

BETWEEN

RAYMOND EVEREST HESSELL

Appellant

AND

THE QUEEN

Respondent

Hearing: 9 August 2010

Coram: Elias CJ
Blanchard J
Tipping J
McGrath J
Anderson J

Appearances: R M Lithgow QC, G J King and C J Milnes-King for the
Appellant
C L Mander and J Murdoch for the Respondent

CRIMINAL APPEAL

5

MR LITHGOW QC:

Your Honours, if the Court pleases, I appear with my learned friend, Mr King and Ms Milnes.

10 **ELIAS CJ:**

And Ms Mills?

MR LITHGOW QC:

Milnes.

ELIAS CJ:

Thank you.

MR MANDER:

5 If it pleases the Court, I appear with my learned friend, Ms Murdoch.

ELIAS CJ:

Yes, thank you Mr Mander, Ms Murdoch. Yes Mr Lithgow?

MR LITHGOW QC:

Thank you, Your Honours. Their submissions have got different orders and
10 for our part, we've intended to take matters in the following order, perhaps
closer to the Crown layout, and that would be, if acceptable to the Court,
I would make some brief introductory remarks and overview, and then Mr King
would deal with the issue of guideline judgments generally, as the first issue,
then I would deal with first reasonable opportunity, then remorse, then
15 Mr King, what to do about murder cases.

ELIAS CJ:

Well, we don't usually sandwich people like that, Mr Lithgow. Can you do
your bit first and then we follow the conventional form and have Mr King
follow?

20 **MR LITHGOW QC:**

There's no difficulty with that. It simply would mean that the big question of
guideline judgments generally would come later. We'd be dealing with the two
specific matters first. But we're entirely in Your Honour's hands.

ELIAS CJ:

25 Yes carry on, on that basis then.

MR LITHGOW QC:

On Your Honour's basis?

ELIAS CJ:

Yes.

MR LITHGOW QC:

5 Thank you. There have been two affidavits filed, one by Mr Gary Gotlieb and
one by Deborah Goodwin for the Crown, and we hope that they are
acceptable to the Court, as both counsel would say, for what they're worth,
they're not strictly evidential or scientific studies but they have captured some
first-hand material from people dealing with these issues and counsel certainly
10 found them useful and we hope the Court does too. So can we take it there's
no objection to the introduction of that material?

ELIAS CJ:

No there's not, although as you – as counsel accept, what we make of it will
really be a matter for the Court.

15 **MR LITHGOW QC:**

Yes, in many ways it's – some of it will simply remind you of earlier times and
us, of things that happen in Court and this and that, but also, perhaps
importantly, reminding the Court that in a number of places Judges,
prosecutors and defence counsel have got round
20 *R v Hessel* [2009] NZCA 450 rather than been able to apply it literally, which
is in some ways an undignified process and one which we hope can be
resolved out of this hearing so that what – at a minimum, what the Court
intends can be in a form which can be utilised in day to day Courts.

25 This case is about the decision of the Court of Appeal, which effectively, at
first instance, sets strict parameters in respect of a so-called discount to the
given upon sentence for the fact of a guilty plea. And I say, "A so-called
discount," because the whole language of bargaining and discount, I think,
does injustice to the process. If there's one thing which is clear from the
30 material that has been provided by the Crown in the main, and that is, that it

has to be confronted that the jury trial is, and has not been for a long time, the central and most important way in which criminal allegations are disposed of and that the vast bulk of criminal allegations are disposed of and resolved by the entry of guilty pleas, and that they're the ones that are way overdue for attention and a judicious and prudential methodology.

The overall theme of our submission is that guilty pleas play a very major role in the orderly administration of justice system and that the way deal with them should reflect that. That an honest and appropriate guilty plea is a public good but that that, in turn, relies on good information, time to read it and to digest it, good advice and something which is largely missing from the traditional approach to it, but I say here, not in the Auld report, and that is, that adult decision making on behalf of accused persons, that they are allowed and should have a respected and dignified role in this and should not always be characterised as simply, angling for advantage and, as the Crown say, entering into a process of treating, because the result, in the end, is a vastly truncated resolution for criminal allegation and it is very different from the common law evolution of emphasis on a fair jury trial. And, as we see, very different from the European system.

The basic features that the plea must be appropriate, that guilt is actually accepted and that, in most cases, it should be, if called upon, demonstrably backed by evidence. That kind of guilty plea is not just something that the accused does for his own purposes, but a guilty plea that meets those criteria, that guilt is accepted, that the plea is appropriate, the level of charges appropriate and that there is evidence there to back it, that's just not about accused persons, it is an endorsement that the investigation process was fair and honest and didn't create collateral grievances as it went along. That the charges are appropriate, that the accused has been listened to where appropriate and that a judicial officer called upon to sentence is actually engaged in the matter. That the victim and the public see that fairness is there and the public resources are not being wasted but, at the same time, that we don't refuse public resources to, if necessary, get to the bottom of partly disputed areas because, again, with the Court of Appeal decision,

there's a sense in which disputation is considered a distasteful characteristic, reflecting badly on an accused's ability to face reality. And so, therefore in the sense that it's a discount, a special deal, a gift in the hand of an overworked judicial resource, has been the traditional view but, we submit, long past its appropriate use.

Not only can we not afford that everyone that is accused be adjudicated by an independent jury or judicial officer, it's perfectly clear that that's not what most people want, including the accused.

10 **ELIAS CJ:**

Is this submission directed at plea rather than sentence?

MR LITHGOW QC:

This is dealing with the big picture, because we're trying to overcome the propositions in the Crown's submission, and in the Court of Appeal that delays or disputation or any of those things, sentence indication, are somehow a diversion from a bald acceptance of guilt, because what we wish to submit is that this is a dignified process. It's not a – there's not anything the matter with it. It's a good outcome if it's done properly and that the system should be proud of all the features that have evolved, including sentence indications, and really adopting many of the things in the Auld analysis, because that –

TIPPING J:

Do you accept some guidelines are appropriate or are you arguing that these are too prescriptive? Is that the essence of the case?

MR LITHGOW QC:

25 The essence of the case is that guilty pleas should be given a greater and thoughtful focus. They're not just a sideline activity. They're central. There's nothing – although we explore aspects of the difference between the Australian theory of instinctive synthesis et cetera, our proposition is that guidelines can be, but can only be, justified if they remain that. That is guidelines, and don't become prescriptive.

TIPPING J:

So the answer really is yes.

MR LITHGOW QC:

5 The answer is yes.

ELIAS CJ:

And do you accept – does that apply also to guidelines on discounts for guilty plea or are you accepting that guidelines are appropriate outside that sphere? I understood from your submissions that you're accepting that guidelines for
10 guilty plea are appropriate.

MR LITHGOW QC:

Well, we're only – I hadn't considered talking about guidelines for other types of activity other than those associated with guilty pleas.

ELIAS CJ:

15 No, but it is possible to say that this is a very different sort of guideline.

MR LITHGOW QC:

Yes, because – well because of its breadth –

ELIAS CJ:

Well, and also because of its effect, which is to manage guilty pleas, to obtain
20 guilty pleas.

MR LITHGOW QC:

To get guilty pleas out at the earliest –

ELIAS CJ:

Yes.

MR LITHGOW QC:

– safe time, the idea being that they're there to be had. In a timeline, from the system's point of view, there's advantages to getting them out sooner rather than later.

ELIAS CJ:

Yes.

MR LITHGOW QC:

And that a – that is recognised in a credit or a discount or whatever it's called, based on the utilitarian aspect. But, our proposition is that the central aspect is out big thinking about the justice system and that is that no matter what other jurisdictions to, we actually think guilty pleas are a good idea, people are appropriately and perfectly entitled to enter guilty pleas, but they should be surrounded by a range of protections, and the chief protection is proper advice and a Judge being prepared to make decisions about different situations, because the first part of the guilty plea is always the charge, which in our – in the English system, has the two components, what did the person do and what do they think they were up too? Not all charges, not all systems have that distinction and between those two there is a proper right to talk about it and yet what we've achieved in the modern District Court set up is that a person can be committed for trial and never see a judicial officer and yet we still think in a way that is no longer relevant.

ELIAS CJ:

Well is your submission then that the discount for guilty plea provided for in this guideline judgment unacceptably diminishes the protections for guilty pleas?

MR LITHGOW QC:

The key lack of protection for the guilty plea is the question of when the cut-off point should come. That is where the pressure arises. There's no suggestion

that we're getting anywhere close to the American situation where the difference between a negotiated plea and a jury trial is several hundred percent and where there's real incentives to plead guilty, even if you're not, because of the fear of consequences –

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ELIAS CJ:

Are you not concerned about that, that this is embarking on that slippery slope, you're not making that submission?

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MR LITHGOW QC:

Of course we're concerned about it. This is why I'm trying to spend a little bit of time attempting to engage Your Honours in the idea that guilty pleas are manly work, or judicial work, great work –

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ELIAS CJ:

Well I'm not sure that I'm very receptive to that submission.

MR LITHGOW QC:

I can imagine that. But there's no mutual word that I've heard of. It's adult
20 activity. This is a modern egalitarian way of dealing – we're no longer in the Victorian analysis of the accused people being part of a criminal class who all have the same needs and the same thought processes and who wake up in the morning wanting to do something bad.

25

ELIAS CJ:

Mr Lithgow, you don't need to convince members of this Court that guilty pleas obtaining right result is an important value in the criminal justice system. You can start with that assumption.

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MR LITHGOW QC:

Well of course we're not only, if you like, we're not only trying to convince Your Honours. We're also extracting from materials, the tools and words that help to explain whatever happens, and also the fact that this is something which counsel have taken on and yet we – there is no mechanism by which

we can speak for the whole profession or for all accused people and so it's important that we articulate what we're saying about all this.

ELIAS CJ:

5 Well I'm trying to capture what you're articulating and it's not very clear to me Mr Lithgow. You're saying that good pleas depend on good legal advice. There has to – that is one of the protections of the criminal justice system. How does this guideline judgment impact on that?

10 **MR LITHGOW QC:**

Well the guideline judgment impacts on it mainly on the issue of first reasonable opportunity.

ELIAS CJ:

15 Yes.

MR LITHGOW QC:

And –

20 **BLANCHARD J:**

Is that what you meant by cut-off point a moment ago?

MR LITHGOW QC:

25 What I do mean, yes, but also the exclusion of certain things which have been invented by thoughtful Judges that assist in those protections and in the most obvious one as set out again Auld is the sentence indication and yet the sentence indication is not a basis on which a Court of Appeal considered or the Crown consider the clock should stop. That that is some kind of a distasteful negotiating scenario.

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ELIAS CJ:

What is the statutory underpinning for bringing sentence indications into the mainframe?

MR LITHGOW QC:

Well there's actually very little about the mechanics of sentencing at all in
5 statute. They're common law –

ELIAS CJ:

Well am I right there is no statutory underpinning or has there been research –

10 **MR LITHGOW QC:**

No there's no statutory underpinning. I don't think they even get a mention.

ELIAS CJ:

No. Well isn't that significant and shouldn't we really start with the principles
15 of the Sentencing Act and how this guideline judgment fits within those?

MR LITHGOW QC:

Well I don't know why Your Honour would consider that because the practice
of the Court was not statutory that that in itself made it any less central.
20 I mean most of the conduct of the criminal resolution is not closely prescribed.
The factors relating to ultimate sentence are but as I would argue sentencing
itself has now become – in serious cases involving guilty pleas, not trials –
has now become inadequate to the purpose.

25 **ELIAS CJ:**

What purpose?

MR LITHGOW QC:

The purpose of getting the best, fair result where everybody knows where
30 they stand because it lacks, it lacks the ability to choose timing. It lacks the
ability to make, really to make further enquires, to look at different options.
The sentencing process now is the filing of a ringbinder, a spiral bound
selection of the Crown's greatest hits and a series of submissions by the
defence which are matters which are already set in concrete, plus the

pre-sentence report which turns up usually late. The true and fair sentencing resolution is now in the sentence indication stage where a Judge looks at the file, discusses what the needs are, how long it will take to get to those needs, to resolve them, courses, drug and alcohol, what's going to happen to the children, have they got any money. The sentencing process has become far too rigid for that to be played out.

ELIAS CJ:

Well aren't you in the wrong forum? Shouldn't you be over the road if this is what you're saying? Don't we have to start with the statutes?

MR LITHGOW QC:

No. The sentencing – sentencing indications are entrenched and they're good and I would like this Court to say they're a good idea. That they're actually something that is adding value to the safe and egalitarian resolution of criminal allegations. They are not something to be frightened of.

BLANCHARD J:

Is your complaint that the sentencing indication process is being adversely affected by the relatively prescriptive rules in *Hessell*?

MR LITHGOW QC:

Yes because previously, and now that is really, I mean there is a formal sentence indication. There is the so-called status hearing and there is the so-called 50 day hearing in Wellington but what, in fact, happens at all those, in the Courts that I'm familiar with, is that a Judge who is interested in that kind of work actually reads the file, asks out loud what the problem is on certain issues. What is, what's the reason why this would benefit from going to a trial. People don't have to say but they very often do. What's needed to be achieved, what timeframe is needed to achieve it in, this is particularly the case with trying to get that group of drug dealers and drug manufacturers who are serious drug addicts to try different things. Women in the Courts, the fact that men now have responsibility for children, all those things get looked at in a straightforward way and often the victims are there too. That is all good.

TIPPING J:

Are you suggesting that time shouldn't really start running until you've had this
5 sentence indication –

MR LITHGOW QC:

If people –

10 **TIPPING J:**

– process?

MR LITHGOW QC:

– want it. If people want it because –

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TIPPING J:

Are you able to give me a simple answer or not Mr Lithgow? Is that the
essence of your suggestion? If it is, fine, if it isn't please tell me what it is?

20 **MR LITHGOW QC:**

Well that is the essence of the suggestion that if people want a sentence
indication they should stop the clock.

TIPPING J:

25 Not that it's, well the clock shouldn't start ticking until it's gone through is what
I put to you?

MR LITHGOW QC:

Well whichever way you put it around it's to the same effect. That you haven't
30 lost your first reasonable –

TIPPING J:

It's still first –

MR LITHGOW QC:

– opportunity.

TIPPING J:

5 – reasonable opportunity.

MR LITHGOW QC:

Yes because we put that in terms that for many people this is the first time they have seen somebody who is actually seized of the matter and who cares
10 about it enough to indicate they know what it's all about.

ANDERSON J:

In what sort of circumstances would a client not want a sentence indication?

15 **MR LITHGOW QC:**

Well in the vast, numerically in the vast bulk of summary matters.

ANDERSON J:

EBAAs –

20

MR LITHGOW QC:

Where you're not going to jail. So – because of the massive economic and domestic disruption of going to jail and in particular now with the, I consider, quite undignified proposition that you could, you find out at the end of a
25 two hour session in one line whether or not you've got home detention.

TIPPING J:

Now these hearings are directed to (A) whether imprisonment is likely and (B) if so, how long. That's where it really bites, I would assume?

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MR LITHGOW QC:

Well the biggest bite at the moment is the cut-off for home detention. Is it possible to get home detention if certain things can be put into place because, for example, for a fraud, serious fraud, woman, the difference between

home detention and going to jail is, is a whole stream of obligations and things to be sorted out for children, housing, financing –

TIPPING J:

5 What they really want to know is whether they're going to jail or likely to go to jail. That's the –

MR LITHGOW QC:

Well blunter than that. What is going to happen if I plead guilty and can I, can
10 I cope with that, can I absorb that, can I work out how to handle that. in their
mind, whether they deserve it or not is another decision they have to come to,
and in most cases they will then make a, I call it an adult decision as to
whether they'll take it, rather than this ex cathedra that they're used to which
is fundamentally English Victorian and it's –

15

BLANCHARD J:

I'm sorry what do you mean ex cathedra stuff that we're used to?

MR LITHGOW QC:

20 Well the Judge simply telling you at the end that are on the one hand, the
other hand, the other hand, the other hand, reciting the facts, and you still
don't know until the very last minute what's actually going to happen. Now it's
quite a revolution in Your Honour's time where Judges started to say at the
beginning, Mr Smith, you can sit down, I'll tell you now that you're going to jail
25 but I'm going to go through it all. It's all, it's still classically done as this
surprise package and there's nothing to recommend that method and it
doesn't dignify the system, in my submission, when we have these other
methodologies and I don't know if, if you've alighted upon Auld. He sets it out
the most simply and he refers to, in his report, the direct challenge to him by
30 name by an academic writer called Penny Darbyshire and that is referred to in
the Crown submissions but not included in their casebook and I have copies
of that criminal law review article by Penny Darbyshire and the mischief of
plea bargaining and sentence rewards which Auld is responding to so that –
and it is very doctrinaire but it has the benefit and it states the absolute

position that nobody should be convicted until an independent tribunal decides they're guilty, a la the French system, and it –

TIPPING J:

5 You mean you can't plead guilty?

MR LITHGOW QC:

10 You can't plead guilty. As you couldn't in New Zealand until the introduction of section 153A, until a case was made out against you. We're all in a big hurry now. We forget that there were – that there's statutory protections against people pleading guilty too quickly and they are intended to protect. Now do Your Honours wish that article, I had –

ELIAS CJ:

15 I'd be grateful for it, thank you.

MR LITHGOW QC:

20 The great advantage of it, it is so straightforward that you can agree or disagree so simply and you also know what Auld is talking about.

ELIAS CJ:

Thank you.

TIPPING J:

25 Are you really saying Mr Lithgow that philosophically it's not reasonable to expect a plea until you know what's going to happen to you or what's likely to happen to you?

MR LITHGOW QC:

30 That's my submission in the modern era you should not walk into a dark room. There is no need for it. It serves no useful purpose. All it is, is a replication that we haven't managed to shake off of a stratified society and we're not now. We're an egalitarian society where a person who is accused of a criminal offence is still entitled to ask what's going on and what's going to

happen to me and there's no reason to be afraid of that if our sentences are logical, our processes are fair, if our police are honest, why would we be afraid of any such thing? And that's what Auld says as well so I know some of us who prefer our English law to say these things and a New Zealand lawyer
5 but there you go.

TIPPING J:

And are you also implying that there's something inherently wrong in being told implicitly that if you plead guilty you'll get home detention but if you
10 defend and get convicted you probably won't?

MR LITHGOW QC:

Well that's difficult. That is one of the real difficulties because – and Auld just confronts that. He said we can't pretend, if we're saying that people are
15 entitled to know what they're going to get if they, we'll deal with it now. We can't pretend that they can no longer work out what that means for what happens if they take it to trial and that that just is and what we do is we call one a principled basis when we want people to agree with it and we say it's pragmatic if we want people to disagree with it but like most of the English law
20 it involves pragmatically and then surrounds itself in ideas of principle but facing up to things, getting them dealt with, using the nation's resources in a measured way is recognised. It may be that in England it's also a perhaps around about way of trying to control prison populations and we're not arguing that here, we just don't have the analysis for that –

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ELIAS CJ:

Well that, you see that is an issue because counsel in this case are not choosing to take the higher ground which is available. That the system should be concerned with right result.

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MR LITHGOW QC:

Are we not?

ELIAS CJ:

Well your answer to Justice Tipping suggested that you're not concerned with that and there are plenty of studies in the United States to suggest that this part of sentence indication ends up in people pleading guilty who shouldn't be pleading guilty particularly at the lower end of the work.

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MR LITHGOW QC:

Well there – well we'll come to that in a little bit but they have a factor of up to about 500 percent and their –

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ELIAS CJ:

500 percent of what?

MR LITHGOW QC:

500 percent more than you could get at a plea guilty if you take it to trial.

15

TIPPING J:

And go down for the worst outcome?

MR LITHGOW QC:

20 Well Your Honours have told me off for this before but for myself America has, their criminal justice system has nothing useful to offer us. Their top sentences are extreme, people getting 60-70 years upheld by the Supreme Court for the theft of videotapes. The three strikes legislation. They have judicial killing and their system clearly discriminates against black
25 people and their prisons are one of the highest prison populations in the world and overwhelmingly and disproportionately black. So I, in the end, don't think it is worth looking at what comes out of there.

ELIAS CJ:

30 But what you're arguing for is to institutionalise a system of plea indications which has been a significant factor in that end being achieved in the United States.

MR LITHGOW QC:

But it's a massive distortion in the United States.

ELIAS CJ:

All right.

5

MR LITHGOW QC:

Actually the best part of the United States system is their military system –

ELIAS CJ:

10 I don't think we need to get into the military system in the United States.
I regret mentioning the United States. Stay with us.

MR LITHGOW QC:

15 One simple thing. The simple thing about pleading guilty in the military
system, which we saw from the Abu Ghraib allegations, is that the Judge
requires that the accused say in their own words what they think they're
agreeing to having done so that they will not accept it just from the lawyers on
a deal basis. There has to be a genuine acceptance of guilt and
20 comprehension of what they're being accused of. So there's protections in
that system that there isn't in the civilian system.

McGRATH J:

Mr Lithgow, am I right in saying that what you really have been putting to us in
the last quarter of an hour or so is that because there are deficiencies in the
25 sentencing process you cannot sensibly address the question of a discount for
an early plea of guilty without re-examining the whole process and reframing
the whole process?

MR LITHGOW QC:

30 Well I would say recognising what's really going on in the Courts.
There's nothing being reinvented, it's just accepting what is actually
happening because sentence indications are happening. They are –

ELIAS CJ:

Well not, not universally.

MR LITHGOW QC:

Well the main, the main naysayers are the same naysayers who have been
5 there from day 1 and that is the Crown and this is the feature which we have
to recognise about New Zealand which is not in any other literature and that is
that New Zealand is the only jurisdiction in our type of world where the
prosecutors are incentivised to go to trial, financially, to go to trial and we
pretend that –

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ELIAS CJ:

What's the submission? What's the submission that you're making here
because it sounds as if you're really agreeing with Justice McGrath that you
cannot have sliding discounts for guilty plea until you address the deficiencies
15 in the whole system?

MR LITHGOW QC:

I wasn't – I didn't understand he was saying it in that way. Well we have to fix
something else before –

20

McGRATH J:

I thought you were saying it in that way.

MR LITHGOW QC:

25 No, certainly not.

McGRATH J:

That's exactly the way the Chief Justice has put it, exactly the way I was
saying it.

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MR LITHGOW QC:

We would have to reinvent the wheel before we could have sliding discounts.

McGRATH J:

That's what it seems to me you're saying and just I, for one, have – do not think it is appropriate for a Court of this kind to go into wider systemic considerations when we are able and should be looking at the appropriateness of a particular judgment dealing with a particular aspect of the sentencing system. That's – you were starting off, as I understood it, with an overview here but I feel that you're putting submissions to try and encourage the Court to take a wider approach to a total reform from the Bench of the system and I'm simply saying to you that as far as I'm concerned I'm not persuaded we should go beyond the particular considerations that are raised by the *Hessell* case in the context of appropriate discounts on sliding scale when early pleas are received of guilty in criminal cases.

