cumulative or concurrent sentences should have been imposed, it really concerns the male assaults female charge, count 11.

The Crown or the respondent's submissions set out at page 9 the relevant or the two most relevant provisions in terms of cumulative and concurrent sentences of imprisonment. The Crown have correctly noted that the way section 4 is worded is that these are general principles. However, the point needs to be made, in my submission, that although they're general principles they're normally followed or relied on.

Section 84(1) describes when cumulative sentences of imprisonment are generally appropriate, and in particular if they're different in kind, irrespective of whether or not they're a connected series of offences.

Subsection (2), concurrent sentences of imprisonment are generally appropriate if the offences for which an offender is being sentenced are of a similar kind and are a connected series of offences.

So using that general guidance, essentially concurrent sentences are deemed more appropriate than not when both of those criteria are met.

It would be extremely unlikely, in the appellant's submission, that if cumulative sentences of imprisonment have been imposed with respect to the male assaults female that he would have had any chance of success by arguing that the guidance provided by section 84 favoured concurrent sentences. In my submission, whilst all sexual offending involves an element of assault they are significantly different in type and in my submission there is no Court of Appeal authority which would support these offences being imposed, sentences for these offences being imposed cumulatively, at least when that's been the subject of appeal.

In terms of section 82, of course if the offences were imposed cumulatively a number of the issues which have been referred to in both parties' written submissions don't need to be determined, including section 82 of the Sentencing Act and what the purpose of that section is and how it should apply in practice.

On that point, if Your Honours would please turn to page 19 of –

ELIAS CJ:
Sorry, did you mean to refer to section 82 there?

MR BAILEY:
Of the Sentencing Act, moving on from the cumulative/concurrent issue.

ELIAS CJ:
Yes, all right.

MR BAILEY:

I should have mentioned that earlier.

ELIAS CJ:

You did but I was just a bit behind.

MR BAILEY:

Now, cumulative sentences in my submission are somewhat tidier because no matter how little or how much of various remand time attaches to each particular charge, it's all taken into account. So as both parties have said in the written submissions, a cumulative sentence on the male assaults female charge would have resulted in all of the 10 months being taken into account.

WILLIAM YOUNG J:

Why mightn't it result in the six months being taken into account? Say he'd sentenced him to six months on the assault charge and 11 years three months on the other charges cumulatively. Wouldn't the 10 months be set off only against the assault charge?

MR BAILEY:

No, it appears not given the provisions of the Parole Act.

WILLIAM YOUNG J:

So what provisions? So the Parole Act treats it as a single sentence.

GLAZEBROOK J:

Well, that's certainly the way it's administered, isn't it?

MR BAILEY:

It's certainly the way it's administered. Perhaps if I can come back to the actual provision.

ARNOLD J:
It's section 91, isn't it? 90 and 91.

MR BAILEY:
Right, the relevant sections. That's certainly one of – at least one of, if not the only provision that's relevant.

So I had turned – drawn the Court's attention to page 19 of the Crown submissions. At paragraph 46 – this is under the heading of imposing cumulative sentences – it's submitted that there's a potential problem even if it is cumulative sentences because the sentencing Judge would still need current, accurate and digestible information about the time the prisoner had spent in pre-sentence detention.

In my submission that's certainly not right in respect of cumulative sentences for the reasons I've just outlined, being that no matter how small or large the earlier or later detention was in respect of a given charge, that will all come into play.

The rationale for section 82 in the respondent's submission is –

GLAZEBROOK J:
Well, so – your submission is they just impose cumulative sentences when that's appropriate and they don't have to worry about remand.

MR BAILEY:
Yes.

GLAZEBROOK J:
Whether it's been one day or 50 days or how it's spread. That doesn't matter, it solves the problem, is your submission.

MR BAILEY:
Yes.

GLAZEBROOK J:

Well, solves what you say is the problem in this case.

MR BAILEY:

Yes, I do. So as per the respondent's written submissions –

ARNOLD J:

Can I just ask, what you're saying is that the Judge should have structured the sentence differently and as I understand it in part that is because one could have imposed a cumulative sentence but it wasn't wrong – or do you say it was wrong – to impose a concurrent sentence? In other words, it wasn't open to the Judge to do that.

MR BAILEY:

My submission, Your Honour, is that it was wrong but ordinarily it wouldn't have any consequences so it wouldn't matter and that's why the Court of Appeal in particular say it's not so much how it's structured but the overall sentence.

ARNOLD J:

Right.

MR BAILEY:

But where it's wrong and it's had an unfortunate result, or where it's even arguably wrong and it's had this result, then it should be fixed at least and hopefully avoided in first instance but fixed if it needs to be on appeal.

WILLIAM YOUNG J:

What should the Judge have done if he'd been acquitted on all charges involving Ms Fitzsimons?

MR BAILEY:

And that's where the respondents referred to the *Goldberg v R* [2006] NZSC 58 decision. Firstly going back to one of my earlier submission, it's my submission the Court should primarily focus on the facts at hand and there's a number of distinguishing features in my submission between that sort of situation and this appeal concerning primarily sentence structure and, of course, if it was just the one offence then there's no structure to it because you can't impose cumulative sentences on something if they'd been acquitted on something.

WILLIAM YOUNG J:

All right. I know this is not that case but it's the same problem, isn't it, because would the Judge have had to say, "Well, you've been locked up for 10 months broadly in relation to this business and this range of similar conduct. I can't take it into account because the statute says I can't so what should I do?"

MR BAILEY:

It certainly, in my submission, would be arguable that the Judge could be invited to discount it, but one of the important distinctions in this case – and there is a number – is that for Mr Booth all of his offending took place prior to his remand in custody. There may be policy reasons that if someone is in jail and has been in custody for a long time and they're sensing that they're either going to have the benefit of a very reduced charge in time then they may have an open slate to offend in terms of things in the prison, knowing that they essentially have money in the bank and that was in part the situation in *Goldberg* where his offending – at least in relation to attempting to pervert the course of justice – took place after his initial remand in custody having occurred while he was in prison.

The rationale, as I've just noted in terms of the respondent's position for section 82 as Judges, should just not go anywhere near taking into account previous remand time. The appellant's submission is that section 82 of the

Sentencing Act is primarily in place to avoid an offender being given double credit, essentially, for his prior remand time. In other words –

WILLIAM YOUNG J:
Or alternatively getting it ignored so the Judge says – or that the whole regime is that the Judges should ignore it. They shouldn't concern themselves with parole. They shouldn't concern themselves with what's happened before trial.

MR BAILEY:
Yes. I'm saying that's on the whole correct because it will be taken into account especially if the offender is sentenced to imprisonment in most cases and this isn't a usual case. So if the Judge, of course, was to deduct the pre-sentence detention on any given charge the offender would be sentenced to imprisonment and the prison authorities would also take that same period off in the majority of cases, and therefore it would be a windfall for an offender.

That reinforces, in the appellant's submission, that in this sort of case where the 10 months wasn't effectively taken into account because of the imposition of concurrent sentences. Then there was no impediment to reducing the sentence on account of that earlier remand time.

GLAZEBROOK J:
Or structuring it differently. Are you arguing that there was an ability to reduce or just that you structure differently? It's sufficient for you to structure differently in this case isn't it?

MR BAILEY:
Well, the primary submission is it should have been structured differently because of the reasons previously outlined. If the Judge was not prepared to impose cumulative sentences or for whatever reason had a preference for concurrent, then the Judge was entitled to take into account the 10 months of remand time and he would not have offended section 82 of the Sentencing Act.

GLAZEBROOK J:

Is that because of rationale, as you say, or because of anything in the wording? So you might need to take us to the wording as well as what you say is the rationale, for the likes of myself anyway?

MR BAILEY:

Yes. I think, and I'll come to that –

ELIAS CJ:

Wording's not very helpful [inaudible].

GLAZEBROOK J:

In your own time.

MR BAILEY:

Yes, certainly. Well, I can do that now.

ELIAS CJ:

You're really driven to the purpose of the provision, aren't you, because the words of section 82 seem to be totally against this submission which you don't need to make in this case?

MR BAILEY:

Yes.

ELIAS CJ:

Although it's an anomaly, as Justice Young points out, on your argument. If you can achieve by restructuring something that you couldn't do by sentence.

MR BAILEY:

Yes, and to the extent that the appeal falls on the interpretation or application of section 82, and in my submission it doesn't, and I'll refer in my submissions because I know I've quoted it somewhere.

GLAZEBROOK J:

It's at page 13 of your submissions I think.

MR BAILEY:

Thank you. Yes, paragraph 52, thank you. Now as I interpret or read or understand the respondent's submissions, the respondent's submitting, and no doubt I'll be corrected if I'm wrong, that even the way the sentencing Judge structured this sentence, the 10 month period is still pre-sentence detention in respect to the male assaults female charge, albeit because of the sentence structure it had no practical benefit for the appellant.