MR LITHGOW QC:

Well I'm sorry if I've given that impression because that's not what's intended. What's intended is that this Court identify that what is considered and addressed, in a negative way in the Crown's submissions, and in the Court of Appeal case, are all perfectly proper mechanisms for making guilty pleas safe and fair and that is that for those people who need to know before they plead guilty, what's going to happen, that somebody engage a judicial officer engages in the case and says so, and that if they have to go off and do – tidy up their lives prior to sentencing, which has been a feature of drug addicts for my entire career, that they go to the course first before they get to the Court, but that should not deprive them of the benefits of a utilitarian discount for a guilty plea. Now I'm not – nothing needs to be – everything is in place, it's just that some aspects have been deprecated in the Crown's submissions and in the Court of Appeal's submissions – the Court of Appeal case, and I invite Your Honours to say there's nothing inherently the matter with any of those features of our system.

30 BLANCHARD J:

Well what you're really arguing I think, is that the guidelines that the Court of Appeal's come up with in *Hessell*, at least in relation to first reasonable opportunity, are too prescriptive and they don't take account of

variable fact situations such as the one relating to drug offenders that you've mentioned.

MR LITHGOW QC:

5 Well the drug offender one exactly, but they have mentioned status hearings and sentence indications as if they are a diversion from the path of admission of guilt, when in fact they are a tool that has been evolved, a proper tool to allow, as I say, and a situation where people accused of offences are treated with a kind of respect, just to find out what the difficulties are and to use words
10 to articulate what's really happening, take the mystery out of the whole thing.

ELIAS CJ:

Well, but it sounds to me Mr Lithgow as if you're coming here with an ulterior motive and that is to get the Court to design a system in which sentence
15 indications will be given. What you are taking – the line you're taking me down is the earlier one of wondering whether the Court of Appeal had sufficient perspective to do what it has done in this guideline, or whether really it has stepped over the boundaries of what is appropriate for appellant function and come up with something more appropriate for the legislature to
20 consider.

MR LITHGOW QC:

Well that's the part that Mr King was going to develop, as to whether or not there should be this kind of guideline judgment, but what I was dealing with
25 was just to, which is perhaps the opposite of the impression I've given, and that is for this Court to say everything that is happening in the lower Courts in relation to this, is perfectly responsible and dealing with real life. And there's nothing inherently to be afraid of in any of it, that's my only ulterior motive.

30 **ELIAS CJ:**

But is your submission then about *Hessell* that it has unintended consequences and it may impede more sensible arrangements developing?

MR LITHGOW QC:

Right if we just get on to the particular –

BLANCHARD J:

5 Is that a yes or a no? It would help Mr Lithgow if you actually indicated as you begin your answer, whether the question from the Court is in your view, correct or not. I've been puzzled with some of your answers because we have to wait for an awful long time to find out whether it's yes or no.

10 **ELIAS CJ:**

And we've forgotten the question.

MR LITHGOW QC:

15 Well I might be a bit more suspicious, but I find some of the questions a touch, what we call, compound, so a yes or no sometimes may not be doing justice to what we're trying to put forward.

BLANCHARD J:

Well I'm not trying to put you off say, "No, but" or "Yes, but."

20

MR LITHGOW QC:

The only – okay the only question I've – can bring to mind at this moment, do I have an ulterior motive? Yes, I want the Court's to say –

25 **McGRATH J:**

No, the question Mr Lithgow was, "Does *Hessell* impede sensible arrangements developing?".

MR LITHGOW QC:

30 Yes, than, you.

TIPPING J:

I'm actually thinking we've had enough of this overview.

MR LITHGOW QC:

Well that's why I just said, I was just going to turn onto this specific of the –

ELIAS CJ:

5 Excellent.

MR LITHGOW QC:

Of the first reasonable opportunity. The – so I, looking then at – starting at
page 18, paragraph 53, but the first reasonable opportunity over the page,
10 then it's starting at 55. Now the Court said that first reasonable opportunity
means what it says. But then went on to hold that it meant, basing itself on a
District Court Judge's guideline, that it meant the second appearance.
Now what we say about – and that if you – because everybody wants to get
the 33 percent, the most if they can, and we're not arguing about the
15 33 percent, because that evolves from a very large number of cases, but if
they want to do things that make the case last longer than that second
appearance, then they have to either indicate that they're intending to plead
guilty or actually plead guilty, or else it falls off quite steeply for a status
hearing, or callover and the callover is presumably now, the so-called
20 post-committal callover. There's real problems with the indictable jurisdiction.

ELIAS CJ:

Where does the 50 day Wellington variation come in here?

25 **MR LITHGOW QC:**

That is to just catch the case before it gets committed –

ELIAS CJ:

Yes.

30

MR LITHGOW QC:

– because the cases are being committed administratively.

ELIAS CJ:

Yes, by register.

MR LITHGOW QC:

5 With nobody reading anything.

ELIAS CJ:

It may be that it's easier if I ask Mr Mander to do this, but at some stage I would like someone to run me through the statutory provisions. Is it under the
10 Summary Proceedings Act?

MR LITHGOW QC:

Yes.

15 **ELIAS CJ:**

Yes.

MR LITHGOW QC:

This is how you get yourself committed for trial.
20

ELIAS CJ:

Yes.

MR LITHGOW QC:

25 Well committed for trial is now, in most cases, not an event at all.

ELIAS CJ:

No, I understand all of that.

30 **MR LITHGOW QC:**

Nor is it a consideration of anything. So what we think of as being a judicial process, whatever else it is, it isn't that. And so the Judges in Wellington have invented, evolved.

ELIAS CJ:

Status hearing or callover, is that – is the status hearing a statutory?

MR LITHGOW QC:

5 No, a status hearing is normally the expression for summary process too.

ELIAS CJ:

And is that after committal?

10 **MR LITHGOW QC:**

No. No, that's – the status hearings are for summary matters –

ELIAS CJ:

Yes.

15

MR LITHGOW QC:

Who aren't intending to elect trial.

ELIAS CJ:

20 Yes.

MR LITHGOW QC:

They still could if they didn't like perhaps what was – how it was all going, but a status hearing is, let's take a classic example of a status hearing, male assaults female, which is where, in a place where there's not a specific domestic Court. It goes to a status hearing, the Judge has read the file, there's a victim input, the victim often comes and listens to what's happening, the lawyers say, "Well he did this but he didn't do that" and the Judge says to the Crown, "Well can you prove that, are we going to have a dispute of facts over that? What's the story? Does the victim want to say anything?" And the victims speak often with unscripted directness as to what they would like to see as an outcome. And then the Judge might say, "Well look I tell –

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ELIAS CJ:

Well, I would really just like to know what the statutory framework is. It probably is much better if I ask Mr Mander about this.

MR LITHGOW QC:

5 There was nothing – I can tell you that there's no statutory framework for a status hearing.

ELIAS CJ:

10 Yes, so that's why in the material put before us by the Crown, there's such a variation around the country in terms of what happens to people.

MR LITHGOW QC:

15 Well yes that's part of the reason although for the brief time I was at the Crown Law Office I very quickly learnt that every time you see what happens is there was huge variation around the country in just about everything so the status hearings, the main –

ELIAS CJ:

20 The reason I ask that, and perhaps you should just move on, I'm sorry, but the reason I ask that is it is a significant plank of the Court of Appeal reasoning that it is necessary to get uniformity and certainty.

MR LITHGOW QC:

25 Well you may be interested to know that the main place where there's no status hearings is Hawkes Bay because the Judges won't do them. The good reason they give is because the Bench is quite small and if they involve themselves in –

ELIAS CJ:

30 It's all right. I don't think we can take in –

MR LITHGOW QC:

But generally there are status hearings.

ELIAS CJ:

Yes.

MR LITHGOW QC:

5 But in some of the small courts is the problem that if a Judge gets into the case and then it goes to a defended hearing, there might not be other Judges to do it. They might be short, it might just mean it gets delayed too far. I'm not suggesting there's always a philosophical objection though there maybe in some areas.

10

TIPPING J:

I think your submission on first reasonable opportunity is summarised by saying that the focus should be on reasonable rather than first.

15 **MR LITHGOW QC:**

Yes.

ANDERSON J:

20 And it requires, not a prescriptive approach but a fairly subjective analysis of each particular case.

MR LITHGOW QC:

Well isn't it, it's a classically a judicial decision, isn't it, to try and pull together what they can –

25

TIPPING J:

Well I'm just trying to get to the nub of it Mr Lithgow.

MR LITHGOW QC:

30 Well that is the nub of it. Concentrate on reasonable and forget about first because if – if all this – all this goes better if there are not artificial precipices around the place so that the person, for example, one example that's given is that a person is trying to delay incarceration. Now again for women with children delaying incarceration until school holidays, exams have finished for

certain ages of children, until this and that, is a very sensible and responsible way to go about things but it is treated as though it is attempting to bargain with the Court. Now that's – bargaining with the Court at sentencing was one of the worse accusations that could be made against you but this method of the status hearing and the sentence indication, which are often not so very different, and the 50 day hearing, which is often not so very different from a status hearing, is simply calling a spade a spade. Why can't you plead guilty now? Well because I want to defend it. All right, well that's that. Defend it then. What about when for the people that are prepared to plead guilty, when, what's the delay, why? Use words, say it out loud. All these things have been discouraged over the years and these processes have been evolved to encourage straight talking. They have evolved after Your Honours' time on the Bench but that's what they achieve. Straight talking about what is the problem.

15

The Court – there is also real problems with 58 – they've got, where there's a dispute about the prosecution summary of facts. That's not going to extend that that plea bargaining is underway or that the defendant is challenging the admissibility of evidence or that the defendant is waiting to see what might happen to a co-accused or that the defendant is awaiting a sentence indication. Now the disputing of the summary of facts was an activity that was mainly done between lawyers and officers in charge of cases or their superior because although – there's no statutory basis for a summary of facts either Your Honour but they are ubiquitous. They are just something that's been evolved. They have no statutory basis but again and again they dictate what actually happens and they're a very big part of the actual *Hessell* case.

20
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Summaries of fact do not, they may or may not directly address the ingredients of the strict offences. Now what is the fear or what is the distraction of an accused person asserting with the person on the prosecution side what is actually the better version of what happened. That used to be considered a good – that's the sort of thing an advocate would do. They would get on the phone to the police and say, "Well he agrees with paragraphs 1, 2 and 3. At paragraph 4 I think you'll find that they've

30

quietened down and they're not actually saying that, it was said in anger, so we'd like that out and paragraph 5 is just literally untrue, that was the other guy."

5 **ELIAS CJ:**

Does that not happen anymore?

MR LITHGOW QC:

Well now there's a big rush to get your plea in. You've got to get your plea in.
10 and when you've got police officers who work on shifts and disappear for weeks at a time there's real difficulty with that. And also the new system assumes that the defence counsel is just waiting for the disclosure for this particular client, not that they've got 50 clients, but that they've got one client waiting to digest it and everything can be done in a matter of days.

15

BLANCHARD J:

By new system you mean *Hessell*?

MR LITHGOW QC:

20 *Hessell*, yes. Now plea bargaining underway. Again most of that is done either with the officer in charge of the case or his or her superior and within every police station there are some people who push things to the nth degree and there's some people that can look at things in the round and, bearing in mind the prosecution guidelines which are to find an appropriate level of
25 charging for what actually happened, and bearing in mind mens rea and actus reus, what would they do, what are they accused of and what did they think they were up to, why wouldn't there be proper discussions about where exactly that falls.

30 **TIPPING J:**

Mr Lithgow it may help you if I, for one, say that the rigidity of saying never well in effect never will it be extended on account on these things I find very problematical.

MR LITHGOW QC:

Well they also –

TIPPING J:

5 There maybe cases where you shouldn't, you know, but there may equally be cases where, for example, admissibility of evidence was central.

MR LITHGOW QC:

Well admissibility of evidence is the most difficult one in a principled sense.

10

TIPPING J:

I know but I'm just giving that as an example.

MR LITHGOW QC:

15 Yes.

TIPPING J:

I would have thought you were on reasonably firm ground in saying that this is extremely prescriptive because there maybe circumstances when it's quite appropriate. It's quite reasonable, if you like, to go through one or more of these processes before entering a plea.

20

MR LITHGOW QC:

Yes but, I agree, but to try and put that in writing at the sentencing is a very different exercise from a Judge following what's going on by a status hearing and by sentence indication. Saying well what are you arguing about. Where is that OC case, can you come to Court, can you tell us why, what the problem is –

25

30 **TIPPING J:**

Sorry I just find your comment completely divorced from what I was saying but –

MR LITHGOW QC:

Your Honour's saying that –

TIPPING J:

5 I'm helping you, or trying to.

MR LITHGOW QC:

How can a Judge decide whether or not this was a fair exception? Where is –

10 **TIPPING J:**

Well he's got to consider, on the broad balance of things, whether it was reasonable to expect the person to plead before whatever event is in question.

15 **MR LITHGOW QC:**

And where would this argument occur. Would this be at the point of entry of plea or at the sentencing.

TIPPING J:

20 I don't want to say anymore.

MR LITHGOW QC:

Well that's the problem whereas the more informal processes are the ones that allow these things to be addressed directly.

25

ELIAS CJ:

But they're not informal on your argument. You're saying, I think, that the Judge needs to be involved because when the Judge gets to it at sentencing hearing there's too much to explain and perhaps counsel too would have to
30 acknowledge responsibility if there's been delay.

MR LITHGOW QC:

Well again, that is the most common outcome isn't it, that the lawyer for whom it does no harm, they can just simply say, "Well I took a bit longer, any delay's my fault," but that doesn't necessarily address things – literal truth.

5

ELIAS CJ:

You want the Judge in there, so everyone knows exactly where they stand.

MR LITHGOW QC:

10 Yes.

ELIAS CJ:

And the Judge is complicit in the entering – in the decision to plead.

15 **MR LITHGOW QC:**

Well complicit's a loaded word, but the Judge is ensuring fair play. The Judge is the judicial officer, but they're prepared to roll up their sleeves and get into it.

20 **TIPPING J:**

I find all this sort of high level stuff, very unhelpful. Are you saying you support the sliding scale, but it shouldn't be as rigid?

MR LITHGOW QC:

25 Exactly.

TIPPING J:

Well for goodness sake.

30 **ELIAS CJ:**

I think you can move on from that.

MR LITHGOW QC:

Well the difficult one is the challenging the admissibility of evidence.

TIPPING J:

Well don't let me provoke you into that Mr Lithgow, I was just trying to be helpful but I've obviously failed.

5

ANDERSON J:

Are sentence indications typically given at status hearings?

MR LITHGOW QC:

10 Very typically, but not inevitably.

TIPPING J:

How would you react to the idea of bands, like so much off for an early plea, so much off for an intermediate plea, so much off for a late plea, without being prescriptive as to what those connotations precisely meant, but just giving some broad brush parameters to work within?

15

MR LITHGOW QC:

That would be perfectly appropriate as far as I'm concerned, but –

20

TIPPING J:

Nowhere in your submissions do you actually suggest that do you?

MR LITHGOW QC:

25 Well our main attempt is to try and preserve the judicial right to decide what's reasonable, because there will be 101 variations and that's their job, and that's –

30

TIPPING J:

So you want some guidance so that there is at least something to work with, but nothing to prescriptive?

MR LITHGOW QC:

Yes.

TIPPING J:

It's as simple as that really isn't it?

5

MR LITHGOW QC:

Yes. Although to be fair, that wouldn't really take it much further than the position pre-*Hessell*, because that was roughly the position.

10 **TIPPING J:**

Well maybe the position pre-*Hessell* there wasn't much wrong with it. I don't know, I'm not expressing a view Mr Lithgow, I'm just trying to illuminate what the argument is.

15 **MR LITHGOW QC:**

Yes, well that is the pre-*Hessell* position and *Hessell's* made it unduly rigid.

ELIAS CJ:

20 Well are you arguing that there should not be – that we should return to the pre-*Hessell* position?

MR LITHGOW QC:

25 Well the pre-*Hessell* position – yes. The Court via the sentencing counsel tried to just pull together a few bits that were a bit loose and furry, but basically, yes. Three bands would be broadly sufficient and then if there are exceptional reasons, late guilty pleas might get them more than 10 percent, but we would, as has become entrenched anyway, but entrench that motivations aside, a person who pleaded guilty would get 33 percent for no other reason than that they produced their guilty plea at a time that was useful
30 to the system.

ELIAS CJ:

Would you – the Sentencing Act really indicates the need to look at the time by saying when the plea is entered is relevant in mitigation. Why would you

want three bands, why would you not simply say, up to a maximum of 33 percent or 25 percent, except in exceptional circumstances, according to whether the Judge thinks it was reasonable? Because one of the things that strikes – is striking here, is in the material that the Crown has put before us, is that very often on the eve of hearing, people are getting a 33 percent discount.

MR LITHGOW QC:

Well, I have to justify –

10

ELIAS CJ:

So do you want three bands? Do you want three bands is really the question I'm putting to you?

15 **MR LITHGOW QC:**

I think three bands is useful, but the main thing is to cement in place, that the third for the early plea is not watered down by not being separated.

ELIAS CJ:

20 So where does that come from, because the Court of Appeal judgment is pretty light on legal reasoning or reference to previous cases?

MR LITHGOW QC:

25 Well that's the English position and although they include remorse, that a third is the system's recognition –

ELIAS CJ:

But that's a legislative system.

30 **MR LITHGOW QC:**

But that was what they – but that evolved through an earlier system. It isn't – it is simply an identification what everybody thought was happening, seemed to be broadly agreed, with the exceptions that some Judges were stirring it in with other mitigating features and not separating it out and the modern fashion

is to identify mitigating features separately, and therefore this one was to be at a degree of rigidity at that end of it, but the rigidity at the other end of it is doing a disservice to the underlying purpose.

5 **ELIAS CJ:**

All right, so you would like from this Court, endorsement of the 33 percent maximum and more flexibility in permitting Judges to assess where in that scale, the discount should be for a guilty plea?

10 **MR LITHGOW QC:**

Yes. The, with respect to Tipping J I think it is still worth identifying, it is a bit tricky on the business of disputing admissibility of evidence, because there's a large lawyer component to the disputing of admissibility of evidence and of course what the Crown or perhaps even the Court called the disputing
15 admissibility of evidence, is what defence counsel called, saying that the police got evidence illegally and unlawfully. Now if the net result of a dispute as to police behaviour normally resolved to be a section 30 of the Evidence Act now, where illegal evidence is condoned on the basis of public good, if that means you're going to go to jail for longer because you dared to
20 challenge the police, that is a tool in the hands of prosecution and investigative systems which has got serious ramifications, in my submission. That's not simple.

ELIAS CJ:

25 Well is that a public interest argument against –

MR LITHGOW QC:

It's a public interest.

30 **ELIAS CJ:**

– taking the view that the Court of Appeal took?

MR LITHGOW QC:

Yes.

5 **TIPPING J:**

I wouldn't want you to think I was necessarily against that proposition, all I – I didn't want you to feel obliged to go through each one of these, analysing them.

10 **MR LITHGOW QC:**

Yes. Well that's the one that's got the biggest public interest and –

TIPPING J:

Well plea bargaining is a loaded term, but there may be that if someone's
15 charged with aggravated robbery and they're actually only really guilty of robbery, it may be perfectly reasonable to go through the necessary processes to illuminate that point and if you plead guilty to robbery after that point, well I don't think you should be marked down.

20 **MR LITHGOW QC:**

Well it appears that some Judges are doing that if the Crown changed the indictment on the eve of trial, that that kind of tidies everything up, the clock starts again then.

25 **TIPPING J:**

Well if you said earlier that I'll plead guilty to robbery, but aggravated robbery is over the top, and finally the Crown realises that and reduces it, then you shouldn't be penalised. In my view anyway.

30 **MR LITHGOW QC:**

And of course – the assault variations are also a huge amount of overlap as has many times been identified and –

TIPPING J:

But these are just all examples of why a very rigid system, in your submission, is not satisfactory.

5 **MR LITHGOW QC:**

A rigid system is anti the role of Judges in my submission. That's a Judge's job to find these degrees.

TIPPING J:

10 What was Mr King going to be arguing? He was going to be arguing that we, whether we should have guidelines at all and then what else was he going to be arguing, because I'm just...

MR LITHGOW QC:

15 Well, we took the view and it's ultimately for the Court what you should make of it, that this matter should be appealed. It was in the first instance in the Court of Appeal, but it wasn't up to us to simply give only our own views. If there is a principled argument on the table that's got to be thrashed out and we say that this is a decision for the Supreme Court as we did, an argument should be made.

TIPPING J:

20 Look, I'm awfully sorry Mr Lithgow, I was only asking to be reminded what Mr King was going to be arguing?

MR LITHGOW QC:

I thought you were suggesting he'd run out of things to say now?

TIPPING J:

25 No, no.

MR LITHGOW QC:

Sorry.

TIPPING J:

You smell rats when they're not there.

ELIAS CJ:

Where are you going now Mr Lithgow, sorry?

5 MR LITHGOW QC:

We're just moving down through the other reasons for delay, which are forgotten. These are the ones that the lawyer takes on themselves at 70, guilt stricken people have to be calmed down, gang prospects often very keen to plead guilty but you suspect that they might not have even been there, and
10 you've just got to get their confidence. A lot of people with psychiatric conditions which make them very keen to resolve things quickly because they say they can't handle delay, but getting to the bottom of what it's all about takes a bit of time.

15 Obviously we've been through drug addicts, and particularly concerned and the English, the English writing on rewards for guilty pleas, has identified that and Auld refers to this, that black people are disproportionately disadvantaged by that and the reason that appears to be given in England, is that their previous experience with prosecution authorities makes them very suspicious
20 of the police and it is very common in the New Zealand scene for people who are charged with quite serious offences to be distracted by events at the time of arrest. Someone was rude to their mother, or somebody got punched. Things which were ultimately irrelevant to the determination of guilt and innocence, but gets in the way of accepting their case. But that is simply
25 something that a lawyer can work through when you get the confidence and I, we've made the example also that Māori and Polynesian clients, there's two aspects often.

ELIAS CJ:

Where are you now?

MR LITHGOW QC:

73, paragraph 73. That Māori and Polynesian clients often consider the lawyer part of the system because, and this has been exacerbated by being able to get to quite an advanced stage in the criminal justice system now
5 without seeing a Judge and you can make your remand appearances at a sort of a bank teller window and your role in it all is pretty marginal. That you have to convince, not only the family, not only the person accused, but also the family that things are happening fairly and correctly and that tough decisions have to be made, because in my experience and speaking on behalf of
10 Mr King as well, if, if particularly Polynesian culture circumstances come to just say, oh well, it's them against us, the complete opting out of responsibility and the criminal charges just accepted as a natural disaster and not anything personally to do with the accused and that is a very serious loss to orderly justice system.

15

Now, in Auld's report he starts off by saying, well, that's tough luck if they don't treat the system in a sensible way, there's winners and losers, but that would be poison to our system, where the brown population is the indigenous population, not the immigrant population. It's not a question of
20 fitting in or you can't use that kind of language and it, there just has to be time spent often and if that is the situation, the lawyer should be able to articulate it and the Judge should be able to make a decision about it.