As I understand the suggestion now set out in *Marino v The Chief Executive of the Department of Corrections* [2016] NZCA 133, when they are referring to section 82 and, in particular, in determining the length of any sentence, that's not the overall sentence in this case, 11 years nine months or thereabouts, but it could relate to the individual sentences. And so in respect to the lead offence, sexual violation by rape, where an 11 year nine month sentence was imposed, the 10 month period of time can be argued to be not – or is not pre-sentence detention for that particular sentence and, in my submission, that interpretation is to be preferred. In other words, the reference to any sentence is – in this case there were three sentences rather, and one overall sentence and, therefore, it is permissible, in this particular situation, to have deducted it if the Judge needed to because of the way the sentence was structure.

ARNOLD J:

Was this effect pointed out to the sentencing Judge at the time?

MR BAILEY:
No it wasn't, Sir.

ARNOLD J:
Well, doesn't that point to one of the problems because one of the difficulties with this is whether the Judge will, in fact, have had all the information and be able to make this kind of assessment that you're now talking about.

MR BAILEY:
And that sort of brings me on to a point that I was going to come to but, in my submission, firstly, the Judge would have, if he wanted to, looked at the file which began from when the defendant, or the appellant in this case, was sentenced. But, secondly, it's very, very common, especially at the District Court level where as more sentences that are imposed that aren't imprisonment than are, for Judges to take into account pre-sentence detention or prior remand time. So a not uncommon sort of example would be where the Judge decides, right, a 10 month home detention sentence is appropriate. You've already done five months in custody, therefore, I am going to impose a five month home detention sentence or thereabouts.

ARNOLD J:
Right.

MR BAILEY:
And even if it wasn't home detention, which obviously is close to a detention sentence, if a person had spent a period of time in remand and then the Judge decided for whatever reason a community-based sentence was appropriate, for example community work, then in my submission it would be very common for the Judge to reduce the length of community work or community detention in a similar way on account of that time in custody.

ELIAS CJ:
Sorry, and why do you say that that doesn't run foul of section 82?

GLAZEBROOK J:

It's just imprisonment, 82. So there's a non –

ELIAS CJ:

Just imprisonment.

GLAZEBROOK J:

These are non-custodial sentences, I presume, sorry.

MR BAILEY:

Yes and with reference to section 82, it's not pre-sentence detention when a sentence short of imprisonment is imposed.

WILLIAM YOUNG J:

I think this just goes back to – I think the definition of pre-sentence detention makes it clear that this was pre-sentence detention, the definition in the Parole Act because it extends to any charge on which a defendant was faced from first arrest to trial.

MR BAILEY:

Yes. Well, I submit it's clear that it's pre-sentence detention in respect to the male assaults female charge and Your Honour takes a view –

WILLIAM YOUNG J:

Yes, but if you look at section 91 of the Parole Act –

GLAZEBROOK J:

It doesn't matter because it just says determining the length of any sentence of imprisonment, so it doesn't stop you doing non – reducing the non-custodial.

WILLIAM YOUNG J:

No, I agree with that. It's just going back to the earlier submission that this wasn't pre-sentence detention –

GLAZEBROOK J:

Pre-sentence it must be.

WILLIAM YOUNG J:

– in relation to the [earlier in time] charges.

MR BAILEY:

Yes.

O'REGAN J:

So do you say that when Judges are determining how much home detention, in the circumstances you outlined, the Judge has available to them exactly how much pre-charge detention has been served or does the defence counsel have to tell the Judge?

MR BAILEY:

It could be a combination of both, Sir, but certainly the charging document will obviously specify when the person was first arrested or remanded in custody, and it's not overly difficult, in my submission, to –

O'REGAN J:

So the Judge will have that on the file in front of him, the information? It will be on the information will it?

MR BAILEY:

Yes, the Judge wouldn't have to, in my submission, go past the file that was already in front of him or her.

WILLIAM YOUNG J:

There used to be a provision, I don't know if it's there is now, that the Judges were to exclude parole considerations except when considering a non-parole period? Is there a provision to that effect, no?

MR BAILEY:

Not that I'm aware of Sir.

WILLIAM YOUNG J:

Because that used to produce awkwardness around sentences that were just over two years.

MR BAILEY:

And it still remains. If an offender is sentenced to two years one month, they could, in theory, get out.

WILLIAM YOUNG J:

Sooner than a sentence of two years?

MR BAILEY:

In two years. Yes that certainly remains.

WILLIAM YOUNG J:

Because it's a mandatory half up to two years?

MR BAILEY:

Yes it is. So in my submission, concluding in terms of – and again, coming back to the point that this is only an issue for concurrent sentences in unique situations, not concurrent sentences in every situation. But if, again, for whatever reason, concurrent sentences are imposed, then this Court should not be concerned about allowing the appeal on the basis that it would have meant, or should have meant, that the sentencing Judge should have deducted the 10 month period of remand that didn't count towards the overall sentence of 11 years' nine months.

The – or one –

GLAZEBROOK J:
There is a slight oddity in deducting a sentence in respect of another charge because of a period of pre-detention on a totally separate charge. I mean I prefer your cumulative solution I must say.

MR BAILEY:
It's the primary submission certainly.

GLAZEBROOK J:
Or else the Parole Act, which we're looking at tomorrow, should be interpreted in a different way.

MR BAILEY:
Yes.

ARNOLD J:
Well, the Court of Appeal, I think, has said for a long time that it doesn't really look at the structure of the sentence so much as the totality, the overall sentence because there are different ways to getting to, essentially, the same result. So you're really inviting us to put a qualification on that, that in general, do you say, in general that is the position but there must be exceptions?

MR BAILEY:
Yes, that's exactly the –

ARNOLD J:
And the exception is not that the total sentence is wrong but it's the way the time served is taken into account that creates the problem.

MR BAILEY:

Yes, and I think even those Court of Appeal judgments that Your Honour is referring to normally say in nearly all circumstances it doesn't matter about structure but they certainly most, if not all, have still left open the possibility that structure is potentially important and not –

GLAZEBROOK J:
Well, and also the cases that say look at the overall structure will also say, however, if there's been an error of principle then there is a necessity to restructure even if you do come up – even if the overall sentence might be within the limits. There was a slight issue on that. The overall sentence doesn't matter about errors but I think it's come down to it does matter about errors of principle because an error of principle could have led to a different structure. So you could argue here that the overall sentence may be fine but there was an error of principle involved, either because the general guidance pointed clearly to cumulative sentences or alternatively because this particular result was anomalous in terms of the pre-sentence detention.

MR BAILEY:
Perhaps those should have been my opening remarks because that's precisely the appellant's position.

In terms of a suggested remedy which the respondent has advanced which, in my submission, is to an extent a concession that what's happened here is not particularly right or fair, it's been suggested section 25 of the Parole Act is a possible way to remedy the situation that's occurred.

GLAZEBROOK J:
Although they admit it's never used except in cases where it was obviously designed to be used.

MR BAILEY:
Yes and it seems that there's very, very seldom used.

In my submission for a number of reasons which I'll come to, that's an unattractive remedy. Firstly, even if there was deemed to be jurisdiction – and this is at tab 10 of the Crown bundle of authorities – even if there's deemed to be essentially jurisdiction to invoke that section as per subsection (6) of section 25(6)(a) on page 80 of the Crown's bundle of authorities the Parole Board can only release such an offender on parole under this section if the offender will not pose an undue risk to the safety of the community or any person or class of persons within the term of the sentence. That is precisely identical to the usual test for parole, the only test for parole, as I understand it, whether an offender will pose an undue risk if released.

So essentially the Crown's submission that prior to Mr Booth's parole eligibility date this section could be invoked, it would mean for him to have any prospects of success that he would have been granted parole at his first parole eligibility.

Now, there would be statistics readily at hand but as far as I know only 10 percent of offenders, approximately, and if required I can make an information request but 10 percent of offenders are granted parole at their first parole eligibility and therefore it would be even harder for most prisoners to achieve early release under this section because for a shorter period of time less rehabilitation and so on would have been completed. So it's unlikely – at least, if those statistics are right – in 90 percent of cases to have any potential benefit for an offender in the position of the appellant's.

Secondly, as per section 25(5), and in particular subsection (5)(b), this is at page 79 of the Crown's bundle of authorities, the Board can't invoke this section if section 86, 89 or section 103 of the Sentencing Act is in force. Now, in this case there were no considered minimum periods of imprisonment provisions. In this case, of course, no such minimum period of imprisonment was imposed but again if it was or an offender in the position of the appellant's had an MPI imposed by the sentencing Judge then this section – even if he got over that very steep first jurisdictional hurdle – will not assist. It appears there's no known cases where it's been used – and certainly used

successfully – in the position, in someone in the position of the appellant. In my submission, having regard to its purpose it would inevitably be unsuccessful. In addition, as the Crown has noted itself, it's of no benefit to an offender who's required to serve his or her full sentence, which is always a distinct possibility.

GLAZEBROOK J:
Well to me also it'd be rather difficult to say it's exceptional circumstances if the sentence imposed has been held to be absolutely fine, able to be structured that way, and it's the result of the act itself if it is, and we're looking at that tomorrow, the result of the act itself that there's a different sentence structure, and to say that's exceptional circumstances would seem to me to run roughshod over the average, I presume is what you meant by the purpose of section 25.

MR BAILEY:
Yes, I agree with that. The final point I wish to make is, at least for me, the practical mechanics of section 25 are not clear. Now if I refer to section 26 of the Parole Act on page 80 of the Crown bundle of authorities, this section allows an offender who's already had his or her first parole eligibility date, and has, as required, been given the next parole hearing date, to apply to the Board for an earlier hearing date than currently scheduled. So subsection (1), "The Board may, at any time after an offender's parole eligibility date, consider the offender for release on parole at a time other than when the offender is due to be considered for parole, and may make an order under section 28(1) directing his or her release on parole."

Now it's clear, at least in relation to this section, as per section 26(2), that an offender can make that application to the Board. "An offender may apply to the Board at any time for consideration for parole and the chairperson or a panel convenor may refer an offender for consideration for parole under subsection (1)." Interestingly there doesn't appear to be an equivalent provision in subsection – well, start again. There doesn't appear to be an equivalent provision in section 25, and it refers rather to the chairperson

referring to, referring the offender to the Board, to the Parole Board, or in the case that the Ministry of Justice has designated class of offenders, then the Board must automatically, it seems, consider such an offender under that section. I'm not necessarily saying that an offender couldn't make some attempts to encourage a chairperson, in exceptional circumstances, to make that application, but it seems, and it's not particularly designed for applications to be brought directly by an offender who's serving a sentence of imprisonment, for early release. But in my submission that section, forgetting about the mechanics of it, is clearly inappropriate for Mr Booth's situation.

I propose to rely on, unless the Court wishes me to add to my written submissions, obviously there's points I haven't covered including sentencing indications, and obviously when a sentence is imposed – sentencing indication is given, two things will normally determine whether it's accepted, the type of sentence and, just as important, the length of sentence. And sentencing indications are obviously to provide some certainty for defendants and in a situation like this, depending on how the sentence is structured, then certainty that a defendant thought they had would be undone, again, depending on the way it was structured.

There is also, I appreciate it's a High Court decision, but in my submission it is a good example of when appellate intervention is appropriate, even when there's been no error. Even when the sentence is perfectly in line with the governing provisions of sentences of imprisonment and that decision is referred to in the written submissions, and it's included in the appellant's bundle of authorities, at tab 10 of the appellant's bundle of authorities, and it's referred to at paragraph 76 of the appellant's written submissions, page 20, paragraph 76 onwards of the appellant's written submissions.

GLAZEBROOK J:
Was that a necessary consequence of the sentencing Judge's mistaken impression? I think you say it can't just be dependent on that. Don't you, because it probably in this case there wasn't a particularly mistaken impression. Or do you say there was?

MR BAILEY:

Well, it certainly wasn't expressed, but I'm suggesting, as I mentioned in my opening remarks, that was probably the Judge's intention that Mr Booth would serve in total a maximum period of 11 years nine months in prison.

GLAZEBROOK J:

Yes, yes, so from that point of view, yes.

MR BAILEY:

Yes. And I've also suggested, and touched on in my written submissions, that perhaps it would have been equally likely that the High Court Judge would have intervened on appeal in that case if there was no mention of what the sentencing Judge thought the practical effect of that sentence would have been.

GLAZEBROOK J:

All right, so the submission is that the error is that the Judge was imposing a certain sentence and because of something outside of the Judge's control it wasn't that sentence and therefore appellate intervention is appropriate to put it back to the position that it should have been in terms of what the Judge had actually imposed.

MR BAILEY:

Yes, well essentially that it was an unjust –

GLAZEBROOK J:

It's probably not expressed that well but…

MR BAILEY:

No it certainly is an unjust result, because if –

GLAZEBROOK J:

But also one Judge didn't actually intend.

MR BAILEY:

That certainly strengthened the appeal.

GLAZEBROOK J:

No, but you're arguing in this case that was the case as well, because the total sentence is what the Judge intended.

MR BAILEY:

Yes. I think that can be safely inferred.

O'REGAN J:

That all assumes the person's going to serve the entire sentence, which doesn't happen that often, does it?

MR BAILEY:

In my submission it probably happens reasonably often.

O'REGAN J:

So what's the impact on the parole eligibility of cumulative versus concurrent. If the Judge had done what you said here, what you said he should have done, which is have concurrent for the two sexual offences, and cumulative for the male assaults female, the parole eligibility date wouldn't have been any different would it?

MR BAILEY:

Yes.

O'REGAN J:

The first parole eligibility date would have still been the same or would it have changed?

MR BAILEY:

If, I think I've got this right, but again stand to be corrected, his total sentences has essentially been increased by 10 months, and his parole eligibility has been extended by a third of 10 months.

O'REGAN J:

No, but what I'm saying is if the Judge had done what you said.

MR BAILEY:

Yes.

O'REGAN J:

What happens to his parole eligibility?

MR BAILEY:

He would have been eligible to go to the Parole Board, three and a third months earlier than his current parole.

O'REGAN J:

So the parole eligibility date would have also been measured from the time he was first in pre-sentence detention.

MR BAILEY:

Yes, yes, because the 10 months is taken into account.

O'REGAN J:

And imposing the cumulative sentence fixes that issue as well, on your…

MR BAILEY:

Yes it does. As I recall the, and I know it's going to be a focus for the Court tomorrow, but the *Marino* decision, I think there were similar remarks expressed by the sentencing Judge in that case believing that the sentence imposed would achieve a certain outcome in terms of release.

ELIAS CJ:

I think it was a bit clearer there than here. What are you referring to in particular in Judge MacAskill's notes?

MR BAILEY:

I'm not.

ELIAS CJ:

Oh I see.

MR BAILEY:

I'm saying it would be implicit and a fair assumption –

ELIAS CJ:

Right.

MR BAILEY:

– that he would have thought this sentence will mean maximum period of imprisonment –

WILLIAM YOUNG J:

Well he may have just thought it means that subject to whatever pre-sentence detention entitlements you have, the sentence is 11 years nine months. He probably didn't allow himself to engage with it did he.

GLAZEBROOK J:

Well, no, but he probably didn't think it was going to be more than 11 years nine months, in the event that the full sentence was served, that's the point isn't it?

MR BAILEY:

Yes.

GLAZEBROOK J:

If he says 11 years nine months, that must have been what he thought was fair for the totality of the offending and if, in fact, it turns out to be more than that, that's implicitly against his intention, even – because one can't rule out the possibility that an offender, especially now, would have to serve the full sentence. Is that…

WILLIAM YOUNG J:
Well the assumption is that he assumed that he would have, must have assumed pre-sentence detention time would count. That's your…

MR BAILEY:
That's what' I'm submitting and of course if Mr Booth was charged with these offences at the same time, that would have, obviously, occurred, and as I've set out in the written submissions, if he was on bail, well there wouldn't be pre-sentence detention, but he wouldn't have had to spend this additional period of time.

Now just coming back to Justice Young's query earlier on about the effect of cumulative sentences and all being taken into account, I think one of the sections has already been mentioned, but it appears to be sections 75 and section 90(3).

ELIAS CJ:
Sorry, which Act are you talking about?

MR BAILEY:
Sorry, the Parole Act 2002. Section 75 and section 90(3).

GLAZEBROOK J:
Have we got these somewhere?

MR BAILEY:
And it's referred to at footnote 34 of the respondent's written submissions, paragraph 30 – sorry, start again. Footnote 34, page 11 of the respondent's – one final brief submission just to really refer to the written submissions, and that was the criteria for leave to this appeal when miscarriage of justice criteria is relied on, and I submit to the Court that that also supports looking at what's just and whether a just result has been achieved, rather than necessarily having to attack the sentence on conventional grounds. But as I come back to the primary submission is it should have been cumulative and because of the

result that this Court should intervene and alter the sentence. It could do that in one of two ways, in my submission, the cumulative avenue is the tidier and more proper approach.

Unless Your Honours have any further questions, those are the submissions of the appellant.

ELIAS CJ:
Thank you Mr Bailey. Yes, thank you Mr Horsley.

MR HORSLEY:
Your Honour. It's probably safest, Your Honours, to at this stage, at least, to follow the general format that my learned friend has in terms of looking at this sentence. The primary submission appears to be that there has been an error here in not imposing cumulative sentences as opposed to the concurrent sentences that were imposed, and in my submission it's important to address that first because this is the difficult sentencing exercise that faces Judges, in District Courts in particular, every day of the week, and that is applying the Sentencing Act, the proper provisions under sections 84 and 85, in terms of whether a sentence should be imposed in a cumulative or concurrent fashion taking into account their obligations under section 82 to not, in imposing that sentence, take into account pre-sentence detention. And the purpose of that –

ELIAS CJ:
That only, of course, relates to length of the sentence.