Now, the rest we've, we've covered. We draw attention at 88 to what is now
25 section 160 of the Summary Proceedings Act, which was 153A and we just, it is worth remembering our history, that an indictable charge is you couldn't plead guilty until, and still can't, until you're given leave by the Court and you've received legal advice, not just technical representation.

30 The, and we add in here that the three strikes law, at paragraph 91 is going to have ramifications for all this too, because what seems like a simple process, at episode one, can come back and bite you as things go along, so the first person's first offence may well end up being their most important one.

Bail is another difficulty which has to be factored in, but there's nothing that this Court can do about it, because the Bail Act is, just is, but there is a different test once you've pleaded guilty and again, this is the advantage of the sentence indication and the status hearing, that all these things are looked at once, what's going on, am I going to have bail, what's the story, how long am I going to have –

ELIAS CJ:

But the point that you made earlier comes in here too. That some people who have to, for example, make family arrangements may defer entering a plea of guilty in order to have bail and you say that that is something that the system should not be punitive about is it?

MR LITHGOW QC:

Well, I do say that. It's because, holding on to the not guilty gives you the power necessary to order your own affairs. But if we simply dare to say what the problem is, which is what these modern inventions allow, the modern hearings allow, then that can just be faced. I am intending to plead guilty, but just the economic destruction of my entire household if I do it now and that kind of thing can be faced squarely.

Auld again looks at the problem of bail, doesn't attempt to solve it and also, the related problem of what some people perceive to be either better living circumstances as a remand prisoner or better living circumstances as a sentence prisoner and that varies between England and New Zealand. But again, all these things can be dealt with better by a sentence indication, than by, and by status hearing, than by simple blunt weigh points.

So, we have a summary of that part. I won't go through it all again, but going to jail is a big logistical exercise for most people, other than the young youth, although they leave a big mess behind for other people and we should just recognise that there is nothing improper with attempting to control that process and facing punishment for what you've done in an orderly way.

And at 97.7, “In every case then the accent should be on reasonable and not first.”

Then comes the question of remorse, as set out in the application for leave.

5 The Court of Appeal argued remorse through and perfectly well. We simply make the proposition that the decision they made was wrong and that the better way was the other way. They were well aware of the other way –

ELIAS CJ:

10 By the way, the other way, you mean wrapping it up –

MR LITHGOW QC:

Yes.

15 **ELIAS CJ:**

– with the, yes.

MR LITHGOW QC:

20 So their view was that it was better to say that remorse was either inherently captured by a plea of guilty or near enough to and –

ELIAS CJ:

There’d have to be something material and exceptional, well I don’t think they say exceptional –

25

MR LITHGOW QC:

Yes. Material is the – exceptional remorse demonstrated in a practical and material way can attract its own reward. Now –

30 **ANDERSON J:**

They’re two different concepts really. Remorse might lead someone to undertake some rehabilitative or mitigating conduct and that then exists as a discrete category of mitigation but the remorse on its own is simply an internal feeling. Wouldn’t it be appropriate in fact to say well yes do capture the

remorse in the guilty plea but if there are indications of a different category of litigation, that shouldn't be excluded simply because it's motivated by remorse.

5 **MR LITHGOW QC:**

I disagree.

TIPPING J:

10 You disagree. I have similar thoughts, I have to confess. That if, if you actually evidence your remorse by concrete actions then that is worth an uplift but the remorse, if you're starting to get into degrees of remorse, if you like, quite separately from the utilitarian aspect of the plea, then you're going to have to have a lower scale for the purely the utilitarian aspect.

15

MR LITHGOW QC:

Well I'm not talking about utilitarian –

TIPPING J:

20 Well I am.

MR LITHGOW QC:

– remorse but I make the broad principle that our criminal justice system is fundamentally Judeo-Christian and mens rea and what you think you are up to as against other justice systems, Roman law, where the Act was enough, means that in every case what you thought you were up to is still important at sentencing because – and it has many inflections and that the person who can see that they've hurt other people, and that they have done wrong, and that they cannot be justified, and that they articulate this, is a different sentencing proposition from the drug dealer, serial burglar who simply says, you can prove it against me, let's get on with it, perfectly respectful, yes sir, no sir, but is not in the least bit concerned about their victims or anybody else other than themselves.

25

30

ANDERSON J:

But in the first case the mental feeling is really – tend to merge with ideas of prospects of rehabilitation.

5 MR LITHGOW QC:

Remorse is the proper heading and for example, again, in terms of, for example, afofa with Polynesian apology methods where the family take a responsibility. In one sense that's anathema to the individual obligations of an individual accused of the English system but in other ways it can be
10 enormously important for community health, for community safety, particularly if young men are involved. If older members of the family are seen to take a role enforcing abject apology –

ELIAS CJ:

15 I don't think you need to convince us of this and anyway, the statute provides for it. Your submission surely is that the statute provides separately for remorse –

MR LITHGOW QC:

20 Mmm, so it just is.

ELIAS CJ:

– and therefore it wasn't open to the Court of Appeal to say well we're going to bundle it all up with a calculation of advantage which is the utilitarian benefit
25 recognised for early guilty pleas.

MR LITHGOW QC:

Exactly because it is, it is a double speak because it says correctly that the guilty plea normally is evidence of remorse. Well that's fine. But that's not to
30 say that where there is remorse that that is always part of the guilty plea, the other way around, because remorse may be part of a jury trial. Now particularly you can imagine where people driving who've killed their friends, people in hunting accidents who are accused of manslaughter, they may well

want an independent tribunal to tell them that they're guilty but the remorse is still very real. It's not –

ELIAS CJ:

5 But in any event it needs to be taken back to the, not that anyone is doing this for us, but taken back to the overall purposes and principles of sentencing which, as members of the Bench have raised with you, also includes rehabilitation. So to say that it's not – I wonder really whether some of this has arisen because until comparatively recently there was no statutory peg,
10 was there, for taking into account early guilty pleas and the Courts came to that by saying that an early guilty plea was an indication of remorse?

MR LITHGOW QC:

Yes, the other way around. Yes.

15

ELIAS CJ:

Yes. And so there's a sort of transference rather than a recognition that the statute now requires both to be recognised?

20 **MR LITHGOW QC:**

Yes but the Court of Appeal also sort of adopt, I think, perhaps the amicus view that it was difficult to – that anyone could say they were sorry. Well we know that from public affairs where apologies are now all the go and people cry on TV and that sort of thing. But again that's a judicial job. To assess the
25 nonsense from the real and that's just what Courts do I would have thought. It is very, very important in family cases, sexual cases, other cases, not – but I have also given examples of public transport, aircraft, boat, sport, deaths, where it is very common for people to go directly to the victim's family, apologise and express remorse and the acceptance and genuineness or
30 otherwise is accepted by, I there submit, the public as well as the people involved, as something that is important for everybody. It's not just a personal state of mind, it is an important public declaration of a view of wrong, bad things happening, future conduct and all of those.

McGRATH J:

Mr Lithgow, the impression I get from some of the overseas authorities cited in the Crown submissions is that different approaches are taken. For example, in Australia there's – the indication seems to be that the discount is for the
5 utilitarian factors and that remorse is dealt with separately and that way you get it out, if you like, the general discount. You get it out of any form of blending with utilitarian factors and you can assess it separately. Now I don't know if you've had a chance to look at those authorities in details but do you have any submissions on whether we should be taking remorse out of, if you
10 like, the general discount that's available?

MR LITHGOW QC:

Well, as the Chief Justice has said, it is out because the Sentencing Act says it's out so whoever –
15

McGRATH J:

Because?

MR LITHGOW QC:

20 The Sentencing Act says it's separate so it is separate.

ANDERSON J:

Section 9(2)(b) and 9(2)(f).

25 MR LITHGOW QC:

It's a separate statutory heading so it should never have been amalgamated in New Zealand no matter what else was done anywhere else. And the –

TIPPING J:

30 If you were amalgamated though wouldn't you have to compensate in the scale?

MR LITHGOW QC:

Well that's what the Crown suggests but remember the Court of Appeal initially were happy to go beyond the – in fact were happy to go beyond the one third for what they called this exceptional remorse that has been dealt with in a concrete, practical and material way. Now there I'm simply disputing
5 that practical and material is the limitation because that's pretty jolly Anglo-Saxon and we should accept intangible remorse as a cultural norm in our society and that it is important to a –

10 **TIPPING J:**

They'd already built –

MR LITHGOW QC:

– big range of people.

15

TIPPING J:

They'd already built that sort of remorse into the scale. Now if you're going to take that right out, as my brother suggests, doesn't it logically suggest you have to have another look at the scale?

20

MR LITHGOW QC:

No.

TIPPING J:

25 Otherwise you're double counting?

ELIAS CJ:

Well some – in some cases people will be getting benefits because they don't have any. You instance the drug dealer and so on.

30

MR LITHGOW QC:

Yes.

ELIAS CJ:

I mean I think I'm agreeing with you Mr Lithgow that I don't know that it is factored in. I think that really what the Court of Appeal has done is simply the utilitarian calculus and it applies to everyone.

5 **MR LITHGOW QC:**

Because the biggest trials in our country, the most disruptive in time and resources are the drug trials. Now they're the ones least likely to have remorse and they're the ones most likely to be ruthless in their –

10 **TIPPING J:**

Well perhaps –

MR LITHGOW QC:

– mechanical assessment.

15

TIPPING J:

– Mr King, after the adjournment, can take us to exactly how the – what level of remorse, if you like, is built into the present scale, if any because I –

20 **MR LITHGOW QC:**

Well that's a mystery, I can tell you that now. There is no such precision.

McGRATH J:

Justice Chambers real concern here was with what he called "discount creep",
25 wasn't it, and he could see that the discounts would be rising to a level that was really socially unacceptable for the level of offending that was involved and that's really why I think he had in mind the – what the point Justice Tipping has made, and I think the Crown has really developed, I take it that you're really resisting any attempt to focus on exactly on remorse as a
30 totally separate factor?

MR LITHGOW QC:

Well there's two reasons for that. One is we have no authority to make any such concession on behalf of the amorphous defence bar because – that we

would trade off the separating remorse for a reduced number, bring it down to 25 percent as the utilitarian amount. So we're in no position to make such a concession but we're also actually against it and say that the Court of Appeal were prepared to accept remorse, they just mis-identified its importance and they overstated the problems of judicial determination as to whether it was genuine and they cut out the intangible remorse, for no good reason, because it's part of our legal and social history.

10 **ELIAS CJ:**

Mr Lithgow, before we take the adjournment, can you give us an indication of where you want to take us and when we'll hear from Mr King?

MR LITHGOW QC:

15 I've picked up you've had enough of me and Mr King can go next.

ELIAS CJ:

Thank you.

20 **MR LITHGOW QC:**

Straight after the adjournment.

ELIAS CJ:

That's been very helpful. Thank you Mr Lithgow. We'll take the adjournment.

25

COURT ADJOURNS: 11.33 AM

COURT RESUMES: 11.55 AM

ELIAS CJ:

30 Yes Mr King.

MR KING:

If it pleases Your Honours. The issues about the appropriate place of guideline judgments in our jurisprudence and the approach to be taken to them, has, I suspect, largely been covered in the debate with Mr Lithgow, but I would just seek the opportunity to state as clearly as I can what the
5 appellant's position in that regard is and the first rider is of course, as has been pointed out by Mr Lithgow, that we do not have a mandate to talk on behalf of the entire defence bar in this regard, unlike our learned friends for the Crown. But it is submitted that there is merit in the Court of Appeal laying down guidance. Whether or not this case crosses the line from laying down
10 guidance to effectively, for what of a better expression, legislating an approach, is very much a matter for the Court. But the appellant's ultimate position is that guidance is good, prescription is bad. Especially prescription that is inflexible, that is contrary to direct legislative provisional principle and where there is an adequate explanation into what circumstances and to what
15 degree the guidelines can legitimately be departed from. Now whilst that might be part of the inflexibility, it is, in my submission, the opposite side of the coin, because it's one thing to say it's flexible, but that is not enough in itself, what needs to be laid out is how it is flexible and what circumstances –

20 **ELIAS CJ:**

You mean we need to prescribe the flexible ability?

MR KING:

Well in my submission – I've backed myself, or painted myself into a corner by
25 agreeing with that, but that's probably close to what's being submitted. But the key is flexibility, but flexibility needs to be articulated. To what extent and to what degree, without being prescriptive in one's mandate in that, but it's –

30 **ELIAS CJ:**

You want a sliding scale?

MR KING:

Yes.

ELIAS CJ:

That is indicated, but from which Judges can depart?

5 **MR KING:**

Properly and legitimately depart.

BLANCHARD J:

Is there any evidence –

10

MR KING:

And the path by which they can do that is actually articulated.

BLANCHARD J:

15 Is there any evidence that Judges have felt inhibited in departing from the scale that the Court of Appeal has laid down?

MR KING:

20 In my submission Sir the opposite is probably true, if one looks at both affidavits –

BLANCHARD J:

Yes.

25 **MR KING:**

Certainly the affidavit filed on behalf of the respondent, sets out the position of the Auckland Crown Solicitor and the Christchurch Crown Solicitor as saying that it's perhaps being honoured in its departure rather than its inherence.

30 **BLANCHARD J:**

Yes, but would –

ELIAS CJ:

Except to the High Court they say.

MR KING:

Yes.

5 **BLANCHARD J:**

But that rather indicates that the Judges have understood that there is inability to depart from it.

10

MR KING:

Well I think with respect, what seems to be coming through from the Crown is not that there is a principled departure, but there's just a kind of ignoring it approach and in my submission that's part of the difficulty. But what I –

15

BLANCHARD J:

Principle departure is perhaps a difficult idea. It's really a matter of making sure that you end up with the right sentence in the particular case.

20 **MR KING:**

Precisely.

BLANCHARD J:

25 And sometimes the guidelines are not going to be adequate if you follow them precisely so that you have to depart?

MR KING:

Yes.

30 **BLANCHARD J:**

Is it anything more than that? I mean sentencing's an art, not a science.

MR KING:

Absolutely and that's a quote I think we used a couple of times at least in the written submissions and it's absolute true.

BLANCHARD J:

5 I knew I'd seen it somewhere.

MR KING:

Oh it's not ours, we didn't invent it.

10 **BLANCHARD J:**

Oh I thought it had come ex cathedra.

MR KING:

But that's absolutely right, and that's really what this appeal is all about. There are many good features for *Hessell* and ironically enough if one looks, and I'm referring to the affidavit filed by the respondent under the Auckland heading that in summary *R v Hessell*, "Has definitely improved the situation in Auckland. While there is still a lot of latitude being offered to defendants who are taking a cooperative approach to resolution it has resulted in greater consistency in deduction for plea".

20

In my submission that's admirable, but what I also equally strongly submit, is that that really is not following *Hessell* to the letter, so to achieve that result, what is being done is essentially what the appellant in this case has advocated, that the good features of *Hessell*, the sliding scale, is recognised, but that the flexibility, which is so essential to doing justice in a given case, is not lost in that process. And by, it seems, a rather inconsistent and osmosis process, it seems that the Judges and the Courts are attempting to achieve that, but it is not proper to simply say, well, in practice *Hessell* was being ignored where it's difficult and therefore there is no need to articulate needs for change, or for a different approach. And the affidavits really, there is a great deal of commonality in the types of issues which are being identified as troublesome and those are the issues which this appeal is all about. The issue of inflexibility, the issue about remorse, the issue about first reasonable opportunity.

So, the appellant's position in that regard, is summarised at paragraph 52 of our submissions, page 17. "That the principles of consistency, uniformity and predictability are admirable, but they should not be at the expense of fairness and/or justice to an individual." Essentially saying that a tailored approach is preferable to an off the rack approach, but guidance that does help achieve those principles of consistency, fairness et cetera, are to be embraced.

The fundamental problem with guideline judgments as a category, is the emphasis that they, by necessity always have on the crime, the circumstances of the crime at the expense of the circumstances of the offender and that is a characteristic which goes through all of the guideline judgments –

BLANCHARD J:

But they're only endeavouring to find a starting, a starting point.

MR KING:

Yes.

BLANCHARD J:

So that's what's, they're giving guidance on.

MR KING:

But, and that's exactly the issue which has been identified Sir, is that that might be the intent and in cases such as *R v Taueki* [2005] 3 NZLR 372 the Courts, the Court of Appeals actually say that, say, look we're not intending to shackle anybody, we do see there is some flexibility, but the reality is that when you get into that sentencing Court, all you're talking about is band 1, band 2, band 3.

ELIAS CJ:

Mmm.

MR KING:

And the circumstances by which you can get around that are just not spelt out and so that the intended consequence of the Court of Appeal is just not finding its way through to the sentencing Courts and that's why the appellant
5 in this case advocates very much that it needs to be spelt at at the highest level and some perhaps, guidance giving on where flexibility can properly be achieved. It's not enough to simply say, these are not intended to be intractable.

ANDERSON J:

10 Do you think, Mr King, that the guidelines, especially in the upper levels, give greater weight to the guilty plea as a mitigating factor than any other mitigating factor?

MR KING:

Yes I do Sir, very much so.

15 **ANDERSON J:**

Well, that's in breach of section 9 (4)(b) then of the Sentencing Act.

MR KING:

Indeed and the other fact is that are specified therein, really do fall to be secondary matters.

20 **ANDERSON J:**

The old, the old method which people of my generation I suppose found perfectly acceptable, is that you look at all the mitigating factors and say, bearing all of these things in mind, this is the appropriate sentence –

MR KING:

25 Yes.

ANDERSON J:

– for you, because it's often quite artificial to try and parse out –

MR KING:

Yes.

ANDERSON J:

– mitigating elements and attribute some value to them –

5 **MR KING:**

Indeed.

ANDERSON J:

– some nominal value.

MR KING:

10 And for whatever reason, guilty plea, I mean, it obviously has a profound
utilitarian value as has been said. It prevents the cost of the trial, it's a
stand up and acknowledgement for the sake of the victims and the community
and it has other tangible benefits as well. It saves the process an enormous
amount of resources. Of course it also results in a lot less appeals against
15 conviction, where someone has pleaded guilty, so to that extent, they are to
be encouraged.

But one can say the same thing about, for example, remorse.
Remorse doesn't just mean I accept I've done wrong. It provides a much
20 greater foundation for rehabilitation, as has been said –

ANDERSON J:

It's linked to section 10, isn't it, which demonstrates –

MR KING:

Yes.

25 **ANDERSON J:**

– positive steps to –

MR KING:

All of us and it must be seen to reduce the risk of re-offending. If someone regrets what they have done, they are less likely to repeat it in the normal course of events, so there is this effect, singling out of the utilitarian aspects of the guilty plea is have far more significance than any other part of the process and in the run of the mill case, that would be perfectly logically.

ANDERSON J:

Say an EBA or traffic offence is dealt with summarily against a background of well known penalties.

10 **MR KING:**

Yes.

ANDERSON J:

It's easiest to apply in that sort of case really?

MR KING:

15 That's exactly right and it's spelt out, it's there, it's unlikely to lead to significant miscarriage of justice. But if one takes the opposite extreme, shortly after *R v Hessel*, I had a man plead guilty to two counts of murder, on his third appearance and the submission by the Crown that he wasn't entitled to a full discount, how, what discount and how it was applied, being the
20 second part of it and we'll come to that later, but saying that, oh, no, this wasn't a guilty plea at the first reasonable opportunity, a man on two counts of murder, pleading guilty on his third appearance. The first appearance being on a Saturday morning in front of a JP, remanded until the Thursday, that's his second appearance, remanded for five weeks for a psychiatric evaluation, and
25 that is the, where this really bites in.

ANDERSON J:

You couldn't, counsel couldn't responsibly advise a client who might, in all probability, require a psychiatric examination.

MR KING:

That's right.

ANDERSON J:

In, on the psych cases.

5 **MR KING:**

And because it was a private report, as opposed to a, the Court of Appeal do recognise the reports under the Criminal Justice Mentally Impaired Persons Act as stopping the clock, but as anybody will know, when you've got someone on a murder charge, you may not want them
10 being interviewed by, in a report that will go before the Court and we go to the Crown. You might want to keep that to see if there's any potential defence for the defence. So, the Crown argument in that case was that the clock didn't stop for that process to take place and just while I'm on examples of where I submit this is not working. If I can take the Court specifically to the judgment
15 in *Hessell* where they specifically address the question of an offer to plead guilty and this is under tab 2 of the case on appeal, at page 43, paragraph 41, where the Court says, midway through the paragraph –

ELIAS CJ:

Sorry, page?

20 **MR KING:**

Page 43 under tab 2 Your Honour.

ELIAS CJ:

Yes thank you.

MR KING:

25 For example, "If an offender charged with murder communicated at the first reasonable opportunity that he or she was willing to plead guilty to manslaughter, but the prosecution chose to proceed to trial on a

murder charge, the offender should receive the maximum reduction or the plea of subsequently convicted of manslaughter.” It goes on –

BLANCHARD J:

You wouldn't object to that would you?

5 **MR KING:**

No, no, but it goes on, top of the next page, mid paragraph, “If an offender does not wish to plead guilty to the offence with which he or she is charged, but is prepared to plead guilty to a lesser specified offence, he or she should communicate that willingness, in writing, to the prosecutor with a copy to the
10 Court, then there will be no dispute.” Well, in strict adherence to that, I wrote to the Court in a case where, to the Court and the Crown, in a very recent case where a murder trial is to, likely to proceed offering an indication to plead guilty to manslaughter, quoting the paragraphs from *R v Hessel*, putting a copy on the Court record, to get a response back on Saturday from the Crown
15 to say that they're not going to accept it, not surprisingly, that's their prerogative, but saying they reserve their right on producing the letter that I wrote as an exhibit in the Court case if the trial proceeds in a slightly different basis. So, effectively trying to use that letter which the Court prescribed in *Hessel* as an admission of manslaughter, whereas of course,
20 pragmatically a person might want to go, if he's forced into a trial, might want to say, well, I'll go for the whole lot.

TIPPING J:

Cause of death might be an issue.

MR KING:

25 Precisely, but in order to avoid all of that, we'll argue that and I've got, I've got copies of this letter if, for the Court just to see how it works.

ELIAS CJ:

Well, I think we can accept that there is a, that the procedural approach suggested may have all sorts of practical consequences –

MR KING:

Including, I might have just written an admission to my client to manslaughter, which is –

ELIAS CJ:

5 Including, including really Mr King, the background described perhaps by Dame Margaret Bazley as well.

MR KING:

Indeed, and that is a real factor and –

ELIAS CJ:

10 Yes.

MR KING:

– as Mr Lithgow tried to articulate, those push pull factors do not simply apply to the defence side of the bar, but we have a similar system whereby the Crown and I'm trying not to inflame anybody, but the reality is we are unique
15 in the world for our system of justice and having a system whereby the Crown are paid by the hour in these things, as well as the defence. So, if there is to be said that the defence have an agenda in dragging a case out because they get paid more, then what's good for the goose is good for the gander and the same argument can be advanced the other way.