MR HORSLEY:
That's right Your Honour. So the purpose of that is –

ELIAS CJ:
So if the choice is a structural one.

MR HORSLEY:

I'm not saying that you can't look at the different structures of the sentence, but the purpose of imposing cumulative versus concurrent sentences is to basically have transparency in sentencing, so as to impose proper sentences on all of the offences which are before the Court, and you'll see that there are various permutations of that. Prohibitions, for instance, on imposing lots of short-term cumulative sentences that don't adequately reflect the criminality of those sentences, or likewise, where imposing two concurrent sentences, would involve a breach of the totality principle. For instance, in two rapes, as we have here, if proper sentences were eight years for both, then you'd see concurrent sentences of 16 years being imposed. Now if that doesn't work then we go back to looking at the imposition of cumulative sentences. The short –

GLAZEBROOK J:

Sorry, I haven't really, I didn't get that point.

MR HORSLEY:

If you can't impose a –

GLAZEBROOK J:

Because it would be –

MR HORSLEY:

– proper concurrent sentence –

GLAZEBROOK J:

Well why would you land up with 16 years, under the totality principle?

MR HORSLEY:

If you imposed cumulative sentences.

GLAZEBROOK J:

Sorry, I thought you said concurrent.

MR HORSLEY:

Sorry, yes, I did, I did, sorry Your Honour.

GLAZEBROOK J:

All right, I understand that's all right. That's why I was having trouble.

MR HORSLEY:

I can understand, sorry Your Honour. But I guess the real message here is that the imposition of those sentences follows our normal guiding principles, which is that totality overrides everything, and that there is guidance within the Sentencing Act as to when it's appropriate to impose concurrent sentences, when there should be cumulative sentences, but I'd have to say it's more an art than a science in applying this.

WILLIAM YOUNG J:

Well, perversely, if these sentences have been imposed consecutively, he would have been better off. He'd have been sentenced to six months consecutive on the charge [inaudible].

MR HORSLEY:

In terms of his parole eligibility and statutory release date, yes he would have been.

WILLIAM YOUNG J:

Four months better off.

MR HORSLEY:

Yes. So, well again, Your Honour, that gives –

WILLIAM YOUNG J:

There's a lot of uncertainty out there but…

MR HORSLEY:

Yes there are and of course the sentence itself was constructed in a way that gave a credit to the fact that it was going to be concurrent versus cumulative

because he only got an uplift of three months for the six month sentence of male assaults female, because that was reflected in the totality on the lead sentence. So we talk about a six month, if we impose that sentence cumulatively, in fact in theory he would be getting instead of 11 years nine months, he'd be getting an additional three months on top of that.

ELIAS CJ:

Sorry, I don't understand that because the totality principle applies.

MR HORSLEY:

Well in all likelihood you'd adjust it again Your Honour.

ELIAS CJ:

Yes, exactly.

MR HORSLEY:

But if you did impose just a straight sentence that was seen to be a proper sentence for the male assaults female, that was actually six months, the sentence itself was constructed by way of eight years on the first rape, another three and a half years on the second rape, and three months uplift for the male assaults female charge, giving you a combined sentence of 11 years nine months, which was the totality principle in play. If you had looked at all of the sentences, you would have been looking at a sentence in the vicinity of eight years plus eight years plus six months, so that's why you see proper sentences being imposed on those concurrent charges, but a lead sentence being used, and the application of a totality principle seeing a sentence of 11 years nine months.

ELIAS CJ:

I'm sorry, I just can't remember, which is the totality provision, what section?

MR HORSLEY:

Section 85.

ELIAS CJ:

Thank you, yes.

MR HORSLEY:

I hope I'm right.

ELIAS CJ:

You are.

MR HORSLEY:

Thank you Your Honour. So again I suppose my learned friend is being somewhat equivocal as to whether there's actually an error here. To be fair he does suggest that this was a situation where it was inappropriate to impose concurrent sentences because he suggests that the offending is different in nature. So if you're looking at section 84 then that would suggest that the male assaults female charge should have been made cumulative upon the rape charges. And perhaps to come back to the point made by Justice Arnold very early in the piece, no such submission was made at sentencing, and it's really only with the benefit of hindsight as to the impact of pre-sentence detention calculations that this submission is made. In my submission –

ELIAS CJ:

Is that a bar though, on appeal?

MR HORSLEY:

It's not a bar, Your Honour, but it does show how – when we talk about the imposition of concurrent versus cumulative sentences, it is principles in play, not absolute rigid rules, and in my submission you did have like offending here. You had – both of these cases involved serious assaults and sexual allegations against a man in a domestic relationship with both of the victims, and very similar offending alleged, at least, against them. Albeit that the charges in relation to the earlier in time complainant ended up being more serious, it was still effectively domestic abuse, and in my submission that shows that is sufficiently similar offending that it was not an error of principle

to impose concurrent sentences, and of course no one suggested it was at sentencing. I'm not saying that's a bar to revisit that later, but it shows how these sentencing exercises can take a different path without it being wrong.

ARNOLD J:
Well it may show that, if you look at the policy underlying the Sentencing Act, and particularly section 82, that really the scheme of it is that these sorts of considerations should come into play in the parole setting under section 90 and 91 and so on.

MR HORSLEY:
Absolutely.

ARNOLD J:
Because at that point all of these implications, ramifications should be well understood, and so if that section, those sections did their job properly, all of this would be taken into account.

MR HORSLEY:
Yes.

ARNOLD J:
It does seem to me, just as a sort of a reaction, that that is a better locale for considering all of this, than in the sentencing one, because as I understand it Judges used to look at time spent on remand, and it produced all sorts of difficulties.

MR HORSLEY:
Yes Sir.

ARNOLD J:
And this was a deliberately move away from that.

MR HORSLEY:

That's exactly right Sir. We've had various permutations of Judges either having to do the calculations themselves and sign on the warrant of commitment a certification as to the actual days spent on remand for which they were given a credit for, albeit that it wasn't taken off the sentence, it was administered in the back rooms of the Corrections department, through to Judges being required to adjust their sentence because of periods spent on remand, and again there was no one for one rule about that either. It was still discretionary as to –

ELIAS CJ:

And they often got it wrong anyway, the calculations.

MR HORSLEY:

They did Your Honour.

ELIAS CJ:

Nobody would want to go back to that, but if as between this the Judge has a choice, cumulative or concurrent, subject to the totality principles, so that the policy is that you're going to end up with the appropriate overall sentence, and the choice should be neutral. If, however, there is a different effect because of the parole provisions, it's hard not to see that that is arbitrary in terms of the scheme of the overall legislation. What's the policy for a different effect?

MR HORSLEY:

There's no, there is no specific policy, and to be fair, Your Honour, I think you encapsulate it well when effectively pre-sentence detention is, on the whole, intended to be calculated back end, and you are to be given credit for it, albeit that it's not as simple as that because we have situations, for instance, if this man had been, if cumulative sentences had been imposed for the male assaults female charge, he would have been entitled to the 10 months that he spent on remand on that charge. If, however, he'd been acquitted of that charge, there is no pre-sentence detention and no remand period that's even before the Courts at that stage, and he would not get a credit for it, at all.

WILLIAM YOUNG J:

And there could be no complaint about the sentence –

MR HORSLEY:

No.

WILLIAM YOUNG J:

– so it's odd that he's got a complaint about the sentences because he's actually –

MR HORSLEY:

Convicted.

WILLIAM YOUNG J:

Yes.

MR HORSLEY:

Yes.

WILLIAM YOUNG J:

Although the sentence would have been a little less, the sentence would have been 11 years –

MR HORSLEY:

Only three months less.

WILLIAM YOUNG J:

– six months, instead of 11 years nine months.

MR HORSLEY:

Yes Sir. So there are anomalies that do arise, and there's no doubt about it, and another anomaly –

O'REGAN J:

But that doesn't mean we shouldn't try and get rid of ones we can get rid of though.

MR HORSLEY:

I think that's right Sir, and this is an interesting case because I think it is important to discuss that and how those remedies might pan out. This is not a case where the Crown is suggesting that there is absolutely nothing you can do here, and we have proposed a number of solutions to some of these anomalies that arise, but I think, from the Crown's point of view, it's really important that we see practical solutions, if we are looking at solutions, to what this problem has given rise to. And on that we see enormous difficulties in sentencing Judges being required to take into account how their different sentencing structures might impact on parole eligibility, or release dates, on a day-to-day basis.

ELIAS CJ:

What about a presumption that if you have charges laid at different times there's a presumption that you'll impose cumulative sentences, something like that to plug this anomaly?

MR HORSLEY:

So, I guess, A, you'd need to know that they were laid at different times, that's' probably not the most difficult exercise, and B, it might be entirely inappropriate to impose a cumulative sentence. You might not –

ELIAS CJ:

Why would it be inappropriate?

GLAZEBROOK J:

Well, full rates at different times with the same person or different persons, but not very different times I suppose.

MR HORSLEY:

Yes.

ELIAS CJ:

But you could structure it like that.

WILLIAM YOUNG J:

Well there are problems if there are appeals and some of the convictions are set aside and then the remaining sentences are artificially low.

MR HORSLEY:

And that is correct as well, so –

WILLIAM YOUNG J:

What happens if they're under two years, are they accumulated, so if someone gets three consecutive sentences of 18 months is that treated as three 18 month sentences, or is it treated as a four and a half year sentence?

MR HORSLEY:

All of those, if they're imposed concurrently, they will be treated as three 18 month sentences.

WILLIAM YOUNG J:

If they're imposed consecutively?

MR HORSLEY:

I'm sorry. If they're imposed consecutively, that's right, you add each sentence.

WILLIAM YOUNG J:

What if they're imposed on different days, different occasions?

MR HORSLEY:

It will be imposed, forget about pre-sentence detention, under the Parole Act your sentence is deemed to be imposed on the day that – sorry, your commencement date is deemed to be the date that the sentence is imposed.

WILLIAM YOUNG J:

The first sentence?

MR HORSLEY:

Yes. Well, well no. So if you'd made it cumulative, on a sentence that you're already serving, that sentence will have been imposed upon that date, but of course the add time will only start at the end of the other sentence.

WILLIAM YOUNG J:

Okay, but what I'm interested about is how parole works. Do you have to do three lots of nine months before you're eligible, and then you automatically get out, or do you, are you eligible for parole after 12 months?

MR HORSLEY:

They become a notional single sentence and so all of your end dates are ended up to give you the end date, a suitable end date, and all of your parole dates are added up to give you the parole eligibility date as well. As well as that, any pre-sentence detention that you have served on any of those three separate charges, is factored in.

ELIAS CJ:

Just dealing with that problem, that objection that you made about cumulative sentences, if there was an appeal against conviction, is there a provision that would permit re-sentencing if cumulative sentences have been imposed?

MR HORSLEY:

The sentence would just - the sentence that you were originally sentenced on is simply gone from the equation.

ELIAS CJ:

Is it?

WILLIAM YOUNG J:

There'd have to a Crown appeal wouldn't there?

MR HORSLEY:

There would.

ELIAS CJ:

I see. Thank you. Why would there be a Crown appeal though, because –

MR HORSLEY:

Because the sentence would now be manifestly inadequate.

ELIAS CJ:

Yes, but so it would be a later appeal, yes. It might be better though anomalies like these. I mean is there a gap in this legislative scheme? Should we be Northland milking?

MR HORSLEY:

Well, that's probably an interesting point, Your Honour, and to the extent that there are these anomalies that crop up occasionally, more recently of course we've got *Marino* in the context of the habeas application, *Te Aho v R* [2013] NZCA 47 and this case, so that's three in the last couple of years anyway, that have drawn to this Court's attention – well, sorry, the Court of Appeal's attention at least, some of the problems that arise with pre-sentence detention that doesn't get taken into account. Yes, you could argue that there is a lacuna in the Act that, because of the operation of the Parole Act, it does have this effect, and that's where the question becomes whether that lacuna is capable of being fixed by this Court, or whether, in fact, it's a matter of policy that needs to go back.

ELIAS CJ:

Well what's the policy? I'd feel a lot better if I knew that there was some reason to reason for it.

WILLIAM YOUNG J:

It can only be you'd take it [inaudible] that this is a 10 month case.

MR HORSLEY:

Yes, so that's, and this is –

GLAZEBROOK J:

But isn't it, as Justice Arnold said, better if you can, because there doesn't seem to be any policy reason under the Parole Act why you'd have this anomaly that exists between cumulative and concurrent sentences, so isn't it better to, if there is a gap, to actually fill it up an interpretation of the Parole Act because for the life of me I can't see the policy under the Parole Act for having a different parole eligibility date or a different – are you counsel tomorrow, I just can't remember?

MR HORSLEY:

Yes.

GLAZEBROOK J:

Well so we'll be discussing that.

MR HORSLEY:

So we can have another crack at that, yes, we can. But in terms of policy, Your Honours, it really stands on the fact that concurrent sentences are standalone sentences, and so if one falls away, it doesn't have the impact on the other concurrent sentence that's still running. Concurrent sentences can be imposed at later periods. For instance, if someone's offended whilst they're in prison, then it's quite appropriate to put a concurrent sentence in there and actually a very good example of that is the mess that is *Nahu v Police* [2015] NZHC 54, which I think my learned friend referenced

you to that, it's tab 10, I think, of the appellant's bundle, and these are not the only anomalies.

So in the *Nahu* case the defendant or prisoner there was serving a two year term of imprisonment. That was a short-term determinant sentence which meant that he was eligible for, not parole, but mandatory release after 12 months of his sentence. In trying to dismiss or, sorry, bundle up the effect of unpaid fines, the Judge there in the first instance said, right, you're eligible for release very shortly. Actually I think you deserve another month in prison for the fines that you haven't paid, therefore I'm going to impose another month cumulative on the sentence you're currently serving. Now what the Judge didn't realise there was that actually changed the nature of the sentence.

It then became a long-term sentence and so mandatory release was not available, and in fact he was under the parole eligibility provisions. Strangely enough, that meant he was actually parole eligible earlier, because only after one-third, so roughly eight months and a couple of weeks say, but of course he was still in custody and had to wait for his parole eligibility hearing to be released. Justice Clifford saw what the Judge was trying to do and, in fact, it was crystal clear what the Judge was trying to do. He was trying to impose another four weeks of imprisonment, and with the greatest of respect to Justice Clifford, he too has made a bit of a hash of it because he has tried to impose a sentence of imprisonment that was to nominally start from a deferred date of the sentence release date, something that, in fact, under the Parole Act he was not entitled to do. So you can see how these difficulties arise. The correct answer in that case was that the Judge –

WILLIAM YOUNG J:

Can you just explain why he couldn't do that, is there a specific provision in the Parole Act that prevents him –

MR HORSLEY:

You can't defer a sentence of imprisonment when you're actually already serving a sentence Sir, so when he quashed that first sentence he needed to impose a sentence that commenced as at the date the first sentence was actually imposed. So if he had imposed there –

ELIAS CJ:

If he was doing it cumulatively, could he have imposed a –

MR HORSLEY:

Yes and what he should have done was imposed a concurrent sentence of two months –

ELIAS CJ:

Yes, to take effect from –

MR HORSLEY:

Which would have taken him out and that's another short-term sentence so you would only serve your one month, whatever the calculation was that needed to get to where he got to.

WILLIAM YOUNG J:

Why wouldn't that be a combined sentence?

MR HORSLEY:

Because they're two short-term determinate sentences.

WILLIAM YOUNG J:

Well, that's what I asked before, that if you got three 18 month sentences are they a four year six month sentence or –

MR HORSLEY:

That's cumulative, Sir. I'm talking about concurrent. So when they're concurrent they will run together and if they're both short-term then you have

the same effect and that is that they're both subject to the mandatory release dates rather than parole eligibility.

WILLIAM YOUNG J:
Oh, I see.

ELIAS CJ:
You should probably – I did see that section in the Parole Act but you should really indicate where it is.

MR HORSLEY:
Section 100, I think, for that. Which one are you talking about?

ELIAS CJ:
Relating to the cumulative sentence can't –

GLAZEBROOK J:
And then 90 and 91, those ones, but this one is two short-term sentences, isn't it?

MR HORSLEY:
Yes.

GLAZEBROOK J:
Sorry, if it's concurrent they're counted as two short-term sentences, is that right?

MR HORSLEY:
Well, as long as they're under the 24 months, each.

GLAZEBROOK J:
Each under?

MR HORSLEY:

Yes.

GLAZEBROOK J:

But if they're concurrent wouldn't it be two years two months?

MR HORSLEY:

No because they start to run – they just run separately. So each of your sentences – and this is the difficulty with concurrent sentences – and the point of them is that they just run and each sentence will run by itself and run out by itself. So it depends on your date of imposition of each of those concurrent sentences. So concurrent sentencing makes a lot of sense when you're imposing sentences on people who are already in custody or when you're imposing something that's happened later in time.

GLAZEBROOK J:

But the later in time, how does that run out by itself if it's concurrent? It just runs from the beginning, the imposition of it, is that right?

MR HORSLEY:

That's right Your Honour.

GLAZEBROOK J:

Okay, so that's why he should have had a two month concurrent sentence, Justice Clifford, if he was trying to fix this up?

MR HORSLEY:

Yes. Technically, in fact, he probably should have had a three month, from memory, because he was imposing it a month before the end of that other sentence because that would have meant you serve half of that so you get six weeks, basically.