20

Mr Lithgow put before this Court the article by Penny Darbyshire, which I certainly commend to the Court, because it does really set out, it's a strongly written argument that clearly delineates the argument from the left, if you like, to be responded by Lord Justice Auld for the right, and in that the author
25 makes, and it starts in the first couple of paragraphs the very reasonable and I submit proper, submissions that the sentencing, the guilty plea process, is really at the very centre of our criminal justice system. She talks about this myth that pervades that justice is administered by be-wigged Judges and juries, but noting in fact less than one percent of cases in the United Kingdom
30 end up being determined in that way. The vast, vast majority of people

convict themselves by pleading guilty to the offence, and has been noted earlier by the Court, the whole process of pleading guilty, of summaries of fact, of sentencing indications, of status hearings, of discounts to be given and so on, is very lacking in firm, hard legislative process.

5

ELIAS CJ:

Well this brings together the first aim of criminal justice system, which is the establishment of guilt with the, what would normally be regarded as the second aim, the punishment of the guilty.

10

MR KING:

Indeed.

ELIAS CJ:

15 And the worry is whether it – whether it confuses the, well as Mr Lithgow said, the protections that the law has evolved to protect against wrong pleas of guilty or wrong findings of guilt.

MR KING:

20 Indeed and I certainly note Your Honour's comments about sentencing indications. If somebody's charged with an offence and they hear if you plead guilty you'll get home detention, if you don't and are convicted at the end of a trial, you'll get imprisonment, then that is a very significantly weighty pressure being applied to someone. But in the run of cases, it's my submission tat
25 putting pressure onto someone from day 1 to plead guilty, when they've only just established a relationship with their lawyer, maybe met them once or twice, when only initial disclosure has been provided, but knowing if I drag out my plea beyond this next appearance, I go from 33 percent discount to 25 percent discount, is undue pressure.

30

At least by the time someone gets to a sentencing indication hearing, there is full disclosure and there is full, usually consultation advice and instructions with counsel in consideration of all of that disclosure. So the risk factor is more pronounced when someone, they're charged, they're remanded,

legal aid usually takes two weeks to assign a lawyer, that's usually a day or so before they're appearing, they trudge up normally, they might have a summary of facts if they're lucky, they might have more, if they're very, very lucky, that often they won't have. And yet that clock is ticking, they turn up at
5 Court, they've got counsel, they've got initial disclosure, and so the first meeting you have with someone on a serious charge, involves not just getting rapport and trying to learn about their background and trying to establish a relationship and a degree of trust, for often very suspicious and paranoid person in many cases.

10

TIPPING J:

If you took a 15 year sentence, the difference between a third and fifth, is two years.

15 **MR KING:**

It's huge.

TIPPING J:

And you could – you'd lose that apparently –

20

MR KING:

Yes.

TIPPING J:

25 – just by running over one appearance.

MR KING:

By saying, "I need to look at the full file, I need to read all the statements, not just the two you've given me, but I know you've interviewed 20 other people,
30 let's hear what they all say." And you're penalised for that, and the rationale for doing that is that ancient one that was used before you were even entitled to having disclosure of the Crown case at all, is that, "Well you know what you've done". And that's the rationale.

TIPPING J:

You know what you've done, but you may not necessarily know whether what you've done amounts to the crime charged.

5 **MR KING:**

That's absolutely right, and Mr Lithgow identified the scale of charges for an assault.

TIPPING J:

10 At the simple level –

MR KING:

Yes.

15 **TIPPING J:**

It's probably fair enough, a blunt sort of approach, but if anything more sophisticated it's fairly –

MR KING:

20 Yes. And it's our submission Sir that all of this can in fact be made to work. The sliding scale, it's not, at the end of the day reinventing the wheel, it's applying in perhaps a more uniform way, a process which has been happening for time immemorial. Well I say that, it's only 1976 that a person was able to plead guilty to an indictably charged offence prior to committal
25 anyway and that was when section 153A was a method. So we are talking about very recent processes in the time scale of the justice system. But it's always been the case that a guilty plea is recognised and the earlier the plea the greater the recognition. Standardising that to say right, so that there is greater uniformity of approach, so that you haven't got Judges giving
30 50 percent and some giving 10 percent for a plea in the same way. It's admirable and the appellant does not say that shouldn't happen, but by exactly the same token, it is submitted, the Court should not be shackled to be able to not take into account highly relevant factors about reasons why there

may be delay. And frankly some of the arguments about plead guilty now, argue about the summary of facts later.

TIPPING J:

5 The problem with this scale is it's described as sliding, but it's actually jerky.

MR KING:

Well, in my submission Sir, a plea of guilty three weeks before trial with 10 percent, it's so minimal. I mean where is the actual incentive or
10 encouragement for a person to plead guilty, then and yet some people simply take time to get on top of it. We all know, and it's the old saying that the courtroom steps are when people have to confront it. Well we now have a system where people just do not have to confront their cases early. And this is obviously an attempt to make them do that. But the reality is that people
15 who are charged with offences, often just had no appreciation of what is happening and what it's all about. The most common question that's asked, if someone stood in the dock and they've had a Judge talk to them about the process and what's happening, and they walk out, and it's, "When do I have to come back?". Even something as fundamental as the date that they come,
20 just washes over people and that, all of this good in theory, good in some sort of treaty situation, but it does, in my submission, just fail to recognise the reality of the process and the people that we're dealing within it. And some flexibility just needs to be built into it, so that they can take some ownership of the process. When I read *Hessell* for the first time the first thing I thought
25 was, we've just invented a whole new category of appeals where incompetency of trial counsel is going to be involved. Not on convictions, but, "My lawyer didn't tell me I should plead guilty straight away." "My lawyer didn't see me, I rang three times, and he was in a trial and I didn't see him." "My lawyer didn't get me through the disclosure." And we're already seeing
30 that now, there's an appeal now, a manslaughter appeal which has been adjourned for precisely that issue to be dealt with.

ELIAS CJ:

My point is that there is objective evidence that a lot of – that much of these delays will be because of lawyer behaviour.

MR KING:

5 Yes.

ELIAS CJ:

And that's really –

10 **MR KING:**

Why should that be visited upon the poor punter?

ELIAS CJ:

Yes.

15

MR KING:

Who had – who in the – as Mr Lithgow said, “In the legal aid lottery, won a certain lawyer”. No, why should that person be visited with that. And that with respect is a problem, and we will be seeing that trickle through into the
20 appellant Courts where people are going to be saying, “I should have got 33 percent instead of 25 percent, but my lawyer wasn't fast enough to get on the phone the prosecutor and negotiate” and so on and so on and so on. It's a dangerous area. Whereas in my submission a sentencing Court is fully capable by experience, by expertise on the full submissions from both parties
25 to make an assessment about whether, and to what degree, credit should be given for a plea of guilty.

TIPPING J:

Could I just explore one point? I was attracted to the idea of bands, but I'm
30 now wondering whether, because of the fact that the reality is that these sort of sliding scales, even with weigh points, seem to have their focus on the weigh points, not the slide.

MR KING:

Yes. First, medium, late, yes.

TIPPING J:

5 Yes. It may be dangerous to even have bands, because then people start concentrating sort of rather more rigidly than a broad brush appraisal, although the worry about that is that it's going to go back to the issue of consistency.

MR KING:

10 Yes. And with respect, certainly the appellant in this case is not arguing that we should just throw this out completely.

TIPPING J:

No.

15

MR KING:

20 What we're saying is, bring in the flexibility, put the emphasis on reasonable rather than first, look at the utilitarian benefit of such things as status hearings and sentencing indication hearings, which are becoming an increasingly important part of our criminal justice process, and that should be embraced because they are actually resolving cases. A resolved case is a good thing.

BLANCHARD J:

25 Mr King, before *Hessell*, was there actually in your view, an inconsistency problem?

MR KING:

30 In my view, no Sir. There were a number of judgments which spelt out in quite clear language really if we're being specific, *R v Accused* said eight years for a contested rape, six years for a non-contested rape. Some of the drugs charges there were very significant differences. I did a case called *Ridout* in the Court of Appeal which was a disparity case where the Court actually went through and found that the range went from about 26 percent to about 35 to 40 percent even in some cases, so there was flexibility, but one

suspects that the reason that there is an apparent disparity in that regard was because Court's minds were not focused to just clearly articulating the specific discount for guilty plea alone. What they were doing, as His Honour Justice Anderson said, is they were effectively rolling everything into one and you get a starting point and say well for everything including your guilty plea, your remorse, and your prospects of rehabilitation et cetera, that it's pulled back and so it was harder in the pre-Hessell era to identify precisely what the discount was for a guilty plea in my submission. But it was always recognised that a guilty plea was a weighty factor for mitigation. The time it was entered was important but there was never this kind of rigidity about right, was it before callover, was it second appearance, was it three weeks before trial and so on, and that's where, in my submission, this problem –

TIPPING J:

15 Three weeks before trial does seem extreme to come down to 10 percent.

MR KING:

Which is – and effectively the day before trial was the same.

20 **ANDERSON J:**

It still saves the victims having to testify, for example, as well as the costs.

MR KING:

That's right and in sexual abuse cases it is so important, you see it in the victim impact statements all the time, that it is just so important and we've actually identified in our submissions you'll see Sir that we submit that sexual offences could be a proper category because for a person, usually a man, to stand up before a Court and plead guilty to sexual offences and of course the first thing that happens when they're arrested is it polarises everyone around them. There are those that just support them, and so they almost feel that if they plead guilty they're letting down their support group, and there are those that are opposed to them and those dynamics are real and the best way to get to a proper outcome is for that person to stand up and say, "Yes, I did it."

TIPPING J:

Where did the three weeks come from? Was that just impressionistic?

MR KING:

5 I think so Sir –

TIPPING J:

It's not a sort of necessarily clear way for him.

10 **MR KING:**

That's right, it was submitted – obviously the scale was based on the utilitarianism.

TIPPING J:

15 But you go down –

MR KING:

You still save a trial.

20 **TIPPING J:**

You still save a trial –

MR KING:

But you don't save the preparation –

25

TIPPING J:

No.

MR KING:

30 You don't save the allocation –

TIPPING J:

I'm not suggesting it shouldn't be lower than at an earlier stage but I mean there's got to be something left in there, doesn't there?

MR KING:

That's right and so – and I embrace this point because in my submission, and we discussed it yesterday, was that one thing that we tended to do in
5 preparing our submissions and our argument was to focus very much on the 33 percent at the beginning and not enough at the 10 percent three weeks before the trial and in my submission there can be room and scope for proper debate. See what we have now, I submit, is –

10 **TIPPING J:**

Well, sorry to interrupt you Mr King, but would it not depend on the nature of the case, the strength of the evidence, how valuable, if you like, to the witnesses and so on –

15 **MR KING:**

Yes –

TIPPING J:

If it was a case where the witnesses were largely professional that might be
20 very different from a case where there were five female complainants, all of whom were absolutely on, you know –

MR KING:

And often, I know that they say you can't take it into account, but often you're
25 dealing with people who really just don't recall the exact details of what happened because they were stoned or intoxicated and so knowing about it – well I'm sure it wasn't like that. Issues of consent, for example, in a sex case, well they can be matters of degree often. Was it – I believe she was consenting, would a reasonable person have believed that. They accept
30 things probably went further than they should have and we can often be dealing with just degrees of thought but the problem I say is this. Under the old regime you go to a depositions hearing. You'd have to stand in a Court and enter a plea at that point in time. The defendant would themselves, not the lawyer, and the officer in charge was there. If there were witnesses they

would be there. The victims would often be there, whether they were required to or not, and it forced that confrontation at that stage of the process and guilty pleas, and from my own experience, and I think many of us were like that, 50 percent of the cases, indictable cases that I dealt with were resolved
5 at that deposition hearing whether through, usually through amendment, some sort of plea bargain or they're never going to turn up and give evidence against me, oh no they have, well game's up, I might as well face it, right, let's get on with it. You've got everyone there, you can deal with it. We've lost that.

10

So now, as Mr Lithgow said, a person is arrested, put before a Court, theoretically they can be remanded through to their first callover date in legislation. Pragmatically different steps have been put into – like one defect in the legislation was that there's no provision for changing your bail from
15 pre-committal to post-committal so you actually have to turn up at the registrar's desk to sign a new bail bond anyway. You don't have to appear in front of a Judge. So that process takes away that part of the game where 50 percent of cases were resolved, certainly in mine and other lawyers I know, that's how we work.

20

Now by the time you're actually getting into Court you're down to such small numbers for discount that really if the disclosure – if the committal process discourages early guilty pleas then, with respect, *Hessell* and its 10 percent discourages late guilty pleas.

25

ELIAS CJ:

Well and the proof of that is probably in some of the material that the Crown put before us about people getting 30 percent discounts the morning or the day before trial.

30

MR KING:

Yes, because the Courts have recognised that to not give a full and proper discount would be an injustice but what they have not done is done it in accordance with the guidelines of *Hessell* which demonstrates clearly that is it

proper to say, right, well we've got these guidelines which on their face are prescriptive but we don't need to do anything about it because in practice it's just being ignored.

5

TIPPING J:

I remember vividly a case where I was asked on the morning of the trial how much I would give off if he pleaded guilty there and then so if I'd had to say 10 percent max –

10

MR KING:

The trial goes ahead.

TIPPING J:

15 – I would have thought that was a sporting probability.

MR KING:

Yes and trials are destructive for all concerned. Witnesses are genuinely traumatised it seems, from all the reports that we get, by being called liars and even when there's a guilty verdict at the end of it it's still not vindication. The ultimate vindication for the victim is when the person stands up and says, "Yes I did it." And that, even if it's late, is still to be applauded in my submission pragmatically or utilitarianly, it reduces the prospect of an appeal. A person who pleads guilty is unlikely to appeal that conviction. It's not universal but –

25

TIPPING J:

Well if it's a month long trial then presumably you can get on with some other work.

30

MR KING:

That's right and talking about the concept of remorse, and I don't want to go into this too much, but I did the makutu trial here in Wellington High Court last year where 10 people were charged with manslaughter and frankly there had

never been more remorseful people put in front of Courts in New Zealand history. They spent five weeks just crying their eyes out through the whole process and at the end of it they had to be sentenced. Now under a strict *Hessell* approach of course there were no guilty pleas, remorse is not a factor.

5 Well that – and there's situations like that and that's an extreme example but by no means, I submit, an isolated example –

TIPPING J:

That leads me to enquire as to your perspective on this question of separating
10 out what you might call the utilitarian factors –

MR KING:

Well taking a purely –

15 **TIPPING J:**

– and removing the remorse for a separate, as the legislation seems to suggest –

MR KING:

20 Yes.

TIPPING J:

Would that be a helpful step in your submission or not?

25 **MR KING:**

It would be but not at the expense of the 30 percent discount.

TIPPING J:

No, yes quite.

30

MR KING:

We want our cake and to eat it too.

TIPPING J:

Point taken.

5 **ELIAS CJ:**

It does occur to me, of course, that the questions we're looking at are not ones in which the only interests are those of the Crown and the defence. There is a public interest –

10 **MR KING:**

Absolutely.

ELIAS CJ:

– in appropriate sentences and even in the UK with their rigid, but legislative,
15 scheme which we have borrowed with –

MR KING:

Yes, did borrow.

20 **ELIAS CJ:**

– perhaps less legitimacy, there is the flexibility to impose the appropriate sentence if a discount is just not proper.

MR KING:

25 Or did not achieve the proper ends of the trial.

ELIAS CJ:

Yes. Of the criminal justice system.

30 **MR KING:**

And of course with legislation, and there's select committee hearings, people have input into, and there's debate and of course there's a process of amendment if things are not working well –

ELIAS CJ:

Yes.

5 **MR KING:**

– in practice and that, of course, is all to be contrasted with an approach where a Court, on a pre-determined basis, set out to really effectively fill what they regarded as a void because of the non-establishment of the Sentencing Council and this judgment is unique in that because it's very
10 openly and candidly done and the first six paragraphs of the judgment explain why they're doing it, what they set out, that they decided to choose an appropriate case. They chose one with a lawyer who had never been to the Court of Appeal previously. They appointed an amicus who I don't know if he'd ever defended anybody or had – and I'm not being critical in that regard
15 but what it loses in translation is just the reality of the folk you're dealing with. You know, we all want them to plead guilty, there's nothing – and this perception that lawyers just want to drag every case out because they get paid more is, I hope, not true in the vast, vast majority of cases. Most lawyers want to close the file as quickly as they can, that's how you run an efficient
20 practice, so there is an incentive for doing it, because it means you can move on to other work.

And I would submit that the reality is that we are still in a regime where by the vast majority of people do plead guilty. We're not in a situation where
25 everyone says, right, let's just go, let's just go to trial so the lawyer gets lots of money. And the Court themselves identified that it was an imperfect process that they went through. But again, the appellant's position is not that they should not have embarked upon this exercise, but they should have recognised that they were not writing legislation here, they were simply setting
30 out guidance and frankly, that summary of the Crown solicitor of Auckland, demonstrates that there was and is utilitarian benefit in *Hessell*, but only if it is applied flexibly.

ANDERSON J:

On another point and I'd be grateful for your experienced view in this Mr King. Are the status hearings conducted in public?

MR KING:

5 Yes, they are. They were incredibly controversial when they first started and Judge Buckton started in the North Shore, but they actually, and many of us, natural defence lawyers smelt a rat and were reluctant to fully engage, but now they, I think, everybody involved in them over a period of time, sees that they are actually very beneficial. Again, it's about that most critical part of the
10 process which is giving ownership to the person standing in the dock. Instead of the Justice system just washing over them and they are unwilling participants, it gives them some say and some, therefore, control and some identity with the process and beyond anything else, that is so important and it does mean that people plead guilty more often than was previously the case.

15

The status system is really a very practical response to the problem that so many people were turning up for a defended hearing and changing their pleas and pleading guilty, so what the practice of the Court's were under pressure of resources, is they were loading the days, so you might have 20 hours of
20 fixtures set down for a single day in the hope that 16 hours of those will fall over by way of guilty pleas, and often that was the case. Of course when it wasn't, it was just pandemonium and you often had people who were remanded three times. Certainly if there were victims involved and so on, but if was a drink driver, you could go on for years, just turning up and you were at
25 the bottom of the list and you just wouldn't get priority and so, they were a very pragmatic and practical response and by and large, a very successful one, because it does resolve, it does give the players, the victims, as well as the defendants, an involvement and an opportunity to speak. Often, unlike other forums, the Judge will address the defendant directly, will address the
30 victim directly, whereas, of course, in a normal strict Anglo-Saxon system, they only talk through the lawyer, or the lawyers.

So, it's that type of approach which, and I suppose the *Hessell* response would be, was that the reality was that everyone would just go to a status hearing, it just became inevitable and the days when people would just turn up and plead guilty on day one, were over because you could usually
5 always get something. There'd be a change to the summary of facts, there'd be an amendment of the charge, there'd always, or there'd be a sentencing indication that if you go and do a bit of counselling you'd be okay. So, generally there's an expectation that whatever you have done, unless it's really prescribed like drink driving, there's a benefit for you in going to a
10 status hearing and I suppose there's, one can understand the Courts to say, let's try and deal with that.

But the pressures of a List Court, on day one, have their own problems. It means that a Judge is going to be struggling. A person turns up on day one
15 without any character references, without any support, without having spoken to a lawyer and so the status hearing meant that when you turn up, you either got time allocated for your case to be heard, you've got a Judge who's got what is on the file at that stage, the lawyer has had an opportunity to talk with the police. It's a very productive and worthwhile process that I would
20 anecdotally submit most people come away happy with. They plead guilty to an offence. They get the penalty they were expecting and they take it on the chin and move on with their lives and that is a distinct advantage of status hearings.

Of course, the reality of the timeline we're dealing with means that a
25 status hearing is not really more than just a hiccup in that timeline. If you are, in many Courts, you turn up at day one, you plead not guilty, you have to go to a status hearing, you can't just bypass that and go to a defended fixture. So, by going to the status hearing, you're not really delaying the process or
30 upsetting it. There's no fixture set down so the Court hasn't set aside resource to determine it. If it is going to a defended hearing, you could be talking six months in Auckland. You could be talking much, much longer for it even to go. So, to say that somehow a person should not receive full credit for going to a status hearing is really, I think, with respect, barking at the very

sensible and useful process in the system that is very successful in resolving cases, saving resources, doesn't result in delay.

ELIAS CJ:

Well, it's really a question of who's identifying and with what legitimacy, what is utilitarian. The *Hessell* judgment seems to think that there's something
5 wrong about people knowing, where, what's going to happen to them, but that they are not taking it on the chin and getting out of the system.

MR KING:

They know what they've done, therefore they just stand up on day one and
10 plead guilty. Nowhere in the Western world is someone expected to make such a life changing decision without full advice and full consultation. We have informed consent in the medical context, but *Hessell* is really requiring someone to plead guilty without informed consent and in my submission, that is the nub of what we're talking about. And it can be a
15 change. Very simply by introducing flexibility and articulating how that flexibility might be applied.

ELIAS CJ:

Right, where do you want to take us now?

MR KING:

20 Can I just and I won't read it out, but if I could just draw the Court's attention to this summary of what the appellant says about firstly, guidelines and I'll just for noting, it's page 17, paragraph 52 and that's the position it's arrived at after a consideration of the international jurisprudence. There's quoting of Hammond J dissertation on this exact debate. The wonderful description of,
25 "The dragon of discretion has not been slain, but it has been domesticated and put on a short leash." That arrives at paragraph 52 on page 17, where the appellant's position is clearly stated as to what we submit is the proper approach to guideline judgments.

And in the second passage, that I'll seek to, to draw to the Court's attention is at page 35, paragraph 123 of the appellant's submissions, going through to paragraph 125 on page 36, where the appellant sets out what it is that it humbly and respectfully asks this Court to give consideration to, in terms of
5 remedying what are the perceived deficiencies in the *Hessell* guidelines.

That, unless there are of course any questions, effectively leads to final aspects to this appeal. The first one is the guidelines to murder.

ELIAS CJ:

10 On the, on those points –

MR KING:

Yes Ma'am.

ELIAS CJ:

– at the last bullet point.

15 **MR KING:**

Yes.

ELIAS CJ:

Why should we bind ourselves on that?

MR KING:

20 That's the Court, well, it's because guidelines –

ELIAS CJ:

A presumption of appeal.

MR KING:

Yes, the wording the Court may conclude is too strongly put there, but
25 obviously one of the criteria for an appeal is public interest. It's the submission of the appellant that when a Court of Appeal embarks upon a

guideline judgment, that obviously has widespread application, far more so than a normal judgment.

ELIAS CJ:

Well, this particular guideline to, was, the Court of Appeal was acting as a
5 Court of first and last instance.

MR KING:

That's right, so there was no right of appeal from –

ELIAS CJ:

But, yes, yes, other guideline judgments may simply bring together, however,
10 cases that have been decided over some time.

MR KING:

That's right and the benefit as practitioners at the coalface, I mean, it's, there's nothing more useful than being able to give a range that your client's likely to fall within. Terrible when you get it wrong, but that's why there are guideline
15 judgments in the first place. So, I suppose that final bullet point is perhaps optimistically stated as recognising that guideline judgments will have, by their very nature, a high level of public interest, but I suspect the Court's never going to adopt a situation that any guideline judgment will automatically be the subject of appeal. I suspect the Court's never going to adopt a situation that
20 any guideline judgment will automatically be the subject of appeal. Yes and of course that submission, as Mr Lithgow rightly points out, was also in response to the Crown submissions at the leave application stage, arguing that this appeal was not justiciable because it did not apply to, they argued, to Mr Hessel, so it's a response to that.

25

ELIAS CJ:

Yes, they didn't prevail in that.

MR KING:

No indeed. And the second aspect were that there are times when guideline judgments, where someone may just not want to engage in the process at all, and so it just falls upon people and it's in recognition of that. Can I just finally draw the Courts' attention to another of those bullet points, and this is the one that's at the bottom of page 36, it says, "Where a sentencing Court departs from the guideline, it should fully set out its reasoning for doing so, including whether or not their approach should be seen as a precedent setting." That is really a response to the whole kind of terminology which is used of instinctive synthesis, because one could readily think, well this instinctive synthesis, it sounds sort of like a gut reaction that – which of course has not been of any assistance to anybody. What the appellant's position is, is that it should be spelt out, put it in words. If you're going to depart from the guidelines, the sentencing Court should put it in words, that's for the benefit if there's a Solicitor-General's appeal which often there will be of course, if there's a perception the guideline hasn't been followed, so there should be that obligation on a sentencing Court to rather than just say, "Well using my instinctive synthesis, I find a discount of 50 percent is justified." There is that obligation to put it in words, why it is you're departing.

20 **ELIAS CJ:**

And if you put it in words of course the appellate Court can supervise for consistency.

MR KING:

25 That's right. That's right. So we hope with that seen as a fair and proper concession from the appellant. So the two other aspects and they can, certainly the one in regards to murder, I'm confident we can easily get through before the luncheon adjournment.

30 **ELIAS CJ:**

Well I'm very keen that you should conclude before the luncheon adjournment Mr King.

MR KING:

Yes.

ELIAS CJ:

Yes, I –

5

MR KING:

Yes, and I will endeavour to do that.

ELIAS CJ:

10 I've read your submission on murder, is there anything –

MR KING:

Just to say, and I argued this the other day in the Court of Appeal in a case which is reserved, the same sort of arguments. In that case the so-called
15 Boldt approach was adopted, a so-called 20 percent was applied, but in real terms it was an eight percent discount, because what it meant was 17 years went down to 15 and a half. So this was a plea that was entered before trial that meant that the co-accused's case was also resolved, because the Crown accepted the plea to manslaughter for that, and in my submission, although
20 there is a slightly different statutory framework, section 104 says, "Seventeen years unless manifestly unjust," if that applies. And you've also, you've got a flaw. You've got the legislation that says, "If life imprisonment is to be imposed, then it's 10 years minimum." You can't go below that for a non-parole period. You can go below life imprisonment, if it's manifestly
25 unjust, but that will be rare. So you do have those slightly different. In my submission though, to say that a proper credit is not being afforded for a guilty plea to murder would be manifestly unjust.

BLANCHARD J:

30 Well Mr King, I've got real doubts that in this case, which has got nothing to do with murder, we should be getting into the area. We left that open at the leave stage. But my doubts are increased when I hear that there's actually a case before the Court of Appeal.

MR KING:

It's a CAD unfortunately and I don't, with regret, they kind of took the – leave it to the spring Court approach with respect.

5 **ELIAS CJ:**

This was a –

BLANCHARD J:

Has it been determined?

10

MR KING:

It's been heard, it hasn't been determined.

BLANCHARD J:

15 Yes.

MR KING:

But in my submission, whilst one does not need to go into prescribing it, what can be said quite clearly is that the utilitarian benefit and the other tangible results of the guilty plea, apply equally, if not more so, in cases of murder. If we can avoid expensive difficult murder trials, then we should and I can think of cases I've been involved in, where if a proper discount had been afforded, guilty pleas would have been entered. But when it's dealing with such small numbers, it's that whole rationale for why do we treat murders separately. Okay there's a different statutory regime, you've got a floor of 10 years, but in my submission –

20
25

ELIAS CJ:

It's not however, a different statutory regime, and it's certainly something that I want to explore with Mr Mander how the clear lack of availability of the *Hessell* approach to murder, doesn't undermine the whole validity of the exercise.

30

MR KING:

Well I hope we've articulated that, because philosophically all of the arguments that justify a guidance for guilty pleas apply, we say even more so –

5

ELIAS CJ:

Yes.

MR KING:

10 In the case of the most serious crime in the book.

ELIAS CJ:

But that may be a pointer to the fact that this sort of approach has to be – has to be legislatively mandated.

15

MR KING:

Yes indeed. And I would certainly engage in the argument before. There are many aspects of sentencing which should be sentencing indication hearings. Some Courts do, some Courts don't. The High Court often don't, District Court often do. What stage is it appropriate? In the case I talked about, the makutu trial last year. We sought, all of the defence counsel sought a sentencing indication hearing with the Judge, His Honour agreed. The Crown scuttled it by saying, "No, we're not doing it." A five week trial results and half were acquitted and all of them, frankly if any of them had been known what the outcome would've been, no one went to jail on that, the trial would have been avoided. So, and recognising, and again this has been said, the centrality of the sentencing and guilty plea process is really the most important and significant part of our criminal justice process, far more so than trials where only one percent of cases end up, I don't know what the New Zealand one is, but one would expect it would be something like that.

30

ELIAS CJ:

That case, of course, may well have been one that illustrates that there are other public interest factors at work.

MR KING:

Yes.

5

ELIAS CJ:

Which meant that the result, a jury trial – a jury verdict was the right way to conclude that process.

10 **MR KING:**

Yes, and some were acquitted, some were convicted, but there was closure for everybody.

ELIAS CJ:

15 Yes.

MR KING:

I mean the proverbial expression is a trial of mitigation and to a large extent that's what it was, when it really was a watershed process, by which people were able to eventually get on and move on with their lives. So there are those aspects to it, but there is a need in my submission, for a wholesale review of the sentencing process, including all of these steps being legislative.

20

McGRATH J:

25 Mr King can I just – can you just remind me, how is it, what is the position that *Hessell* has left in relation to discounts for minimum terms of imprisonment for murder. Wasn't it just business as usual?

MR KING:

30 Well it said – no they said it was unfinished business.

McGRATH J:

Unfinished business.

MR KING:

What seems to have been embraced though, and practically all sentencings that have taken place since, is the so-called Boldt approach, which means that the full credit is applied, but only to the discretionary period.

5

McGRATH J:

Nothing for the first 10 years.

MR KING:

10 That's right. And so in real terms, and when one talks about 20 percent discount, in fact they're talking about an eight percent discount, 17 to 15 and as half and that seems to have been the approach that is being taken and certainly in every murder case that I have seen since then, that is the approach the Crown has advocated.

15

TIPPING J:

So if you are an ordinary murder, justifying no more than 10 years.

MR KING:

20 You effectively get nothing.

TIPPING J:

You get nothing?

25 **MR KING:**

Yes. Unless you can – I mean I don't think that situation's arisen yet. It did close in a case called *Tamatea*, which was a Palmerston North killing where a man pleaded guilty and got 10 years. Co-accused ran the trial, was convicted and get's 12 years and –

30

ELIAS CJ:

Yes, it may end up in sentences being ramped up.

MR KING:

Yes, to make it look, to make the appearance look of a discount.

ELIAS CJ:

Yes.

5

MR KING:

That's right. But it is open of course to a Court, or to someone to say, "Right standard murder, 10 year one, guilty plea on the first reasonable opportunity, it would be manifestly unjust to sentence this person to life imprisonment." Now the legislation does actually prescribe that. I suppose that highlights the –

10

ELIAS CJ:

Manifestly unjust, goodness.

15

McGRATH J:

And that also applies to the 17 year minimum?

TIPPING J:

20 They're sentenced to less than life.

McGRATH J:

There's a manifestly unreasonable –

25 **MR KING:**

To the 17 year one, 104 seventeen years, and yes it does. And likewise it applies to 103.

McGRATH J:

30 So it would apply to both the 10 year and 17 year minimums?

MR KING:

Yes. Well yes, but no one's interpreted the 10 year minimum, the life imprisonment component. No one has said it would be manifestly unjust to impose life imprisonment because of your guilty plea.

5 **TIPPING J:**

You couldn't do that on the 17 year one?

MR KING:

No, that's a big stretch. No the 17 year one which you argue of course is that
10 you get the full discount on the full non-parole period. But of course what is
so significant there, is you've still got the life imprisonment component, so just
because you pleaded guilty and your non-parole period is reduced from
17 years to 13 years, on a full recognition it doesn't mean by any stretch of the
imagination you will get out, because it doesn't trump life imprisonment, you
15 can still do it right.

TIPPING J:

But if it's the character of murder that justifies the 17 years, how do you get
out of that?

20

MR KING:

By saying Sir, that it's the life imprisonment component that is the character of
murder. That's the critical –

25 **TIPPING J:**

It sounds awfully problematic to me.

ELIAS CJ:

But the minimum non-parole periods are discretionary.

30

MR KING:

Well to a large extent they are prescribed by statute.

ELIAS CJ:

Yes, I know. That's the problem.

BLANCHARD J:

Well the more I hear the more I think we shouldn't get into it. We've got
5 enough on our plate without this.

ELIAS CJ:

Unless it undermines the whole system.
10

MR KING:

If it undermines the whole basis of the guidance because if one says
philosophically there's a place for guidance, but it doesn't apply to murder,
then there's an inconsistency there in my submission.
15

McGRATH J:

I would certainly like to hear what the Crown's saying on this in relation to
Mr King's submissions, then to make a decision on whether or not –

20 **TIPPING J:**

I think the guidance philosophy applies the same for murder but the statutory
framework precludes it from being worked through.

MR KING:

25 But the reality is, if you've got someone who's found themselves charged with
what would be a 104 murder regardless of plea or not, so you've got someone
who by definition has committed the most heinous type of crime, to expect
that that person's going to say, right, well I'm going to plead guilty on day 1
because it will reduce my sentence from 17 years to 15 and a half because
30 frankly it's just not going to work. That person who has got themselves in that
situation in the first place is not going to be motivated to plead guilty in that
way so that's the problem and yet we should be encouraging guilty pleas and
not losing sight of the fact that the actual sentence is life imprisonment –

TIPPING J:

The problem lies in the murder area not so much in the other areas. It doesn't, and this is, I think, part of the Chief Justice's, there could be quite an interesting point here as to whether you let the difficulties in the murder area
5 spill over into the other area. I mean everyone accepts you should get a discount for a plea of guilty in the general sense but in some cases in murder you might not be able to do it.

MR KING:

10 Well that's the debate but at the end of the day –

BLANCHARD J:

But that's going to be so –

15 **MR KING:**

– focusing on what the purpose behind –

BLANCHARD J:

– whether or not *Hessell* stands.

20

TIPPING J:

Yes.

MR KING:

25 Yes.

ELIAS CJ:

But it may impact upon the size of the discount properly available by way of judicial mandate.

30

MR KING:

Yes.

ELIAS CJ:

I wanted to ask you, it's sort of aligned to this, the rather – the notion that the Court of Appeal flirts with that sex cases should attract a higher discount because conviction rates are low.

5 **MR KING:**

Yes.

ELIAS CJ:

I mean that's packing quite a lot into utilitarianism.

10

MR KING:

Yes. It is a recognition, though, that if someone is charged with rape, usually there are two witnesses, him and her. Usually there's very little else to support it. Usually it's fought in a narrow area and what seems to be the experience is that the trauma on the victim is huge. You still have, no matter what the outcome of the trial, people don't believe it or do that and the way to avoid that is by someone pleading guilty to it. So that means that they haven't put the Crown to proof. the flip side of the coin, however, though is that *Hessell* rightly, in my submission, said we're not looking at the strength of the case when assessing discounts because effectively you're running a trial for the Judge, the sentencing Judge to decide whether it was a strong case or a weak case. So the best – they properly avoided that but in a sex case where frankly anyone can run it and have a fighter's chance of beating it, as it were, then the guilty pleas are significant because –

25

ELIAS CJ:

I understand that but again it's a question of legitimacy. If the legislature were to take that view –

30 **MR KING:**

Yes.

ELIAS CJ:

– and wear the fact that sentences that were very light might be imposed because of that desired outcome, that’s one thing, but really whether Judges should do it is where I struggle.

5 **MR KING:**

The appellant has rather approached that issue from the perspective of remorse to say that remorse in sex cases is more valuable than remorse in most other cases. But it certainly would be the appellant’s position that you get into difficulties by separating out various crimes and it rather defeats the
10 generality of it.

ELIAS CJ:

Yes.

15 **MR KING:**

The way to accommodate –

TIPPING J:

I’ve always understood –
20

MR KING:

– that is flexibility.

TIPPING J:

25 – Mr King that part of the reason to justify, and I’m not expressing a view whether it’s justified or not, is that the trauma of the trial is usually greater for your rape complainant than say you’re burglary complainant or your –

MR KING:

30 That’s right. There are protections in place though, for example, you know the modes of evidence –

TIPPING J:

Of course but nevertheless –

MR KING:

– the fact that it's closed court, suppression and so on, which a victim who has an axe put through their head on the street, and an act of street violence, doesn't have any of those protections and is arguably as traumatised as someone else. But there is no doubt that the trauma of rape victims, and one only has read victim impact statements on them, is aggravated when a person does not plead guiltily. Effectively calls them a liar. When they have to go through that horrible experience of giving evidence and being cross-examined and so on and that really harps on, I suppose, back to the fact that even a late guilty plea in that context is worthy of significant credit.

ELIAS CJ:

There is –

MR KING:

Part of the flexibility I would submit.

ELIAS CJ:

There is, however, trauma in manifestly inadequate sentences arrived at through application of inflexible guidelines such as these.

MR KING:

Yes. That must be so.

ELIAS CJ:

Yes.

MR KING:

Which is why, again, we say flexibility is so important for everyone. Now can I just have five minutes to address Mr Hessel's case directly?

ELIAS CJ:

Yes.

MR KING:

We have set this out very much in writing. There are a couple of aspects to it. Firstly, we say the sentencing court erred in concluding that Mr Hessell's
5 culpability was the same as that of his co-offenders for the reasons that are set out at paragraph 129 of the appellant's submissions, which is page 37, it is the appellant's submission that he should have been regarded as less culpable. He was not the father of one of the complainants. He did not know the age of them. He thought both girls were 15 years, it turned out that the
10 daughter of the co-accused was only 14. He had not been involved in supplying the complainants with alcohol earlier in the day. He had not met them before. There was no – nothing like the position of trust that the mother held over the victim. His offending could properly be categorised as an isolated and spontaneous incident of poor judgement.

15

The methamphetamine, and that's significant because His Honour increased the sentence, by only one month but increased it nonetheless, because the appellant had a previous methamphetamine related charge. And yet on the summary of facts that he pleaded guilty too the methamphetamine was
20 supplied by the co-accused.

The fifth matter – sorry the sixth matter which is set out there is that it was the co-accused, the mother of the youngest complainant and not the appellant, whom invited the two of them into the bedroom to watch her and the appellant
25 having sex. It was her who engaged the complainants in conversation about the pornographic DVD. It was her who initiated sexual contact with the complainants by taking the elder complainant by the hand and so on.

It's submitted that there was – it should have been recognised that his
30 culpability was less. Now where this runs into is a very significant point, in my submission, and that is that this appellant, Mr Hessell, pleaded guilty to an agreed summary of facts. Now in some respects that summary of facts was markedly different from that of his co-accused but Mr Hessell, of course, just like a co-accused out of court statement in the normal run of mill trials, he had

no input into. He wasn't there and had no opportunity to respond. It was a separate sentencing hearing. So the proposition is that if the co-accused was fortunate enough to negotiate a more favourable summary of facts, that put him in a poorer light and her in a brighter light, then that was her advantage but that should not have been used against Mr Hessell. Justice – the co-accused was entitled to be sentenced on the summary of facts to which she had pleaded guilty, without reference to anything he'd said about the event, in the same manner, it's submitted, Mr Hessell was entitled to be sentenced on the summary of facts that he'd negotiated which had those particular factors that are set out in the roman numerals 127 on page 37 and 38.

So it's submitted that one, that firstly the Court erred by concluding his culpability was the same as hers. Secondly, the Court erred by increasing his starting point by one month to reflect the previous methamphetamine charge. Thirdly, it is submitted the sentencing Court erred in not sentencing him strictly according to his summary of facts but by effectively adopting a hybrid between the mother's and his and noting the distinction. Fourthly, and most significantly of course, the Court erred in two critical respects. Firstly, by giving insufficient credit for his guilty plea –

ELIAS CJ:

So where is the – I haven't read –

MR KING:

The co-accused's summary?

ELIAS CJ:

No, no I'm looking for the sentencing notes. Where do we find them?

30

MR KING:

They're in the casebook, Your Honour, under tab 5 at page 44. The summary of facts that –

ELIAS CJ:

Where is the discount referred to? Oh yes, I have seen this.

MR KING:

5 Yes. It's really from page 51 onwards where His Honour increases it for his
previous methamphetamine by one month, it says three years. Now what
happened is Justice Potter in sentencing the co-accused had adopted a
starting point of three years. His Honour in sentencing Mr Hessel adopted
10 the same starting point saying that the culpability was equivalent because he
was an older person and so on. In my submission that just doesn't bear
scrutiny. That the mother's position must have been seen to be more severe
than that of him. He didn't have that breach of trust and it's a greater breach
of trust one simply cannot imagine, a mother being involved in a sexual
violation –

15

ANDERSON J:

But he was aware –

MR KING:

20 – or the sexual exploitation –

ANDERSON J:

– that one of them was the daughter of his paramour?

25 **MR KING:**

He was but he believed they were both 15, for what it's worth. I'm not saying
he deserves he medal, he doesn't, he deserves a good, hard kick. But in my
submission the mother's culpability should be seen as worse than his.

30 **TIPPING J:**

And you're making a point about the plea. He got four months off, down from
three years to two years eight months, is that right?

MR KING:

Yes. Well it went up a year so it went to three years one month.

TIPPING J:

Oh right.

5

MR KING:

And then it was reduced to two years, eight months.

TIPPING J:

10 So he got five months off 37 months?

MR KING:

Yes and that's a credit in the region of 10 percent which included everything. And His Honour declined to give any credit at all for remorse but, and you'll see, I won't take the Court through it now, I'm conscious of the time, but we've set out in the written submissions the various references in the pre-sentence report and the letter that Mr Hessell had provided to the Court were demonstrative of remorse and a desire to attend rehabilitation and so on. Now – so the matter is there, and those are the arguments really those – that there was insufficient credit for the guilty plea and no credit for remorse. It shouldn't have been up by a month, I know it's only a month, but a month's a month –

15

20

ANDERSON J:

25 But wrong in principle?

MR KING:

Yes. Exactly. Now the Court of Appeal finish it by dealing with the issue of apparent disparity by saying, well in real terms the co-accused might end up under the regime longer than him because we've got home detention for 12 months and he would be eligible for parole at an earlier stage. He's still in custody now. He's been denied his parole and it seems likely, from the indications that have been given, that he will serve very nearly all of that two years and eight months in prison whereas the co-accused, the mother,

30

the one who plied the complainants with alcohol, the one who introduced them to the complainant, the one who provided the pornographic video, the one who invited them into the room, having provided the methamphetamine to Mr Hessell, having initiated the sexual contact with the two complainants,
5 receives a sentence of home detention.

TIPPING J:

10 Of course this is part of the problem with home detention, isn't it, that that watershed of two –

MR KING:

It skew-wiffs, it does.

15

TIPPING J:

Yes.

MR KING:

20 So someone gets two years and that is commuted to home detention then that on a rough scale is 12 months Home D, whereas if someone doesn't, then so you can have –

TIPPING J:

25 Are you saying that he should have received a sentence that was amenable to home detention?

MR KING:

30 Well he did, in fact, because of the transitional provisions of *R v Hill* and so on. Section 57 of the transition provision still gave the Court jurisdiction to impose home detention notwithstanding –

TIPPING J:

I see.

MR KING:

– a final sentence of over two years' imprisonment.

5 **TIPPING J:**

Right.

MR KING:

10 My submission is that in all of those respects the sentencing Court was wrong in principle. Unless there are any questions? Can I just check with Mr Lithgow? Thank you.

ELIAS CJ:

15 Thank you Mr King. We'll take the lunch adjournment.

COURT ADJOURNS: 1.03 PM

COURT RESUMES: 2.16 PM

ELIAS CJ:

20 Yes Mr Mander?

MR MANDER:

May it please the Court. In my submission there is no contest that guideline decisions, issued by an Appellant Court, are seen as a positive and good thing and in my submission there is no basis to suggest that the tradition of
25 guideline judgments issued by the Court of Appeal do not provide sufficient flexibility and do not acknowledge the discretion available to a sentencing Judge and that the sentencing process will always be an evaluative one. And in my submission, the Court of Appeal's guideline in this case adheres to those principles of flexibility and adheres to the
30 acknowledgement that a sentencing Judge will always be involved in an evaluative exercise.

Guideline judgments in this country have always been acknowledged as providing guidance only and the guidance that has been provided by the Court of Appeal in respect of discount for guilty pleas, in my submission,
5 follows other like jurisdictions in giving effect to the recognition of guilty pleas, as is required by statute.

In my submission, the *Hessell* guideline is issued by the Court of Appeal, had as its prime objective, the need to provide clear and predictable guidance in
10 order for sentencing Courts to be able to exercise their discretion in the knowledge that their approach was a consistent one, but without fettering the Judge's discretion and without giving rise to rigidity and in my submission, it has not and it would not give rise to unjust results.

15 The approach taken by the Court of Appeal, in my submission, is consistent with the now accepted and acknowledged, what is described as the *Taueki* sentencing methodology and some overseas jurisdictions described as the two step process and in my submission, is in accord with the requirements of the Sentencing Act, the purposes and principles of the Sentencing Act, and of
20 course, the need to acknowledge and provide for, as a mitigating fact, the entry of plea. Not just the entry of plea, but as provided for in the statute, when the plea was entered. Hence, in my submission, the development of the sliding scale to give effect to the words of the statute.

ELIAS CJ:

25 You don't need, of course, a sliding scale to give effect to the words of the statute Mr Mander.

MR MANDER:

No, that's certainly correct Ma'am –

ELIAS CJ:

30 And when does require you to focus on when the plea was entered?

MR MANDER:

The statute does require that, yes Ma'am.

ELIAS CJ:

Mmm.

5 **MR MANDER:**

And in my submission, there is an obvious correlation between the timing of the plea and the rationale or justification for the credit being afforded. That's firstly the utilitarian benefit, the saving in cost and time to the Court, which of course is going to be measured against a continuum of time from
10 when a person is first charged.