GLAZEBROOK J:

Yes but whatever, he should have done that.

MR HORSLEY:

Yes, he should have.

GLAZEBROOK J:

I can see why he didn't realise what he was supposed to be doing.

MR HORSLEY:

No and to be fair I'm not sure whether Mr Nahu was actually finally released there but he was basically trying to ensure that he was released immediately. In fact, I think he must have been in custody because he said, "I think this means that you will be released immediately."

GLAZEBROOK J:

"I think."

MR HORSLEY:

This was a very long-winded way of coming back to your point, Madam Chief Justice, that in trying to fix some of these things you have to be aware of the anomalies that can arise in any number of situations with these and that is why I am concerned about some form of rule that says just because a sentence has happened or that there has been a later in time event you should automatically impose cumulative sentences.

ELIAS CJ:

Well, yes. I wasn't going so far as to say that. I was suggesting a presumption because it seemed to me a way of getting through this. In your submissions you indicate that there's a steer in the Sentencing Act towards concurrent sentences as opposed to cumulative. I really found that hard to pick up from the provisions.

MR HORSLEY:

If I said “steer” I suppose what I mean by that is that if in imposing a sentence a Judge is silent as to whether they are concurrent or cumulative the presumption is that they’re concurrent.

ELIAS CJ:

Yes, I can understand that.

MR HORSLEY:

Yes. So that’s as strong as I would …

ELIAS CJ:

But just in terms of the choices the Judge has, the Act itself doesn’t constrain those choices, by language, anyway. Some policies, perhaps, might.

MR HORSLEY:

Yes, depending on the fact scenarios there might be a presumption that you would tend towards one type of sentence. That's right. But there’s no general presumption that concurrent is more likely than cumulative, as a broad proposition. That’s true.

ELIAS CJ:

It is deeply troubling, to me, at any rate, these anomalies, because they are significant.

MR HORSLEY:

Well, they can be.

ELIAS CJ:

They can be, yes.

MR HORSLEY:

There’s no doubt about it. This is, you may think, a good example of that. There are other situations like the *Te Aho* one where it resulted in, I think, 113

days that weren't taken into account. But in reality that's no different from many people who are either acquitted of charges or have been remanded in custody, quite frankly, for a very good reason and protection of public reasons, building up to their trial, and forget about whether it's a cumulative or concurrent issue, we see a lot of people who are remanded in custody who go through trial and are acquitted.

ELIAS CJ:

But those are different because there is an explanation for it. This is, this turns on judicial choice as to how the sentence is structured and that's what is difficult to accept, that there should be different outcomes.

MR HORSLEY:

Yes and I appreciate that. I suppose where the Crown is coming from is what is the role of an appellant Court in looking at intervention in those circumstances?

ELIAS CJ:

Well, it's to correct injustice, surely.

MR HORSLEY:

Well, it depends on how we use that term "injustice" and again if it's to simply say that it is in the very looser sense of the word error correction then it has to be that we know for sure that in fact the Judge fell into error here.

GLAZEBROOK J:

But you're suggesting section 25 can be used where it says exceptional circumstances, which must mean the injustice of it and yet you're suggesting that section 25 can be used but the appellant Courts can't intervene. It seems an odd – a very odd submission or group of submissions.

MR HORSLEY:

I'll try to deal with the oddness of that. The only reason why we raise section 25 is because they have direct applicability to parole eligibility,

something that Judges don't take into account. In fact, the only time that parole eligibility is taken into account by Judges is in the imposition of a minimum period of imprisonment and that's the only time that they would be looking to interfere, for want of a better description, with parole eligibility. And again, that's not to do with the calculations as to when it might arise. It's just to simply say that one-third, the default position, is not enough. But in the administration of the sentence, there are a lot of things that happened with parole. There are circumstances where you can, under section 25, if it's exceptional, at least get your parole hearing date brought forward. I'm not saying that you will be eligible and in fact the Parole Act itself makes it very clear that there is no presumption that you will be granted parole at a parole – once you are parole eligible. There are other provisions.

GLAZEBROOK J:
But where do you get the exceptional circumstances out of that? That's what I was saying. Because if you can't – if the only way you can get exceptional circumstances is out of an anomaly and out of the fact that it would be unjust to have that anomaly, because otherwise there's no exceptional circumstances. Nobody's ill, which is the normal sort of use in terms of section 25, I imagine.

MR HORSLEY:
It has been.

GLAZEBROOK J:
Whereas if you say the appellate Courts can't intervene to deal with that injustice – because that's just the way the Act works – it's very difficult to say that section 25, that that could create a section 25 exceptional circumstance, to me.

MR HORSLEY:
Yes, Your Honour, except that an appellate Court is actually looking at the total sentence. So section 25 is around parole.

GLAZEBROOK J:

That's the only thing you can say although, frankly, if that's what the Parole Act says it's difficult to see it's in exceptional circumstances. The only reason that exceptional circumstances because of the way the Act or the sentence was structured and you say that that's just the way the Act works in terms of the sentence structure and that's the end of it. So in fact – and you say parole is administrative which I would take issue with, in any event, but it's difficult to see how an administrative issue can actually fix up what you say is a function of the sentencing regime generally, or what the Crown says. Sorry, I shouldn't – you're an advocate rather than a …

MR HORSLEY:

No, that's fine, Your Honour, understood. No, the point I was going to make was that this may not be of exceptional circumstance in terms of warranting appellate intervention in the totality of the sentence. It may have been an entirely conventional application of – as here I say of the concurrent sentencing regime and the total sentence itself is seen as an appropriate sentence. So there is no injustice in the sense of a manifestly excessive sentence or an error of principle in imposing that sentence. But what I have suggested – and it might not be the complete fix at all – is that at least for the purposes of parole eligibility, there are other things that can happen and I've suggested that section 25 is one option because, of course, the 10 month in Mr Booth's case, the 10 month remand period that is not taken into account if it had been done cumulatively would have made him parole eligible 10 months earlier. That is a circumstance which seems to be one which he could at least raise as being quite exceptional, ie, out of the ordinary, in asking for an earlier parole hearing.

WILLIAM YOUNG J:

Could he have done that if he'd been acquitted on the charges involved there?

MR HORSLEY:

I suspect he'd struggle, Sir, but that's because there would have been never – or there never would have been an earlier parole eligibility date but perhaps, and again, if one has spent an extended period in remand and been acquitted that may be a very good reason why you can go and at least request before the Parole Board an earlier hearing based on your extended period on remand has served some of the effects of your sentence and that you are more ready for release. So, again, it's somewhat speculative but …

ELIAS CJ:

And it's entirely discretionary.

MR HORSLEY:

Yes.

ELIAS CJ:

Anyway, perhaps it would be convenient to take the adjournment now.

MR HORSLEY:

Yes, Your Honour.

ELIAS CJ:

Fifteen minutes, thank you.

COURT ADJOURNS: 11.33 AM

COURT RESUMES 11.51 AM

ELIAS CJ:

Yes, thank you, Mr Horsley.

MR HORSLEY:

Thank you, Your Honour.

ELIAS CJ:

Sorry, the – apart from the section 25 thing, just feeling for when there needs to be some basis for intervention on appeal, if on the face of the sentence it appears that the effect is not what the Judge intended, isn't that reason enough to intervene? I know there's a big if in there and you might say that this is not a case where it is clear that the Judge had a different impression, although maybe tomorrow's case may be a little bit more difficult to argue that.

MR HORSLEY:

Yes, and in fact that is probably two good examples in a way. Certainly in *Marino* Judge Spear indicated that he didn't see any difference in effect in imposing the sentences either concurrently or cumulatively and that is –

ELIAS CJ:

Because the Crown had asked for them to be cumulative.

MR HORSLEY:

Yes so that was a clear error by the Judge in terms of what the effect of the sentence would be. Here I would argue it's not so clear. Certainly in the context of a Judge who actually had conducted the trial and had pre-sentence reports which made it very clear that this man had been previously remanded in custody, was probably very familiar with the facts, there's an equally – if this Judge had been on to these sorts of issues there's just as much of an inference to draw that in fact in imposing 11 years nine months for what was quite horrific offending he actually was conscious of what that meant in terms of an end sentence. The problem is we don't know either way, and so in my submission, on *Booth v R* [2015] NZCA 603, at least there is no clear error which gives rise to the ability for appellate intervention.

ELIAS CJ:

This – my impression is that this issue has only just swum into focus and that it might be the case that Judges simply have not appreciated this difference where charges are laid at different dates, because that does seem to be a

principal reason for it although not the only basis for it, and that therefore one shouldn't assume that the Judge did intend it. Here on out, it might be safe to think that the Judge has turned his or her mind to the consequences as part of the sentence imposed.

MR HORSLEY:
And certainly I am not saying that it would be safe to assume actually either way on this one.

ELIAS CJ:
Yes.