Secondly, the reduction or mitigation of stress and inconvenience to witnesses and to victims, who have these Court proceedings hanging over them, which again is to be measured against the length of time that the proceeding is
15 indeed hanging over them and thirdly, in my submission –

ELIAS CJ:

These victimless, so-called victimless crimes. I'm not saying that any crime is victimless, but because the standards apply to cases in which there aren't victims of the sort that you're describing.

20 **MR MANDER:**

No, but in my submission, the rationale is wide enough to, for instance –

ELIAS CJ:

Yes.

MR MANDER:

25 – to cater for the police officer who has to put a day aside in his diary to be in Court, which he wouldn't otherwise be available to do other things. I put that in the category of inconvenience to the professional witness, as perhaps the stress that is associated.

MCGRATH J:

You might have counted that already as a utilitarian factor, in terms of public resources.

MR MANDER:

5 Certainly, in terms of public resources in general, the utilitarian factor, when it is discussed, seems to be discussed in the context, in the context of the Court, the saving to Court time, the fact that by a person pleading guilty, they facilitate quicker justice for another accused person, who hopefully will be able to get their matter on earlier, because people are pleading earlier, who are
10 indeed guilty.

So my submission, firstly there is nothing wrong with the issuing of a guideline, in of it itself, and there is nothing wrong in the issuing of a guideline in relation to this issue of discount for guilty plea.

15

The issues that have been identified are discreet ones. The first relates to the issue of first reasonable opportunity. Clearly, in my submission, the determination of first reasonable opportunity is going to depend upon the circumstances of the individual case. There is no getting away from that in my
20 submission. But that statement by itself does not provide any guidance and does not provide any assistance to lower Courts.

In my submission, the Court of Appeal was attempting to provide some measure, some weigh point at which the various circumstances, which must
25 be assessed in relation to the individual case, is to be examined against. It has to be remembered that the Court of Appeal's judgment was to have application across the complete spectrum of criminal proceedings, ranging from the most simplest summary matter to the most complicated indictable matter, which in of itself, may be an impossible task. So, in my submission, it
30 may be that the Court of Appeal's guidance is couched in such broad terms and such stark terms, because it's an appreciation that the guidance that can be provided has to be of a very basic and simple type.

TIPPING J:

There, and I suspect, might lie some of the difficulty Mr Mander, because if you look at paragraph 15 of the Court of Appeal judgment, which is what everyone will be inclined to focus on, where that little table with heading is set out, that's on page 36 in the case on appeal. First heading, first reasonable opportunity. Second heading, at status hearing or first callover. That, coupled with the discussion in paragraph 17, strongly suggests that if you reach the second heading, it can't be first reasonable opportunity.

MR MANDER:

At the status hearing?

TIPPING J:

Yes.

MR MANDER:

Or first callover.

15 TIPPING J:

Because this is segmented into those three categories, or benchmarks as they are called, and then in 17, "Because reductions are made on a sliding scale, a guilty plea entered in the period between first reasonable opportunity and status hearing," et cetera. It, they may have not meant it to come through like this, but it has all the appearance of a real sort of box type. If you are within this box, it's so much. If you're between this box and this box, it's halfway. If you're in the next box –

ELIAS CJ:

You can round it though.

25 TIPPING J:

You can, but what I think is problematical here is perhaps as much its mode of presentation, as the concepts lying behind it. Now, you could easily see how

people are just going to apply this, saying, well, you're not in the first box because you're in the second.

MR MANDER:

I acknowledge Your Honour's point. I would make the submission that these
5 weigh points, as Your Honour has referred to them earlier this morning is an
apt description. In my submission, those weigh points are proper ones. In my
submission, one cannot expect in the, in respect of an indictable offence, to
get the maximum discount of 33 percent, if after committal for trial, which is
what first callover denotes, nor, in my submission –

10 **ELIAS CJ:**

What's the problem, what's the problem with that, the practical problem, why
couldn't one? If one is being brutally utilitarian?

MR MANDER:

Because in my submission, to be fair to the other accused, who has made an
15 informed plea –

ELIAS CJ:

But that's the issue isn't it? One accused may be in a position to enter an
informed plea, another may not.

TIPPING J:

20 See, this looks as though the Judge can't listen to an argument., I know
Judge, I'm a prima facie in the second box, but actually you should treat me
as being in the first box because, because, because.

MR MANDER:

Well, in my submission, if I can first just deal with that discreet point.
25 Paragraph 19 does provide or does contemplate a situation where a Court
may not follow the guideline.

TIPPING J:

I accept that, but that really, this is, if you don't follow the guideline in such a case, you're really undermining the guideline, rather than not following it in an individual case.

5 MR MANDER:

Well it would certainly Sir be an exceptional and the Court of Appeal no doubt is acknowledging it would be an exceptional situation, whereby those three bands didn't apply. The submission that I make is that those are realistic cut off points. Taking indictable example. In my submission, if the
10 person is not in a position to plead guilty before committal, it shouldn't have reached that point. I acknowledge immediately that no person should be entering a plea prematurely. That the plea must be entered on an informed basis, with proper legal advice.

ANDERSON J:

15 What's the magic about these weigh points, and that they exist as weigh points, that gives them some sense of utility, but apart from that, what's so magic about them, three weeks before trial, why not two weeks, or nine weeks, or, what's the point?

MR MANDER:

20 Well, the three weeks before trial, and my submission is difficult, but –

ELIAS CJ:

It is arbitrary really isn't it, it's the Court's best shot?

MR MANDER:

It is.

25 ELIAS CJ:

At a rule?

MR MANDER:

At a rule, at dare I say it, guidance. But in my submission, it's attempting to reflect those three justifications, the proceeding hanging over witnesses and victims, the utilitarian benefit to the system and in my submission, there is a
5 correlation between remorse and time in a plea.

MCGRATH J:

Are you really saying that the flexibility comes because you can depart from the guideline, but you can, should have some rigidity in the guideline markers themselves?

10 **MR MANDER:**

In my submission, there needs to be some consistency. There needs to be some skeletal outline against which one can measure these three justifications for the deduction itself.

MCGRATH J:

15 So you have to have, on the scale, bright lines to mark the difference between the two positions, rather than broad bands, if you can put it that way.

MR MANDER:

Well, in my submission, in relation to the middle ones, status hearing in callover, but those are significant steps in the procedural chain, in my
20 submission and they do stand, or they are recognised, in my submission, as obvious demarcation points. For instance, the status hearing in relation to a person charged with a summary offence. A person has acknowledged that they may plead guilty, that they want to enter into a negotiation and wish the Judge to be involved in that exercise. That person is quite distinct from
25 another person who has had disclosure, who has had legal advice and wishes to plead guilty. Doesn't wish to negotiate with the Court, or with the prosecution, but upon receiving proper legal advice, been properly informed, wishes to plead guilty and in my submission, it's an inconsistent approach that that person gets the same credit as the person who wishes to move further
30 down the procedural chain and wishes to discuss the possibility of pleading

guilty, which in itself uses up judicial time and is a cost, is a further stage down the track and of course, obviously, there's the time factor.

ELIAS CJ:

5 So is it the plea bargaining element that the Court of Appeal clearly set its
facile against, that you also think is something to be avoided?

MR MANDER:

Yes, in my submission, the plea bargaining aspect of it, it's a formal, I'm not sure if plea bargaining is the right, right term, but it's involved in the Court process.

10 **ELIAS CJ:**

But discussion about penalty I suppose, yes.

MR MANDER:

15 There can always be discussion about plea bargaining between the parties properly, not about sentencing between the parties. But it's involving the
Court in a further or later stage in the proceedings.

TIPPING J:

Is a plea bargain, in this terminology, encompass both what is the appropriate charge and what is the appropriate penalty?

MR MANDER:

20 In terms of –

TIPPING J:

Because we all know full well that there was cases that are overcharged at the start, for maybe valid reasons, but are both of those swept up in this expression, plea bargaining?

25 **MR MANDER:**

In my submission they, they are, in terms of a status hearing.

ELIAS CJ:

Well, in terms of *Hessell* because the Court of Appeal both says you can't expect a sentence indication and to get the maximum and also because they say you can't, you must indicate unmistakably your intention to plead to a lesser charge if you maintain that the charge is too high.

MR MANDER:

Indeed.

ELIAS CJ:

So it's *Hessell* that brings about that condition?

10 **MR MANDER:**

It brings clarification to what was always a very hazy area, relating to the entry of plea as the result of a plea bargaining and in my submission, what the Court of Appeal has made clear is that an individual's position is retained. The credit attaches to the willingness to plea and if an accused person gives notice that they are prepared to plead guilty to this particular offence and subsequently they are vindicated, then they are entitled to the credit that would have attached to the formal indication of their willingness to plead earlier in the proceeding.

ELIAS CJ:

20 It's quite a change isn't it, from the accusatory system of trial. It is treating the and I think Mr Lithgow perhaps brings this on himself a bit by his emphasis on dignity, but it is treating this very like civil litigation. If you make a wrong call, you should wear the consequences.

MR MANDER:

25 Well, in my submission, it is not a question of wearing consequences. Everyone's entitled to go to trial. You're getting a discount from the sentence that otherwise would have been imposed and if you have got proper legal advice, if you have been properly informed, in other words, the

disclosure obligation has been discharged and there is nothing to prevent you from entering the plea at that time, why isn't the plea entered?

ELIAS CJ:

5 Is it correct, is it accurate to see this only through the lens of discount, because the effect is that those who plead at a later stage will have higher sentences. In other words, you can say that the appropriate sentence for an early plea, is less. I just really wonder whether it's right to say that it's just put too much on the fact that it's expressed as a discount.

MR MANDER:

10 Well, in, that gets back to a very fundamental issue -

ELIAS CJ:

Mmm.

MR MANDER:

15 – about whether or not you're penalising a person for pleading not guilty, or you are giving credit to a person –

ELIAS CJ:

Yes.

MR MANDER:

– for pleading guilty.

20 **ELIAS CJ:**

But that's a debate that's never been held by the political branch of government and the judiciary is taking it on itself to make this assessment.

MR MANDER:

In my submission, the starting point is the Sentencing Act, which says –

ELIAS CJ:

Well, I was going to take you to the Sentencing Act, because nobody's really taken us to it, but yes, go ahead, which says?

MR MANDER:

5 Which expressly states that entry of plea is a mitigating factor.

ELIAS CJ:

Absolutely and in subsection (4) of section 9 says, "That no factor referred to in these subsections must be given greater weight than any other factor the Court might take into account," and the plea is simply one of a number of
10 factors identified. What is more, if you take the, and I'd be grateful for your submission on this, if you take section 9, the aggravating the mitigating factors, and look at it in the context of the purposes and principles of sentencing in sections 7 and 8, I'm not sure that this emphasis on guilty plea, is warranted. That the utilitarian, so-called utilitarian dimension
15 doesn't seem to me to come through, if you look at section 9 in the context of the purposes of sentencing and the principles of sentencing. And I really would be grateful for your exploration of that.

MR MANDER:

20 Well the first submission I would make, I take Your Honour's point, but the first submission I would make is perhaps the obvious one, and that is that for many years, the guilty plea has been recognised as providing a significant discount from the sentence that would otherwise be imposed and hence the Court of Appeal cases that have been included. The more recent ones –

25

ELIAS CJ:

Have you got any older ones?

MR MANDER:

30 Well the oldest –

ELIAS CJ:

Is *Mako* is it?

MR MANDER:

The oldest *R v A* (1997) which is in volume 2 at tab 33.

5

ELIAS CJ:

10 And of course, sorry, this is a new Sentencing Act which does purport to bring together all the principles and arrange them, so in some respects, one should look at it afresh perhaps. Sorry page?

MR MANDER:

Page – its page 6, it's at tab 33, page 647, line 38.

15

ELIAS CJ:

What other cases did you want to take us to?

MR MANDER:

20 The cases that follow Ma'am, they're more recent cases *R v Wilson* [2008] NZCA 496 and *R v Walker* [2009] NZCA 56 which are just further examples of the recognition of the plea and importantly that the Court of Appeal –

ELIAS CJ:

25 I'm just grasping for, and there probably is, some reasoned decision which indicates how we've arrived at such emphasis on this one factor. There's nothing else that you can point to really that in this list of section 9 that gets anything like a comparable discount is there?

30 **MR MANDER:**

No there's – no.

ELIAS CJ:

No.

MR MANDER:

Co-operation with police turning Queen's evidence does attract very substantial discounts.

5

TIPPING J:

I was just going to observe perhaps, that it's the universality of pleas of guilty,
10 the fact that they are –

ELIAS CJ:

Yes.

15 **TIPPING J:**

That has probably encouraged this concentration on them, because it's here that the greatest level of consistency or inconsistency is likely to shine.

MR MANDER:

20 Yes. Certainly the English guidelines, specifically, expressly states that it's not a mitigating factor, the deduction's not afforded on the basis of mitigation. It – the guideline is perhaps worth going to that.

ELIAS CJ:

25 It's simply a legislative acceptance of utility to the state which has then been provided for through that legislative process.

MR MANDER:

Indeed. And then at the other extreme you have the High Court of Australia in
30 *R v Cameron* (2002) 209 CLR 339.

ELIAS CJ:

I wanted – if you wouldn't mind to take us to *Cameron*, because it did seem to me going through, that there was much of interest in that.

MR MANDER:

Well in *Cameron* of course the Australia High Court was dealing with the Western Australian statute, which expressly stated that it was not an
5 aggravating feature that the person, the person would not be penalised for not pleading guilty. *Cameron* is found –

ELIAS CJ:

32.

10

MR MANDER:

Thank you.

ELIAS CJ:

15 So it's against a statutory discount, is it?

MR MANDER:

It is. Well, I'll just get that – the Western Australian statute provided for a discount for guilty plea, but it also expressly stated, and indeed the statute is
20 in volume 1 at tab 15 and the statute, the Sentencing Act specifically stated, “An offence is not aggravated by the fact that (a) the offender pleaded not guilty to it, but it also provided us a mitigating factor, a plea of guilty by an offender is a mitigating factor and the earlier in the proceedings that it is made, or indication is given that it will be made, the greater the mitigation.”
25 The High Court of Australia in *Cameron* –

ELIAS CJ:

So it's quite comparable really to our Sentencing Act structure because pleading not guilty is not an aggregate baiting factor in the Sentencing Act, but
30 the time at when you enter the plea is a mitigating factor.

MR MANDER:

Indeed.

ELIAS CJ:

Yes.

MR MANDER:

5 But the High Court in *Cameron* attempted to reconcile those two provisions
and held that it could not be – they could not be reconciled on the basis of
justification for a credit on the basis of objective utilitarian benefit to the
system, because in effect you were therefore aggravating the person's
10 offence who had not pleaded guilty because they had not provided that to the
system, but the High Court of Australia however did say that what could be
recognised as a subjective mitigating factor, was that the accused by pleading
guilty had facilitated the course of justice.

ELIAS CJ:

15 Oh yes.

TIPPING J:

That's a very sort of – well I'll say no more.

20 **ELIAS CJ:**

Weasel word.

TIPPING J:

Well no, it's just – it's a very, very, very fine distinction.

25

MR MANDER:

I agree.

McGRATH J:

30 What page were you at? Can you give us a page reference in that?

MR MANDER:

I'll just go to my written submissions.

ELIAS CJ:

It's at page 345, at about, just under line 19.

MR MANDER:

5 Thank you Ma'am.

McGRATH J:

So three five is it?

10

ELIAS CJ:

Three, four five, "Once it is appreciated". I think that's probably what you're referring to Mr Mander is it?

15 **MR MANDER:**

Yes, I'm just trying to get the quote. Three four three –

BLANCHARD J:

20 The head-note actually, misses out the word "simply" and thereby rather distorts the meaning of what's being said.

MR MANDER:

At 343, specifically at line 14.

25 **McGRATH J:**

Paragraph 14 is that, yes.

MR MANDER:

Sorry, paragraph 14.

30

BLANCHARD J:

The head note's picked out paragraph 14, but not the amended version in paragraph 19.

ELIAS CJ:

What sort of discount was in issue here?

TIPPING J:

5 He got 10 percent and the High Court said he should have got more because he pleaded, only after this drug had been correctly identified.

MR MANDER:

That's correct.

BLANCHARD J:

It appears that they go as high as 35 percent.

10 **MR MANDER:**

Similarly, in New South Wales in *R v Thomson* [2000] NSWCCA 309, and subsequently in *R v Sharma* (2000) 130 A Crim R 238, the approach of the New South Wales Criminal Court of Appeal is that the discount attaches only to the utilitarian value of the plea and again, it is not a matter of mitigation as such, it stands apart from the assessment of mitigating factors, which the Criminal Court of Appeal are at pains to point out, is dependent upon the assessment of the individual case and certainly remorse is not part of that equation.

ELIAS CJ:

20 Mr Mander, I see that the quote at the top of page 353 from *R v Wong* (2001) 207 CLR 584 at 611-612, which echoes what's been said in other jurisdictions about the apparently equal, unequal, well, the equal, the unequal effect of apparently equal laws. It is critical, isn't it, that the, that this assessment be contextual?

25 **MR MANDER:**

I accept that Ma'am, in so far it's a pre-requisite to the proper entry of a plea, that a person has been properly advised and has been provided with sufficient

information to responsibly enter a plea, otherwise the Court ought not accept it.

ELIAS CJ:

5 Yes. If the Court of Appeal had said, first available opportunity means the point at which the accused is in possession of sufficient information and properly advised, there really wouldn't be as much problem would there?

MR MANDER:

No there wouldn't. The submission I would make however, is that the term initial disclosure can be misunderstood.

10 **ELIAS CJ:**

Yes, yes, I was going to ask you about that.

MR MANDER:

And in my submission, it is very important that there is an appreciation of what initial disclosure entails.

15 **ELIAS CJ:**

I think it's in your submissions isn't it?

MR MANDER:

It is Ma'am.

ELIAS CJ:

20 There's reference somewhere and it's to really all the documents, all the interviews.

MR MANDER:

Mandatory initial disclosure, which must be served within 21 days is in essence, the summary of facts and the accused's previous convictions, if any.
25 But the other part of initial disclosure, is material that has been requested by the accused to be supplied and that can include witness statements, the

accused's transcript, really, the substantially, the prosecution, certainly the core of the prosecution case. Now, the submission that I make –

ELIAS CJ:

But he has to request it.

5 **MR MANDER:**

It must be requested.

ELIAS CJ:

So, if he's not properly advised, he's, you can't really rely on the, I had thought that mandatory initial disclosure was more substantial, but it's only on request.

10 **MR MANDER:**

It's only on request Ma'am, section 12.

ELIAS CJ:

Which provision is that, that's the summary –

MR MANDER:

15 It's the Criminal Disclosure Act 2008. Again, I think, as I recall, it has been included in the bundle, tab 8 at volume 1. I'm sorry, that's, no, it is there, section 12. Included in the initial disclosure which must be served within the 21 day period, is also a notice to the defendant of their right to apply for further information, under subsection (2) and subsection (2) provides that the
20 prosecutor, must if requested by the defendant in writing, and then lists a whole raft of matters, quite significant and substantial matters.

TIPPING J:

Isn't that related to, oh I see, it's not restricted to the Youth Court.

MR MANDER:

25 No Sir.

TIPPING J:

And that has to be given, whether requested or not?

MR MANDER:

No Sir, it does. There must be a request for it.

5 **TIPPING J:**

Oh.

MR MANDER:

But it does come under the heading of initial disclosure as opposed to section 13, which is full disclosure.

10 **TIPPING J:**

Where's the request, because on its face it appears to be mandatory and unconditional, but is there some earlier section that says you –

MR MANDER:

Sorry, sorry Sir.

15 **TIPPING J:**

No, if requested.

MR MANDER:

Subsection (2) in writing.

TIPPING J:

20 Oh, I see. Sorry, I hadn't turned to the page.

MR MANDER:

25 So, the submission that I make is that, if for example a person is facing a very serious offence, then clearly they will need more information to enter an informed plea, than just the summary of facts. It is incumbent on the accused to make a timely request for information in order for the person to be fully informed, in order for a decision as to plea to be made. Now, if an accused

representative at the second calling of the matter for example, tells the Judge, this is a crime of murder, or this is a crime of serious fraud, I've just received as a result of my request for, under subsection (2) for the statements and for various pieces of information, I'm not in a position to properly advise my client
5 as to entry of plea.

In my submission, it would be obvious that the Judge would further adjourn the matter off, in order for that type of inquiry, that type of exercise, to be undertaken and in my submission, the Court of Appeal, when it referred in its
10 judgment to first reasonable opportunity being further adjourned, paragraph 29, "If either of those depths and that's a reference to initial disclosure and legal representation have not taken place, the Judge may be justified in considering a latter time as the first reasonable opportunity to plead guilty."
15

And in my submission, some of the feedback, I can put it no higher than that, that has been included in the affidavit, would suggest that Judges are still, are not robotically applying second appearance as being the only time when first opportunity, first reasonable opportunity is being assessed, but quite properly,
20 as no doubt Courts were doing previously, are assessing the merits of the case in front of them and making a determination based upon that.

BLANCHARD J:

Typically, when will that second appearance occur? It will be quite soon after the initial arrest won't it?
25

MR MANDER:

Sir the best way I can answer that is to refer the Court to the Chief District Court Judge's practice note which is in volume 4 at tab 53. Because it's the combination of the new part 5, to the
30 Summary Proceedings Act and the Chief District Court Judge's practice note –

ELIAS CJ:

Sorry, when did part 5 and 5(a) come into effect?

MR MANDER:

29th of June last year. I recollect that was the date.

5

TIPPING J:

It's the date in paragraph 2 of the practice note anyway.

MR MANDER:

10 Yes.

ELIAS CJ:

And the subsequent legislation looked to, is that part of – is that the criminal simplification stuff. Is there a bill on any of this at the moment, or is it – sorry I

15 should know this but I –

MR MANDER:

I can tell Your Honour there's a Cabinet paper which is just about due to be received by Cabinet in the next fortnight.

20

ELIAS CJ:

Right, and it is expected to deal with status hearings and –

MR MANDER:

25 Yes it is Ma'am.

ELIAS CJ:

And sentence indications?

30 **MR MANDER:**

Sentencing indications will be given statutory effect.

ELIAS CJ:

Is this appeal brought at an inopportune time then? I suppose there's no perfect time, there's always legislation possible, but it does look as if we might be on the edge of having to factor in statutory recognition of the procedures that Mr Lithgow and Mr King were saying need to be brought into the framework, the *Hessell* framework.

MR MANDER:

The criminal simplification project is, as Your Honour no doubt knows, is a massive exercise which completely changes the procedural landscape of criminal law and my recollection of the papers that I have read, is that it's unlikely to be in force for another 18 months to two years, to give the Court some sort of timeframe.

TIPPING J:

Mr Mander, I wonder if I could trouble you to go back to the Criminal Disclosure Act, section 12, which is on tab 8 of your volume 1. 12(1)(b) requires the prosecutor to give the defendant a summary of the defendant's right to apply for further information under subsection (2) before entering a plea. So that seems to suggest that you've got a right to get this further information if you ask for it, before you enter a plea. So you could hardly be penalised for not entering a plea before you've got it.