MR HORSLEY:
I wouldn't make that submission at all, Your Honour. The question then becomes – which I think this was where this was heading just before the morning adjournment – what is the role of the appellate Court, then? Faced with this current proposition of somebody who has (a) the ability to have had cumulative sentences imposed and certainly the Court of Appeal acknowledged that that would have been available, but there is no apparent error in the imposition of the concurrent sentences.

ELIAS CJ:
Well, if it was an intended sentence, a conscious sentence, it wouldn't have been possible to – it would have been available. It would have been an available sentence. Is that really what you're able to say?

MR HORSLEY:
It's more that the Court of Appeal has certainly said that the imposition of concurrent sentences was quite proper but it wouldn't have been improper to impose cumulative sentences. Which comes back to our very early discussion, which is that there's no hard and fast rule about the construction of these sentences. There is guidance but that is about it. So to the extent that my learned friend says there's been an error in imposing concurrent

sentences, the Crown disputes that. This sentence was, in fact, properly imposed. The problem that faces us now is that there is –

ELIAS CJ:

Sorry, I'm still teasing away at this in my mind. But surely it's not too much for an appellate Court to insist that the matter is addressed in the reasons of the Judge. You say, well, you can't assume it was an intended outcome. If it has such different consequences, why shouldn't the Court say, well, the Judge hasn't dealt with this? We're not prepared to assume that he did really mean to do that. In other words, he hasn't really given reasons. There's a deficiency in reasoning for a quite different result.

MR HORSLEY:

I'd argue not, Your Honour, because of the structure of the Sentencing Act, the changes that were made to remove parole considerations and sentence end dates into the administrative sphere of Corrections that the Judge, in conducting this exercise, acted entirely properly and that is that the Judge looked at what a proper sentence is, considered whether it should be concurrent or cumulative, and imposed concurrent sentences. Now, they do not need to then go on to say, "I acknowledge that the effect of this is that certain periods of pre-sentence detention will not be taken into account." That would seem to run contrary to section 82 of the Sentencing Act which is directing Judges not to take into account pre-sentence detention and –

ELIAS CJ:

In imposing the length of sentence.

MR HORSLEY:

That's right. And also the change from having Judges actually calculate the pre-sentence remands to actually having, now, Corrections calculating the effect of pre-sentence detention.

ELIAS CJ:

The Judge wouldn't have to calculate them.

MR HORSLEY:

Well, he'd need to know to be able to say this is the effect of my –

ELIAS CJ:

The Judge would simply have to indicate that he appreciated that it would have an effect on the allowance to be made administratively or whatever by parole.

MR HORSLEY:

Which means that in every sentence the Judge would need to know what the effect is to be able to make that statement.

ELIAS CJ:

Just that there is some effect.

MR HORSLEY:

But if they – if it's not a *Booth* situation then they would need to know that to be able to say, well, actually, this doesn't have an effect. Say it's a *Marino* situation. The Judge would have to be saying, "I am cognisant of the fact that this is going to have an impact and I have adjusted my sentence accordingly," or, "I am going to impose cumulative sentences because of the effect of it," or, "Actually, I'm still going to impose concurrent sentences."

ELIAS CJ:

Well, just that I'm conscious of it.

MR HORSLEY:

And I suppose, Your Honour, the answer to that is that there is no requirement for them to be conscious of it. That is the whole purpose of the change in the removal of parole calculations and sentence end dates and remand periods to go back into the sphere of the Parole Act and the administration by Corrections. It's easy for us, I think, here, to say in a difficult situation –

ELIAS CJ:

But there's a choice to be made between concurrent and cumulative sentences which actually has an effect. I think you've probably said everything that can be said. I'm certainly not persuaded that there isn't a deficiency in the Judge's reasons in indicating why or in failing to indicate that he's conscious of that difference. Not that he's calculated it, not that it needs to be factored into the sentence but just that it's not inadvertent. That is the result that I recoil against.

MR HORSLEY:

Can I perhaps try a different proposition there, and that is that in the situation of Judges who are conducting numerous sentences on a day, it might be an indictable sentencing list day, not that the word indictable exists any more, but defence counsel, in fact, are the ones who are most familiar with their clients, the remand periods that they've had, and one would have thought the impact on a defendant of a particular structure and sentence, if defence counsel are not even suggesting to the Judge that the sentence should be constructed in a particular way or that there will even be an effect, then in my submission to say that the Judge should have put that in their reasons is requiring something of the Judges that is a very difficult – I'm disagreeing with you, Your Honour. I think it is hard for Judges to put that in their reasons.

ELIAS CJ:

Well, I'm indicating that from things that I have seen people are now conscious of this and it may be a bit different going forward because I suspect you will see Judges acknowledging this but here we have an anomaly that has only just been, really, appreciated. Anyway, I do understand the argument.

GLAZEBROOK J:

Can I just say to you, though, that the high point of the Crown's argument is that even if defence counsel did suggest that that it would be improper for the Judge to take it into account because of section 82? That's the high point of your argument, so it would be improper for the Judge to take it into account even in structuring a sentence rather than the calculation of times.

MR HORSLEY:

I'm not sure what you mean by "high point".

GLAZEBROOK J:

Defence counsel say, "This will have an effect on parole if you do it this way or that way, Judge," and the Judge says, "Okay, I'll do it this way." Effectively, it might be mixing up your submissions from tomorrow and today, but effectively the high point of the Crown's argument is that it is improper for the Judge to have any notion of parole when constructing a sentence. Or is that not the high point? Does the Crown concede that you could take into account in structuring your sentence for parole?

MR HORSLEY:

I don't think we're as emphatic as the so-called high point, Your Honour, and in fact if it is available, properly available, for a sentence to be either cumulative or concurrent, and that that is raised before a Judge, then I accept that a Judge is entitled to take that into account.

GLAZEBROOK J:

Well, if they're entitled to take that into account is it a big step to say that appellate intervention can say, well, it should have been taken into account in this circumstance even though it wasn't raised?

MR HORSLEY:

No, it's not a big step and I think that's where I was perhaps taking you before the morning adjournment which is to say if it could have been taken into account what should this Court do about that?

WILLIAM YOUNG J:

It's hard to do it without in some way taking into account the pre-trial detention in relation to the length of the sentences imposed, although the primary impact is on structure, concurrent or cumulative. One would – there would be a knock-on effect on the length of the sentence.

MR HORSLEY:

Yes, yes, there is. There definitely is. It is a little bit artificial. I certainly accept that, Your Honour. But in essence the full length of the sentence was imposed here on the rape charge, the rape charge which had no pre-sentence detention attached to it, and in imposing that sentence there, because the Court may not take into account the effect of pre-sentence detention you have this other period of remand which, in fact, for the purposes of that lead sentence, is not pre-sentence detention. In my submission, in those circumstances it may be available for the Court to take that into account. Exactly what effect they give to it is still unclear, whether it's a day-for-day or what that might be is still unclear. But it's not an error for the Judge to have not taken it into account, but if it had been drawn to their attention they may have done and we don't know what the result would have been. That's where we look at what this Court does in its appeal. Well, in fact, normally not this Court but we look at what an appellate Court would do faced with that proposition because most of these things, if not all, quite frankly, have been discovered only after the person has been sentenced and has by the parole eligibility release dates or end dates have actually been calculated and brought home to the prisoner in accordance with, I think, section 92 when they're doing that assessment.

GLAZEBROOK J:

Why would you assume the Judge wouldn't have done something had it been brought to his attention in this case rather than assume, as the Chief Justice was suggesting, that had it been brought to his attention he would have said, "Oh, whoops, I better do this differently," because frankly I would be on the "oh, whoops" side rather than the other side because one can't imagine a situation where you'd go, "Oh, well, I was meaning to impose 11 years nine months but actually it's likely to be more than that because of this parole anomaly."

MR HORSLEY:

I suppose if you assume that the Judge is saying that there's a parole anomaly and he didn't understand that –

GLAZEBROOK J:

Well, no, you're conceding that if it was properly available, and it would have to be properly available here because you do have a different offence, a different victim, and quite a long period, so it would have to have been okay here to add a cumulative sentence, there's no – nobody's going to say you couldn't. But you just said to me that you can take that into account despite section 82 in sentencing structure so there would have been no error if the Judge had done so. Well, why, then, why we – and then you say, "But the appellate Court can't intervene because we don't know what the Judge would have done." Well, if the Judge was allowed to take it into account why on earth would you assume that he would have said, "Well, that's what I meant. I meant it to be 11 years nine months plus."

MR HORSLEY:

I don't think I've ever said that, actually.

GLAZEBROOK J:

No, no, but – oh, well, sorry. You said because you don't know what would have occurred if it had been brought to his attention then the Court of Appeal shouldn't intervene. That's what I'd – I was paraphrasing. What's wrong with the paraphrasing?