MR MANDER:

Indeed Sir, indeed and that was the Law Commission's approach to this legislation in terms of making a dividing line between initial disclosure and full disclosure.

TIPPING J:

Well how can you logically go back before initial disclosure is complete and say you don't – you're at risk of not getting a full discount if you leave it until that time?

MR MANDER:

Well that's my submission, that you're not at risk.

TIPPING J:

But you might be under this second appearance mightn't you?

5 **MR MANDER:**

No, my submission is that if you appear at the second appearance, and say, "That initial disclosure has not been completed, I've written to the prosecution and requested the various items listed, in subsection (2) you cannot be penalised.

10

TIPPING J:

But you could end up though, if the Judge wasn't aware of that at sentencing, or –

15 **ELIAS CJ:**

What's the timeframe for compliance, and does it trigger, does it trigger another Court event?

MR MANDER:

20 It will trigger another Court event.

ELIAS CJ:

Yes.

25 **MR MANDER:**

And the subsection (4), it means, sorry Ma'am, it's subsection (2), "As soon as is reasonable practicable to describe", so it's got quite a flexible – the prosecution is under an obligation of duty to disclose as quickly as is reasonably practicable. So if they haven't –

30

TIPPING J:

But shouldn't a guideline at least draw attention, specifically to this feature, so that it's not overlooked? Because this is about the first statutory that one has come across, or one might say stumbled across, in the course of discussion.

I'm not criticising you Mr Mander, I'm just saying, I know it was in your – but it's very short of statutory guidance here isn't it? But this is one of them, this is at least something where you can say, "Well you couldn't possibly be penalised for not entering a plea until this has happened."

5

McGRATH J:

Mr Mander does that – I'm sorry I don't want to interrupt you, but does that mean in terms of paragraph 29 of the Court of Appeal's judgment, the last sentence, Court of Appeal may not have put this strongly enough, and it says, 10 "If either of those steps has not taken place, the Judge may be justified in considering a later time". Doesn't it really mean the Judge has to consider a later a time, has to adopt a later time?

MR MANDER:

15 I would acknowledge that Sir.

ELIAS CJ:

Well it would have to be tweaked really, I mean that's quite misleading isn't it?

20 **McGRATH J:**

But this is really, your argument on first reasonable opportunity is in fact a, is not a fixed concept, it's a concept that has to move and at least in accordance with the statutory provision.

25 **MR MANDER:**

Indeed Sir.

BLANCHARD J:

Mr Mander just looking at the Chief Judge's practice note, it would appear that 30 if the defendant doesn't indicate a plea of guilty at the second appearance, or indicate that they want to apply for some further disclosure, or say they haven't received the initial, then committal is going to proceed automatically and the next time the defendant comes before a Court, will be at a post committal conference. This seems to me that it may be a little early therefore,

given the speed at which the matter is proceeding and the possible lack of further contact with the Court it may be a little early to be saying that first reasonable opportunity doesn't extend through to that first committal, post-committal conference.

5

McGRATH J:

And that's only before a registrar.

10

BLANCHARD J:

And that's only before a registrar actually, quite right.

MR MANDER:

15

I acknowledge Your Honour's point and that is why for instance, in Wellington there has been this creation of this third plea indication.

BLANCHARD J:

Yes, in other words, the Judges have recognised that there's a problem with *Hessell*.

20

MR MANDER:

25

Well in my submission, with the greatest of respect to the Chief District Court Judge, it's not a problem so much with *Hessell* as with the practice note. Because the practice note doesn't contemplate, it doesn't appear to contemplate, although to be fair, at the top of the second page, it does refer to, "Unless the Court considers a further remand is necessary."

BLANCHARD J:

That's a different category of the case.

30

MR MANDER:

That relates to where there's been an election.

BLANCHARD J:

That's charging summarily, been charged summarily.

MR MANDER:

An elect Sir.

5

BLANCHARD J:

With an electable offence, yes.

10 **MR MANDER:**

I can't understand why the Court considers a further remand is necessary in the situation where a person is elected, the Court wouldn't think or wouldn't have some discretion for a further remand where the charge has been laid indictably, but –

15

TIPPING J:

Perhaps we should be embarked on a plea of guilty simplification project Mr Mander. This is all getting extraordinarily complicated, isn't it?

20 **MR MANDER:**

It is very complicated Sir.

ELIAS CJ:

25 Mr Mander I'm very concerned that if there is in the pipeline, and I realise it's very early days, but if there is in the pipeline, a huge project which is going to confer a right to sentence indication and provide for status hearings, what was the hurry for the Court of Appeal in issuing this guideline judgment?

MR MANDER:

30 I'm not sure I can answer that Ma'am.

BLANCHARD J:

The Crown wasn't requesting it.

ELIAS CJ:

No.

MR MANDER:

5 No the Crown didn't request it and of course the new committal regime had literally only been in place a matter of months, if not weeks.

BLANCHARD J:

But we have *Hessell*, everyone's having to adopt it, or apply it.

10

MR MANDER:

Indeed Sir.

ELIAS CJ:

15 We could disallow it. We could go back to the previous law, leaving this huge reform to take effect, because it can't help but impact on it. So as what I was feeling for, what's the problem with the previous law? Where early pleas are taken into account under section 9?

20 **MR MANDER:**

In my submission the perceived problem was one of inconsistency in the provision of credit.

ELIAS CJ:

25 Well how is that – how is that demonstrated? I can readily accept that there may have been variations in terms of the maximum available, and it may be that some indication from the Court of Appeal of what the maximum discount available is, would be helpful, but why was it necessary to go to these resting points and to elaborate on this sliding scale?

30

MR MANDER:

In my submission, and it's very much a theme of the criminal simplification project, is that the real worth of a plea is an early plea.

ELIAS CJ:

Yes. But Parliament can factor that in, so we don't have Judges legislating these things.

5 **TIPPING J:**

Well they have implicitly when they said whether and when.

ELIAS CJ:

Yes.

10

TIPPING J:

But the real problem in my mind, with respect, is the sort of straight-jacketing, or apparent straight-jacketing. You say Mr Mander, it isn't really a straight-jacketing because they're all these, treat them only as guidelines and so on, but I suspect de facto in busy list Courts and busy other sentencing Courts, sentencing Judges would seize onto this lime manna from heaven and simply sort of give it a quick look and that's it. I don't mean that in any way pejoratively, it's just the way things work.

20 **MR MANDER:**

In my submission Sir in reply, that in busy list Courts there is a need for this guide, because defence counsel can, with some surety say, "You'll get a 33 percent reduction." The legal aid lawyer can say, on a disqualified driving charge, "This is what you're entitled to," and that, in my submission, is the benefit that's provided by the guideline.

25

TIPPING J:

Yes, well that would be so from the point of view of saying, "Well the maximum is so much and if you enter an early plea you're likely to get the maximum," but all these subtleties and then having to read it with this other Act and with the practice note and so on and the inconsistencies between them and so on, is just awkward.

30

ELIAS CJ:

And if – the indication that if you want to have a sentence indication, you're going to be penalised for that, or if you want to go – if you're going to want to challenge the admissibility of evidence.

5 **TIPPING J:**

I would've thought that a plea always has value. It has its maximum value when it's early, but I would be rather resistant to the idea that it really tails off to having virtually no value, sort of, within three weeks of the hearing.

10 **MR MANDER:**

Well Sir, I have to say my initial reaction, particularly as a former Crown prosecutor was a similar one, that if on the morning of a trial when I had three complainants in the witness room and the accused was willing to plead guilty, I would try and grab onto that as quickly as I could and if it mean
15 giving him quite a substantial credit, in my submission in relation to that individual case that's a great thing.

TIPPING J:

It would always depend on the circumstances as one has to say. I mean if it
20 was a short sharp trial, almost certain guilt, no great issues, no great resources, then very little. But if it was a long, long trial with real angst for a lot of people, different story.

MR MANDER:

25 The difficulty in my submission is that, what about the next trial? Why hasn't that person that has pleaded that morning to these serious sexual cases, where the witnesses are there in the witness room primed and ready to go, why, in the next case, the next accused will know, I can wait, I can and will be advised to that effect.

30

TIPPING J:

They may not get the same discount if it was a different sort of case. That's life.

MR MANDER:

I appreciate that Sir, but that might be seen as an inconsistency and an injustice. In my submission one needs to look, not at the individual case, but at the volume of cases as a whole and this is one of the problems in my
5 submission which lead to *Hessell* was a perceived inconsistency and –

10 **ANDERSON J:**

What was the basis, was there any empirical basis of thinking that there were inconsistencies and allowances across different jurisdictions and different parts of the country, or is it just an anxiety that it might have been happening?

15 **MR MANDER:**

I'm not aware of any empirical –

ANDERSON J:

There's none as sighted by the Court of Appeal, it's sort of, it's just an
20 apprehension without any evidential basis.

ELIAS CJ:

And the material you've put before us, demonstrates that *Hessell* hasn't cured that, because the information there that stands out is that in the High Court
25 they're adhering to *Hessell* fairly rigidly and that in Wellington they're manufacturing another stage so that you can still preserve the maximum and that things are different in other parts of the country, so it's a shamble really.

MR MANDER:

30 Well in my submission, firstly taking the High Court, the High Court really is in the box seat, because they have a limited number of cases –

ELIAS CJ:

Yes.

MR MANDER:

Serious cases facing imprisonment and that shouldn't be difficult to apply this type of sliding scale. The difficulty will be in the busy District Courts where
5 there are applications for adjournments of the nature that I've just referred to in terms of that we haven't got disclosure and in my submission that's just the reality, it's the other side of the coin, but it has to be flexible. Courts cannot accept pleas that are premature and my submission is that far from showing that it's not working, it's showing that it's had no detrimental effect, it's not
10 being applied inflexibly or with rigidity –

ANDERSON J:

Or at all perhaps.

15 **ELIAS CJ:**

That is an impression – comes through.

MR MANDER:

My submission is that if one takes the feedback as a whole, people know
20 where they stand.

ANDERSON J:

You see it gets back to the question, what's the case like? If it's a pretty straight forward motor case, you can say, "Yes, don't spin it out, it's going to
25 be this answer." But in another case, the first reasonable opportunity will be much further down the track and there will be evaluations that have to be made about any element of each defence is reasonable for example, because who knows what's reasonable? The Court ultimately. So one size doesn't fit all in this area.

30

MR MANDER:

I entirely acknowledge that Sir.

ELIAS CJ:

And the benefits you're pointing to would, it seems to me, be met by simply an authoritative identification of the maximum, against the statutory recognition that timing is going to have affect here, leaving it to be contextually assessed. Everyone knows that the sooner you plea, the more likely you are to get the highest discount available.

MR MANDER:

10 Well that would be a return, if I may say Ma'am, to the law as it was before *Hessell*, although not strictly, because the Court of Appeal had already given indications, quite strong indications, as to this sort of sliding scale.

ELIAS CJ:

15 30 percent in particular.

MR MANDER:

Yes. Yes.

20 **ELIAS CJ:**

That, it does seem to me is something that everyone needs to be singing off the same song sheet.

MR MANDER:

25 I have approached this appeal on the basis that the framework provided by *Hessell* is valuable. It provides clarity, it provides – it means that the credit associated with pleas, is to some extent predictable, as far as it can be within the realities of the criminal justice system and while the judgment doesn't perhaps explicitly as it might spell out the level of flexibility that needs to be
30 afforded, it is clear that an operation in applying it, the Courts are applying it in an appropriate and realistic way. So, in my submission, the guideline is an advance.

TIPPING J:

If we called it an early plea, rather than a first available opportunity, early being a relative term that enabled to take into account a whole heap of factors, early in the context of the case, would that be helpful, or is that just
5 sort of dodging the issue Mr Mander? Because I take the point that there needs to be some sort of broad point, needs to be some sort of broad guideline. I've been toying with this early, middle and late, but –

ELIAS CJ:

Well, it's inevitable.

10 **TIPPING J:**

It's inevitable, yes. I mean –

ELIAS CJ:

It hardly bears saying.

TIPPING J:

15 Exactly, so.

MR MANDER:

Well, it's obviously going to create further issues in terms of trying to further define what does early mean.

TIPPING J:

20 Well, maybe, well, the less definition and room for argument of definitional terms the better in this field I would have thought, so maybe just start at X, maximum X, minimum Y, get on with it.

MR MANDER:

25 Could I perhaps just try to advance the discussion by referring to the, how the UK has approached the issue?

ELIAS CJ:

Yes, just before you do that though, just before, speaking of the present situation in New Zealand, the impression I had from the material that's been provided by defence and by the Crown, is that in areas where status hearings
5 are apply, *Hessel* isn't being applied because the maximum discount is being made available, is that right? I mean, it's certainly true in some areas isn't it?

MR MANDER:

I, I would agree with Your Honour's assessment.

ELIAS CJ:

10 Yes, and so if that's so, on its face, the Court of Appeal guideline is not helpful and maybe positively misleading in a jurisdiction like the High Court, which doesn't have status hearings.

MR MANDER:

My submission, in response to Your Honour, is that if it is not being applied,
15 then it ought to be, because my submission is –

ELIAS CJ:

Well, it has to be really because you're supporting *Hessell*.

MR MANDER:

Well, I am, but I will also make the submission that a person that's facing a
20 charge of assault simpliciter, who gets their initial disclosure, who gets legal advice and gives their instructions to their lawyer to enter a plea of guilty without condition, without negotiation, that's worth more as a credit and as a deduction, than the person that says, I might, let's go to a status hearing, let's see if we can bargain the charge down in some way. Let's see what the
25 Judge might give us as a sentence.

ELIAS CJ:

Now, why do you say that?

MR MANDER:

Because in my submission –

ELIAS CJ:

Just because it clears it out sooner?

5 **MR MANDER:**

Because of all three rationales. Because first of all, time, it needs another Court hearing, inconvenience, witnesses are still on standby and remorse, if indeed remorse is part of the credit, where's the remorse, which is clearly shown by the clear unconditional acknowledgement.

10 **ELIAS CJ:**

Well, it's another reason to keep remorse separate perhaps, as the statute does, but, mmm.

TIPPING J:

15 That doesn't allow for cases where the person accused says to the lawyer, well, yes I did do this or that or the other thing, but whether that amounts to the crime charged, can be quite a more subtle issue and this is part of what's troubling me, that it's the one size fits all sort of approach. That is just doesn't accord with the realities as one vaguely recalled them and one hears about them.

20 **MR MANDER:**

Well, in my submission, my response to that is that the defendant has access to legal advice. The legal advice is you're either guilty as charged, you're not guilty or I think you might be guilty of a lesser offence. I don't think they can prove this, I don't think you have committed this crime, but you certainly have
25 committed the lesser, more stricter offence. Well, accordingly, my advice to you is to plead guilty to the lesser offence. I'm going to send a letter, copied to the Court, that you were prepared to enter a plea to that lesser charge. That immediately, in my submission, locks in the first reasonable opportunity, locks in full credit for the plea. If the Crown doesn't want it –

ELIAS CJ:

Not if you don't succeed –

MR MANDER:

Not entirely.

5 **ELIAS CJ:**

– and you're doing this on legal advice. These are matters of assessment. It's a big penalty to, I don't see how responsible counsel could advise people where there's a contested statement of facts for example, not to go to a status hearing and try and negotiate a better outcome.

10 **MR MANDER:**

Well, certainly, if a person contests a summary of facts, then they don't have to accept that. To state the obvious, you plead guilty to the charge, you don't plead guilty to the summary of facts. Section 24 in the Sentencing Act provides a code, which should be applied to determine those sorts of issues.

15 **ELIAS CJ:**

Manslaughter, for example, covers a huge range. Would it be responsible to advise a client to plead guilty and then have a contested hearing on the facts?

MR MANDER:

Well, it depends what –

20 **ELIAS CJ:**

Yes, it depends on the context, that's really what I'm putting to you, self-defence.

TIPPING J:

25 Excessive force. In other words, the fine line between going too far and just staying within the boundary for force in self-defence. I know we're putting to you the difficult ones Mr Mander, because I accept in the great majority of cases it's not going to be as difficult as that, but the system applies according

to the Court of Appeal, across the whole board and there are some cases, for which I am sure it's absolutely appropriate, but the worry is that there are other cases where it might end up with a bit of an injustice.

MR MANDER:

5 Well, I acknowledge that Sir. The submission that I'm making is that in the vast bulk of cases it is of assistance.

ELIAS CJ:

Sure.

MR MANDER:

10 It is, it is of value.

TIPPING J:

We just have to live with the fact that in some cases it may not actually do.

MR MANDER:

15 No, no, there needs to be some acknowledgement that there will be cases where, which will fall outside the parameters of the scale, that need to be individually examined. But I would have to say within the scale itself, the individual circumstances will still need to be examined.

TIPPING J:

20 Well, that isn't how I, I know that is how literally it reads, but I return to a theme at the beginning. Just looking at it in a quick way, which is what probably people will do, it looks as if you are either in one box or another box, or you're somewhere between the boxes, but they all attract a different outcome, depending on categorisation, as opposed to evaluation.

MR MANDER:

25 Well, the evaluation, in my submission, in order to provide guidance, you do need to provide some sort of weigh points and the submission I've made earlier, I repeat and that is that what has been identified as those weigh points

are significant steps, identifiable steps in the procedure which, when you go back to the rationale for giving the credit in the first place, you can see why they might logically apply, dependent on the individual circumstances of the case.

5 ELIAS CJ:

Mr Mander, paragraph 31, about, "Will not be extended on all of these basis," and the acknowledgement in 32 and emphasis, "First reasonable opportunity means what it says." Does the Crown support that?

MR MANDER:

10 Well, in my submission, I would support it, in terms of the sentencing indication. I would support it in terms of the disputing the summary of facts. The challenging to the admissibility of evidence, in my submission, is difficult because there are different types of challenges to the evidence. The reason why I support it, support the statement of the
15 Court of Appeal in paragraph 31, is because the accused, or the defendant can preserve their position. So if they say, I am willing to plead guilty on the basis of this account of what occurred, the onus is on the Crown to prove beyond reasonable doubt those factors that it alleges.

20 In terms of the sentencing indication, I again would make a distinction between the person, who having been properly informed, having proper disclosure, proper access to legal advice, admits their guilt, is deserving of greater credit than the person who, notwithstanding those two prerequisites is still not prepared to enter a plea of guilty, but wishes to go and bargain with
25 the Court to see what outcome they can get, which is most suitable to them. I may, I may not plead guilty, let's see what the Court has to say and that, in my submission gain, if one goes to the rationales for the credit, they qualify the rationales for the credit.

30 In relation to the admissibility of evidence. Again, as a rule, in my submission, you're pleading guilty because you are guilty. You are not pleading guilty because the Crown may, may or may not be able to prove the charge. Now, I

say that subject to the situation where, for instance, the example given by Anderson, J in relation to negligence, in relation to the admissibility of evidence that might go to that type of issue.

TIPPING J:

- 5 What would your reaction be to a letter saying, I will plead guilty if this evidence is admissible?

ELIAS CJ:

You don't get the maximum.

MR MANDER:

- 10 And the evidence is admissible?

TIPPING J:

Yes.

MR MANDER:

Then, in my submission, you don't get the credit.

- 15 **ANDERSON J:**

Why, what's the benefit of people pleading guilty if there isn't enough evidence to show that they're guilty.

MR MANDER:

If, we've got all the, they've got the Crown case, they've got legal advice.

- 20 The legal advice is this evidence may have been obtained illegally. Do you wish to and you may get off the charge as a result of me. You may be, the Crown may have no case if we challenge this evidence. The person has, is making an informed choice –

ANDERSON J:

- 25 They take a punt on whether it's going to be, even though it's unlawfully obtained, it may be included on the proportionality test.

MR MANDER:

Well, even in that situation, we all know what the rules are. We all know what the law is and again, so long as the person is properly informed. They could only, they could not contemplate pleading, unless they accept that they were,
5 my drugs in the house searched by the police and I was dealing in them. I –

BLANCHARD J:

But often in those kinds of situations, difference defence lawyers may give difference advice. They may assess the, whether the evidence is likely to be in or out differently and some of these are very hard calls as we know and as
10 Judges, we come to review the situation.

MR MANDER:

I agree Sir, but if one gets into the realms of the quality of the advice, it's –

ELIAS CJ:

Well, we will get into that because counsel for the appellant is quite correct,
15 that this will be an important ground of appeal, so I'm not sure that the system will be saved that. Mr Mander, I think we'll take a short adjournment, but you've been interpreted, you were going to take us where next?

MR MANDER:

I think I should take you to remorse Ma'am.

20 **ELIAS CJ:**

Yes. Remorse and back again.

MR MANDER:

I think perhaps if I can just quickly cover, I'm unsure of whether the Court wishes to hear from the Crown in respect of credit for murder.

25 **ELIAS CJ:**

I would like to hear why the mandatory sentence doesn't undo the legitimacy of the exercise that's been undertaken here, if one is looking at the Act as a

whole, because it does seem to me to be inconsistent with the general approach being taken and again, I'm not sure that there's a statutory basis for drawing such. It's a substantial gloss really on the statute and –

MR MANDER:

5 And then it's the appellant's case I think.

ELIAS CJ:

Yes, all right thank you, we'll take 15 minutes.

COURT ADJOURNS: 3.35 PM

COURT RESUMES: 3.55 PM

10

MR MANDER:

Yes, may I please the Court. If I could just very briefly take Your Honours to the UK guidelines, that's in volume 4 at tab 54. Tab 54, page 5, paragraph 4.1, it refers to, "The proportion of the discount calculated by
15 reference to the circumstances in which the guilty plea was indicated," and further down at paragraph 4.3 relating to, "When the offender indicated willingness to admit guilt at first reasonable opportunity, when this occurs, will vary from case to case," and then there is a reference to an appendix which is
20 at page 10, it's the last page under that tab and Your Honours will see that the counsel have set out a number of examples, having made the statement that the opportunity, the opportunity of first reasonable opportunity will vary, with a wide range of factors. The Court will need to make a judgment on the particular facts of the case before it. So that was one approach, saying, "It will
25 depend upon the various circumstances" and in a way not similar to previous guideline judgments of our Court of Appeal, list a series of examples, to provide the guidance required. And Your Honours will also note page 6 of the guideline, the description that is given which is a broader description of the division of the sliding scale at the top of the page.

30 **ELIAS CJ:**

Well it's a much more generous sliding scale than ours after trial date is set, that's a lot later than the status hearing or callover.

5 **MR MANDER:**

Well Court –

ELIAS CJ:

And it's 25 percent.

10

MR MANDER:

Indeed it is Ma'am. After trial date is set, that would be the equivalent of our callover, at the first callover there'd been an expectation – the indictment would have been filed and there would be an expectation that the – that a date fixture would be set.

15

TIPPING J:

Presumably, if it's somewhere between that date and the door of the Court, it's somewhere between 25 and 10.

20

MR MANDER:

Indeed.