MR HORSLEY:

That there was no error and I've never said that the appellate Court can't intervene. It's just that they can't intervene on the basis that there is an error that requires correction. So the appellant intervention –

GLAZEBROOK J:

So what it is, that he was entitled to take it into account but it's not an error if he doesn't take it into account, even though had it been brought to his attention he would have taken it into account?

MR HORSLEY:

Well, this is the second part to that which is I don't know whether they would have taken it into account.

GLAZEBROOK J:

Well, why would you assume he wouldn't have if it had been brought to his attention?

MR HORSLEY:

There's a number of reasons, Your Honour. One is that the 11 years nine months sentence is not actually particularly long. It's well within range. In the context of the offending against –

GLAZEBROOK J:

Well, why wouldn't he, if he wanted it to be longer, just have added it, made it longer?

MR HORSLEY:

If this had been drawn to the Judge's attention, and I'm not saying this is how it would have played out but here is one possibility, that is that the complainant who was the subject of the male assaults female charge, originally there were a number of allegations of incredibly serious violations and part of the reason why those charges ended up in acquittals was because, in fact, the complainant was quite severely brain damaged as a result of the assaults on her. It is the reason why this man was remanded in custody, because of the nature of those assaults in the first place, and albeit it that the end result of this was a more minor charge of male assaults female because that was the only one that had independent witnesses to the event, the Judge may well have considered that the previous remand in custody was

well warranted by the nature of the serious domestic offending and really had nothing to do with the overall result in this case. He may have considered –

GLAZEBROOK J:
Well, I don't know that the Judge can do that, say, "Well, even though you weren't convicted on those charges I'm going to take them into account and say you jolly well deserved a good 10 months for them anyway and that's what should have happened."

MR HORSLEY:
No, not necessarily but in terms of –

GLAZEBROOK J:
Well, at all I would have thought.

MR HORSLEY:
Well, in terms of setting the sentence of 11 years nine months that may well be something that the Judge is entirely comfortable with, despite the fact that there's another 10 months worth of remand that will not be given credit for. It's very difficult to say whether that is the case. That is why I say there's no error there. There's no obvious error. The Judge has imposed concurrent sentences quite in accordance with principle and the effect of parole and sentence end dates was not drawn to the Judge's attention. We come back to, well, what can this Court do about it? We now know what the effects of the parole or the 10 month remand was and there are a number of solutions, in my submission.

The first is that if one is concerned about parole eligibility then there is the ability under section 25 to ask for an earlier hearing date. There is also potentially, as a result of this hearing, the ability for this Court to give firm guidance to the Minister of Justice that under subsection (3) of that section that direction should be given that parole eligibility date should be brought forward for people in this position. And finally, and probably most importantly, there is the ability for this Court to intervene if in its consideration there has

been a manifestly excessive sentence imposed. Ultimately that is the role of the appellate Court. Now, you'll see from our submissions that –

GLAZEBROOK J:
But not taking into account parole eligibility.

MR HORSLEY:
Not parole eligibility because –

GLAZEBROOK J:
Or differential parole rates between concurrent and cumulative so what on earth – you're basically saying there isn't an ability to intervene, aren't you?

MR HORSLEY:
No, I'm not, Your Honour. The reason –

GLAZEBROOK J:
Well, when would there be an ability to intervene because of this anomaly between cumulative and concurrent on the Crown's analysis?

MR HORSLEY:
Well, if you take, for instance, my friend's submission and that is that my learned friend has not actually focused on parole eligibility. He has focused on the end sentence, the full length of the sentence, and he has suggested that this Court could either adjust the sentence by saying that it should be cumulative or reduce the end sentence by 10 months. My submission is that you would only do that in circumstances where you consider that 11 years nine months plus the additional 10 months has resulted in a person being incarcerated, potentially, for a period that you consider to be manifestly excessive for the offending. So in essence, you are adding that 10 months on to the sentence that was given by the Judge in the first instance and then analysing that under normal principles of, is that out of range? Is that manifestly excessive if that sentence had been imposed?

GLAZEBROOK J:

Oh, sorry, I thought you'd finished your answer.

MR HORSLEY:

I had finished my answer. I wasn't sure whether you had a follow-up.

GLAZEBROOK J:

No, no, I think that answers the question. It basically means that you wouldn't be taking it into account because it's very unlikely that a few months either way is ever going to be manifestly excessive without the Court starting to tinker. So if you're assuming the Judge meant to do that, then as you say you have to assume, then effectively the Judge meant there to be that extra 10 months and nobody could suggest that 10 months in those circumstances for this sort of offending was manifestly excessive. If it was 10 months on a two year sentence, well, obviously.

MR HORSLEY:

Yes Your Honour. So the end point is what I agree with. In terms of whether the Judge meant to do it, I'm completely neutral on that. I don't know what the Judge meant to do.

GLAZEBROOK J:

But you – well, I just have a difficulty if he didn't mean to do it then it seems difficult to say there hasn't been an error of principle.

MR HORSLEY:

Which I suppose, Your Honour, and perhaps I'm talking in circles a little bit now –

GLAZEBROOK J:

I think we come back to what your answer to that is and I know what your answer to that is.

MR HORSLEY:
Yes, thank you, Your Honour.

There's just a couple of more minor matters to wrap that up Your Honours. I'm not sure if it's worth just mentioning section 26, which my learned friend raised as being of relevance. But section 26 of the Parole Act is quite a different provision and that is the ability for a Parole Aoard who has already, is already faced with an offender who is parole eligible to bring their next parole hearing forward because that offender has complied with the requirements under section 21A as to …

GLAZEBROOK J:
I think it was just being brought up to say there wasn't a clear application process for section 25 as against section 26.

MR HORSLEY:
Right. If that's the submission, there is actually a very clear application process, which is to simply apply to the Chairperson.

GLAZEBROOK J:
Well, I think it was just a semantic issue in terms of – there was a right to apply, effectively, under section 26, not an explicit right to apply under 25. That's as I understood the submission.

MR HORSLEY:
In that case, Your Honour, I don't need to pursue that any further.

GLAZEBROOK J:
When I say "semantic", that's understating the submission but it was a right to apply as against an implied right to ask the Chairperson then to …

MR HORSLEY:
Yes, Your Honour.

GLAZEBROOK J:
Probably the same effect, you would say.

MR HORSLEY:
Yes, Your Honour.

I think that largely covers the submissions that I wish to make on these issues but I do understand that there are anomalies that arise in this area. We have proposed a degree of solution to this but if there is anything I can assist the Court further with in answer to some of those either anomalies or our submissions, I'm obviously available for that.

ELIAS CJ:
No. Thank you, Mr Horsley.

MR HORSLEY:
As Your Honours please.

ELIAS CJ:
Mr Bailey, do you wish to be heard in reply?

MR BAILEY:
Your Honour, I have three very brief matters, if I may.

As I understand the perhaps concluding remarks from my friend in terms of when this Court should intervene and, as I understand his submission, it should come down to whatever, to what's happened, it doesn't matter so much but the end criteria is going to be whether the sentence could be said to be manifestly excessive in the ordinary sense.

Even the case law that we have to date provides more of a scope than that criteria, and, in particular I draw this Court's attention to paragraph 89 of the appellant's submissions. Paragraph 89, page 22, and there's a quote there. Now, that's obviously, as the Court of Appeal stated there, just a

straightforward example and only one such example and it really leads on to the discussion that the Courts have with my friend as to what would have happened if this matter that we're discussing today was brought to the sentencing Judge's attention. So in my submission that's a clear authority that it's not necessarily it comes back to always the manifestly excessive criteria.

The second point – and I appreciate that if the appellant tomorrow was successful then the correct interpretation of the relevant parole provisions would be different. But the submission that this Court's not prohibited from taking into account remand time in certain situations is explained in the *Marino* Court of Appeal decision, which is tab 5, paragraph 28 of the appellant's bundle of authorities. I may have quoted that part in the appellant's written submissions but if I haven't that sets out why in this situation such as the appellant's, in this case, and in the *Marino* decision, that the Judge wouldn't have been prohibited in taking into account the 10 month period of remand and the other period of remand as it applied to *Marino*. Again, obviously this is only an issue if concurrent sentences are imposed rather than cumulative. So that was paragraph 28 tab 5.

Finally, and I think this has been corrected by my friend, I was asked by Justice O'Regan what would have been the effect on the parole eligibility date of Mr Booth if cumulative sentences were imposed. I said his end sentence, ie, the total period he has to serve if he has to serve it all would be 10 months earlier, which remains correct. As I think my friend pointed out, the parole, his first parole eligibility date, would also be 10 months earlier because essentially that period of time is not counting towards his sentence of imprisonment. I, for whatever reason, I don't know, suggested it would be a third of 10 months but in fact it would be 10 months, as well.

Those are the three matters I wish to raise.

ELIAS CJ:

Thank you. Thank you, counsel, for your submissions. We will reserve our decision on this matter and clearly we will want to consider it in tandem with the case we're hearing tomorrow. Thank you.

HEARING ADJOURNS