ELIAS CJ:

25 And is the model that the Court of Appeal drew on, the next tab?

MR MANDER:

Indeed Ma'am. The draft guideline of the, what was the sentencing establishment unit, effectively the law commission.

30

ELIAS CJ:

So they simply adopted it. I haven't looked at this before.

McGRATH J:

Tab 55?

ELIAS CJ:

Apart from –

5

MR MANDER:

Tab 55 Sir, yes, page 3 is the breakdown.

ELIAS CJ:

10 Apart from the, well the first, the summary really, looks very reminiscent.

MR MANDER:

Yes indeed.

ELIAS CJ:

15 What was the way in which they diverged from the Law Commission, I can't remember?

MR MANDER:

The Law Commission did not include remorse as a factor to be taken into account.

20 **ELIAS CJ:**

So they left it separate?

MR MANDER:

Yes they did Ma'am.

ANDERSON J:

25 Consistently with the Sentencing Act, section 9(4).

MR MANDER:

Indeed Sir.

TIPPING J:

And with Australia and with New South Wales.

ELIAS CJ:

5 Yes, remind me, the status of this, which of course has been superseded by the Court of Appeal adoption of it, but it hadn't gone out for public discussion, is that right?

MR MANDER:

I would be loathed to make any accurate assessment. I understood it had gone out for consultation.

10 **ELIAS CJ:**

Yes, but I think, I don't think –

MR MANDER:

Not public consultation.

ELIAS CJ:

15 No, not public consultation, that's my understanding too.

MR MANDER:

20 That perhaps leads into the topic of remorse. In my submission, well, firstly the Court of Appeal approached the issue on the basis that traditionally remorse was part of the, a component part of the credit afforded to individuals who plead guilty and at paragraph –

ELIAS CJ:

But was that, was that adopted before section 9 was enacted, that approach?

MR MANDER:

Before and after.

ELIAS CJ:

It was maintained afterwards, but before there was any statutory acknowledgement that you could take into account a guilty plea, this was a way that the Courts took it into account?

5 **MR MANDER:**

Yes Ma'am.

ELIAS CJ:

As an expression of remorse? Yes, thank you.

MR MANDER:

10 In my submission, one of the difficulties that arises out of this issue, as to
whether or not remorse is included within the credit, arises out of the label,
which is given to various mitigating factors which might otherwise be
incorporated under the wider umbrella of remorse and if I may illustrate that by
again referring Your Honours to a draft guideline of the
15 Sentencing Establishment Unit, it's at tab 56, which was their draft guideline
relating to mitigating factors.

ELIAS CJ:

Sorry, did you say that the English guideline has the discount coming off
before there are the aggravating and mitigating circumstances?

20 **MR MANDER:**

No Ma'am. The discount is calculated as the final stage in the process.

ELIAS CJ:

Oh, final stage, but outside that balancing of factors?

MR MANDER:

25 Yes, it's seen, again it's seen as distinct –

ELIAS CJ:

Yes.

MR MANDER:

– from the credit for the plea.

ELIAS CJ:

Yes.

5 **MR MANDER:**

In the draft guideline, relating to mitigating factors, if one looks at page 1 under the heading, factors personal to the offender, the third bullet point, is remorse, which of course complements the draft guideline in relation to the guilty pleas. Turning to page 6.

10 **ELIAS CJ:**

Sorry, I'm behind again.

MR MANDER:

Sorry, page 6, tab –

MCGRATH J:

15 Sorry, where was remorse, sorry, at page, where was remorse, oh, yes, sorry, got it.

ELIAS CJ:

Sorry, which volume is it?

MR MANDER:

20 Sorry, Ma'am, volume 4, tab 56. It's in the same volume as the UK guidelines.

ELIAS CJ:

Yes, sorry. I've just, in a mess here, yes, thank you.

MR MANDER:

25 Page 6, the Law Commission dealt with the issue of remorse and in particular, the assessment of the genuineness of remorse, which was something to be

assessed by the Judge and there's a list there of various events, which might be relied upon as evidence of remorse; prompt confession to investigators, an early guilty plea, admitting to other offending. Now, obviously (a) and (b), in my submission anyway, would be covered by the Court of Appeal's discount
5 for a guilty plea.

Then if one goes on to consider the other matters, disclosing the whereabouts of proceeds. If I could just leave the apology to the victim to one side for the time being, voluntary paying compensation, willingness to participate in a
10 restorative justice, immediately rendering assistance to the victim, accepting counselling. In my submission again, leaving the apology to the victim to one side, all those factors, (c) through (h), in my submission, would fit into the Court of Appeal's description of, as it is worded in the judgment, "Exceptional remorse demonstrated in a practical and material way." So, in my
15 submission, if an individual was referring to the fact that they had paid the loss back and indeed, as it must be recognised under section 10, indicate the willingness to participate in restorative justice process.

ELIAS CJ:

But are they available everywhere, restorative justice processes?

20 **MR MANDER:**

I'm not sure Ma'am. I can't answer that.

ELIAS CJ:

I have a feeling that they are not. It's just occurring to me, looking at these factors, that these methods of providing practical indication of remorse are not
25 going to be available to everybody.

MR MANDER:

No they're not Ma'am, although one would like to think if a person indicates a willingness to undertake counselling, that in itself would be an indication of remorse.

ELIAS CJ:

Accepting counselling and help again, are they available?

MR MANDER:

They may not be available, but their willingness to engage in such a process
5 would, in my submission, would be the test. The point I'm seeking to make is
that if one, it's how one defines remorse in terms of the component part of the
credit to be afforded to the guilty plea. In my submission, there's a strong
correlation between pleading guilty and remorse. The earlier one pleads
10 guilty, that must be seen presumptively anyway, as an indication of
acknowledgement of wrongdoing, of some first step towards insight and
hopefully to some step towards rehabilitation.

ELIAS CJ:

But how does that square with section 9(2)(f), which is unglossed?

MR MANDER:

15 If remorse, and the provision Your Honour's referred to, is supposed to refer
to the types of things that are listed by the Law Commission in paragraph 27,
(c) through (h), there may, they are properly things that are distinct.

ELIAS CJ:

20 But how can you limit it to those sort of matters? It's not qualified at all in
section 9?

MR MANDER:

No, but if remorse includes the simple acknowledge of wrongdoing and of
regret, then in my submission, the credit that's traditionally been, or the
component part of the credit that's traditionally been afforded for the guilty
25 plea, encompasses that part of remorse.

ELIAS CJ:

Well, that's the question.

BLANCHARD J:

I suppose the problem that you're pointing to is a double counting. That if you're going to include an element for remorse of a generalised kind in the discount for the guilty plea, then you don't separately count that sort of
5 remorse, though you may count the other sorts that you've been pointing to.

MR MANDER:

Indeed Sir.

BLANCHARD J:

But it might be that the better solution is to not give quite such a big credit for
10 the guilty plea.

TIPPING J:

And add on whatever you think for –

BLANCHARD J:

An maybe that's what the Sentencing Act is pointing to, in treating them
15 separately.

MR MANDER:

Certainly that was a submission that was made in the Court of Appeal following *Thomson* whereby the maximum for the utilitarian part, for want of a better word, of the credit was a maximum of 25 percent, as opposed to
20 33 percent in New Zealand.

McGRATH J:

Were the Act speaks of remorse shown by the offender, does the word "shown" have a particular significance in your view? Is it indicating some
25 demonstration or something of that kind?

MR MANDER:

Well, in my submission, yes, there would need to be something to be able to point to, to demonstrate. I suspect the difficulty is the defendant can point to

his guilty plea as a demonstration, as much as he or she can point to making an offer to compensate or to undertake counselling.

McGRATH J:

5 I was really thinking of the point in paragraph 28 of these guidelines, that expressions of remorse that follow conviction don't get much, and I was wondering if perhaps that would not be regarded as remorse that's been shown at that late stage, and merely expression rather than one of the other sort of more tangible acts that are...

10

MR MANDER:

Yes, indeed.

TIPPING J:

15 The problem really is that a plea of guilty can be evidence of remorse, but isn't always.

MR MANDER:

No.

20

ELIAS CJ:

And on the utilitarian calculus, it almost never will be. It's because there's advantage, it's a prize.

25 **MR MANDER:**

Yes, in terms of the utilitarian approach it's an irrelevancy.

TIPPING J:

30 But that suggests that the better analytical approach is to separate the two, because it's easy to slide from it being evidence of, to it being treated intrinsically as, whereas the two are really separate ideas.

MR MANDER:

Well, that is the alternative approach.

TIPPING J:

Well, that's what I understood you to say you were submitting in the Court of –

5 **MR MANDER:**

And you're correct, Sir.

TIPPING J:

– and they didn't buy it.

10

MR MANDER:

That's correct, Sir.

TIPPING J:

15 Well, I can say here and now that provisionally it sounds like quite a good idea.

MR MANDER:

The Court of Appeal's view was that for predictability, for clarity –

20

ELIAS CJ:

They didn't want more than 30 percent.

MR MANDER:

25 No.

ELIAS CJ:

No.

30 **MR MANDER:**

No, they didn't.

ELIAS CJ:

Well, what would happen if you have someone who pleaded guilty at the first available opportunity and who was 17? That's something that's to be taken into account as a mitigating factor, or any of these other things.

5 **MR MANDER:**

Absolutely, Ma'am.

ELIAS CJ:

They –

10

ANDERSON J:

They'd end up with a credit if several of them applied.

MR MANDER:

15 Well, that's right, I agree.

ELIAS CJ:

It really indicates that this calculus is partial, and that it gives much too much emphasis to only one factor.

20

MR MANDER:

Whether it does or it doesn't isn't really for me to judge.

ELIAS CJ:

25 No, no.

MR MANDER:

However, I think, my submission is that there is no question that there is a great deal of emphasis placed on getting people – I'm repeating the submission I made earlier.

30

ELIAS CJ:

I know. Get people out of the system to let victims get on with their lives and, for whatever indication of remorse, although we've rather gone away a little bit

from that. What about, though, the public interest in an appropriate sentence, because there must be, it's easy to imagine a case where perhaps a guilty plea to manslaughter reduced from murder, so, at the first available opportunity when it's reduced, or with the indication of a plea, you could come
5 down pretty low. It may not be, the public interest may not be served, the wider public interest may not be served by this.

MR MANDER:

No, I acknowledge the point that, this is where I think the Court of Appeal
10 were concerned about so-called discount creep, that there was a danger that because of all these, because of the emphasis now on a certain sentencing methodology, whereby you identify the credit that you're giving for particular mitigating factors, that if you calculate them up the aggregate's going to be such that the discount from the sentence is going to result in an
15 inappropriate sentence.

ELIAS CJ:

Well, it may be though that the discount that they've alighted on for this one feature is what drives that, and that some analysis more calibrated to the
20 range of considerations identified by the statute would be better. But I think what they meant by "discount creep" was that having identified 30 percent as the maximum they didn't want to see 40, 50 percent exceptional circumstances.

25 **MR MANDER:**

No, I think that's right, Ma'am.

TIPPING J:

Just for that factor alone.

30

ELIAS CJ:

No, for any other factors as well.

TIPPING J:

For all other factors.

ELIAS CJ:

Yes.

5

TIPPING J:

For the total.

MR MANDER:

10 Just – indeed, yes. Although it’s perhaps an interesting point that in the case
before the Court the appellant’s co-offender, who was sentenced by
Her Honour Justice Potter, ended up getting a 42 percent discount. And if
one examines the sentencing notes, that seems an entirely – well, it certainly
is my submission was an appropriate approach to be taken by the
15 sentencing Judge on that occasion. And that included a 33 percent discount
for the guilty plea at the first earliest opportunity, and on top of that was
remorse, counselling, co-operation with the police, she was prepared to give
evidence against her co-accused. So, another 12 percent, although that was
not calculated, that was not identified as a figure. But that was the net effect
20 of it, it was a further 12 percent on top of the 33 percent, to get to a total of
45 percent, which seemed, in my submission, an entirely appropriate
approach.

TIPPING J:

25 Of course, well, the counter to that is that you get people ratcheting the
starting point up in order to reach what they regard as an acceptable overall
result, because, you know, some would say that that’s a pretty
amazing outcome, that, you know, you’re getting only a half approximately of
what is thought to be, all other things aside, the appropriate sentence.

30

MR MANDER:

Yes.

TIPPING J:

But the way to fix that is to simply have a slightly higher starting point. But that's artificial. You see, if we get too much towards the sort of, that sort of level of discounts, I think there's going to be anxiety all round the place.

5 **MR MANDER:**

I have made the submission in my written submissions that ultimately, surely, the bottom line still much be for a Judge to determine whether or not the final sentence is an appropriate response to the offence.

10 **ELIAS CJ:**

It must be.

MR MANDER:

15 Notwithstanding what the component parts are or how they've arrived at the ultimate sentence, ultimately that's the final, the final test.

I'm mindful of the time. Your Honour wished to hear from me in respect of murder and specifically in relation to why we should treat murder differently.

20 **ELIAS CJ:**

Well, yes, is there any particular reason? It was an awkwardness for –

McGRATH J:

You did address this in your written submissions in a fairly –

25

MR MANDER:

I have.

McGRATH J:

30 – firm way.

MR MANDER:

And my response really is encapsulated in the approach taken in the UK guideline, which also treats murder differently, treats murder differently for

three reasons. One, because when one's dealing with minimum periods of imprisonment the deduction is greater, the net effect of the credit is greater, because that is a year that the person must serve, it's mandatory, there's no question of that being mitigated by parole or the workings of the Parole Act.

5 The second is the unique nature of the offence of murder. As was referred to by the Court of Appeal in *R v Williams* [2005] 2 NZLR 506 case, the sanctity of life and the community's abhorrence of a killing, a deliberate killing, coupled with the specific intents. And, thirdly, of course is the unique fact that murder carries a mandatory life imprisonment, or near mandatory life imprisonment.

10

ELIAS CJ:

My query wasn't directed at the difference in a general sense, but the sentencing principles and provisions of the Sentencing Act, apply, except in respect of the minimum periods of imprisonment, generally across the board,
15 this is a – we're being invited to cut out a bit that just can't fit within the approach adopted by the Court of Appeal and my query is why that doesn't suggest that it's approach is flawed if you're applying the Act as a whole.

MR MANDER:

20 And my response to that is because the legislature has provided a statutory framework as to how you sentence people convicted of murder, and it doesn't admit of the framework, which would ordinarily apply.

BLANCHARD J:

25 I think you're really saying is you could never find a framework which would apply to both because of the effect of the mandatory period.

MR MANDER:

Indeed Sir. The statutory framework is such that it would render –

30

ELIAS CJ:

You can't have a discounted approach, you can't have a mathematical model that you follow –

BLANCHARD J:

You could have a discount, but what you're discounting down to is something that then does not permit of any parole reduction –

5 **ELIAS CJ:**

Yes.

BLANCHARD J:

Whereas with ordinary sentences it does.

10

ELIAS CJ:

Yes.

McGRATH J:

15 I suppose Mr Manders, the statutory language are manifestly unjust, the Courts can't, for example, go below in the 17 years minimum term cases, can't go below that unless it's satisfied it would be manifestly unjust, is that – how does that operate in this respect, I mean is that bar, is that what you're – is that – I think Mr King is really saying is that it would be manifestly unjust in
20 some circumstances not to take account of a guilty plea in that respect.

MR MANDER:

The Courts, the High Court in sentencing has recognised that it would be manifestly unjust not to recognise credit for the guilty plea.

25

McGRATH J:

Right.

MR MANDER:

30 And have given deductions below 17 years in order to reflect that I've included in the – however I don't intend to take Your Honours –

TIPPING J:

But the proportion is the same proportion as that would've applied to the whole 17 years, but is applicable only to the seven years. That's the problem isn't it?

5

MR MANDER:

Well that's the approach that has been taken.

TIPPING J:

10 So if you get 20 percent off, it's not 20 off 17, it's 20 off seven?

MR MANDER:

That's correct Air. Well that was one of the – the Court of Appeal said that they concluded it would still be a matter of discretion for the sentence in Court.

15 Two options that were proffered before the Court of Appeal with the so-called Boldt approach which Your Honour has just outlined, and the UK approach, which is a one-sixth reduction.

TIPPING J:

20 Off the whole?

MR MANDER:

Off the – no off the –

25 **TIPPING J:**

Off the bit above the minimum?

MR MANDER:

30 The minimum period of imprisonment, coupled with ultimately a requirement, that even having done that deduction, the Court must still look and see whether or not the ultimate sentence isn't appropriate, actually explicitly stating that.

TIPPING J:

So you're getting a lesser deduction for pleading to murder than you would for pleading to burglary, in proportionate, total proportionate terms?

MR MANDER:

5 Indeed. And in my submission that's because the legislature –

TIPPING J:

And you're forced into that?

10 **MR MANDER:**

Yes. The alternative, if you gave for instance, and it's included in the written submissions, if a person was sentenced to a 17 year minimum period of imprisonment, entitled to a third, they'd be a little under 12. The person that didn't attract section 104, sentenced to life imprisonment without anything,
15 they'd be on 10 and the difference doesn't adequately reflect the difference in the seriousness of the offence that had been committed. It just simply doesn't stand scrutiny if you apply wholesale, the so called sliding scale. I'm unsure if whether the Court wishes to hear me further on that.

20 **ELIAS CJ:**

You're going to – no, thank you. You're going to deal with Mr Hessel's circumstances.

MR MANDER:

25 Yes, in relation to the substantive appeal, in my submission the sentence imposed by the sentencing Judge was an entirely proper one, well within his sentencing discretion. In relation to the issue of disparity, in my submission no issue of disparity arises, it is difficult to go beyond the Court of Appeal's analysis set out at paragraphs 57 through to 59. But the appellant faced
30 nine charges, four counts related specifically to his own offending, five jointly with his co-offender, he was a principal offender in relation to seven of the nine acts of sexual offending, as opposed to his co-offender, who was only charged with five, two as the principal. My learned friend places great emphasis on the gross breach of trust by the mother as making her the

principal offender. Her Honour Potter J rightly stressed that that was a serious aggravating feature of the co-offender's offending, but it does not, in my submission amount to a significant point of difference, considering that the appellant is a 51 year old man who was aware of two intoxicated, as he understood them, 15 year olds, so he knew that they were under age. One of whom was the daughter of his sexual partner, in front of whom he was committing sexual acts, he quite clearly had a responsibility quite independently of the mother to protect, not exploit the victims.

10 **TIPPING J:**

Are you in effect saying that the breach of trust on his part was less, but not much less, than that of the mother?

MR MANDER:

15 Indeed Sir. If not equivalent.

TIPPING J:

If not equivalent.

20 **MR MANDER:**

What was apparent is that it must have been apparent to the appellant that the mother's actions were entirely abhorrent behaviour, born out of the effects of drugs and alcohol. It should've have been patent to the appellant that this was an entirely unacceptable situation, yet he didn't choose to stop it, he chose to take advantage of the situation, and his assertions, which he made to the pre-sentence report writer, that he was some passive participant swept along by events beyond his control, in my submission only goes to highlight his complete lack of insight and contrition for the sexual exploitation of the girls, notwithstanding his claims of being apologetic and remorseful.

25

30 Apart from the limited credit for his plea in my submission, there were no other mitigating factors. As rightly found by the learned sentencing Judge.

ANDERSON J:

What about this extra month, what's the principled justification for that?

MR MANDER:

Well the sentencing Judge took the view that he had previous convictions for drug offending and for violence, and that drugs, on his own account, played a part in his offending and that therefore was an aggravating factor, there was a connection between his history and an element of his offending on that occasion.

ANDERSON J:

10 But is the mother who supplied the drugs and –

MR MANDER:

On his account, it was.

15 **ANDERSON J:**

Sorry?

MR MANDER:

On his account Sir, the summary was silent as to that.

20

ANDERSON J:

All right. But the Sentencing Act requires the relevance to be taken into account and it's difficult to see what a rather older, single P offence, had to do with minor sexual offences.

25

MR MANDER:

I have to acknowledge it's difficult to see the direct connection Sir.

ANDERSON J:

30 Of itself, there's not much in the three month sentence, although I suppose an extra week is important, relatively, but it just doesn't seem quite right to my mind.

MR MANDER:

No, it does seem something of an inconsequential inquiry or connection, or however one wants to describe it.

ELIAS CJ:

5 My query is more with the discount for guilty plea and the fact that there wasn't an additional credit for any remorse. I mean the Judge did not, I don't think he said that there was no remorse did he? In other words, the Judge effectively has applied the Law Commission approach, which has been adopted subsequently by the Court of Appeal in his case, but clearly is what
10 the Judge is working to here.

ANDERSON J:

The Judge said that he didn't believe that he was remorseful.

ELIAS CJ:

Oh, did he.

15 TIPPING J:

Swept along by events beyond his control, seemed to rather cloud the plea of remorse.

MR MANDER:

No, in my submission, the learned sentencing Judge was entitled to conclude
20 that this man was not remorseful. He was entitled to accept the pre-sentence report writer's conclusion that he, that he, he shifted blame and responsibility onto his co-offender and indeed, the submission made by his counsel at sentencing that he was under the "conniving influence of the mother" just did not bear scrutiny and really was very telling in terms of whether or not there
25 was general remorse.

TIPPING J:

He didn't do himself too many favours in some of the submissions that were made on his behalf.

MR MANDER:

No Sir.

ELIAS CJ:

Well, I'm rather more interested in the approach that's been adopted to the
5 discount and the –

TIPPING J:

He got about 13 and a half percent. The Judge said he was allowing him
about 10, but five over 37 amounts to something like 13 and a half. I mean,
just –

10 **ANDERSON J:**

He slid up slightly.

TIPPING J:

He slid up, unless my arithmetic is horribly astray. It was certainly more than
twice five, it was, yes, it was about 13, 13 and a half.

15 **MR MANDER:**

It came very late Ma'am.

ELIAS CJ:

I accept that. I'm just thinking about this as a case which comes before the
Court and is purportedly not applying the *Hessell* guidelines, but making the
20 point that the Judge seems to have had the Law Commission draft in mind
and indications of that are at paragraph 20, which is slightly different from
what you had put to us. So, one only has to indicate willingness to undertake
rehabilitative programmes, but clearly, this Judge was taking the view that
something significant would have to have been done. I'm not criticising that
25 approach, but it is part and parcel of, it's very close to the Law Commission
proposals and then the 10% discount because it's come so late.

MR MANDER:

Well, in my submission, the learned sentencing Judge wasn't, was following the Court of Appeal's approach at that time.

ELIAS CJ:

5 Yes.

MR MANDER:

I can refer Your Honours to *R v Walker*, tab 35, volume 2, which would have been applicable. Sorry Ma'am, I'm just trying to check when he was actually sentenced. March, March 2009. But *Walker* is almost at the same time as he
10 was sentenced.

BLANCHARD J:

Same day.

MR MANDER:

Wilson is perhaps a more accurate authority, given the time, tab –

15 **ELIAS CJ:**

Well, see they've referred to the UK Sentencing Guidelines, so they all applying the same approach. The fact that the full Court has adopted it more formally in *Hessell*, doesn't mean that this man wasn't dealt with, under this approach.

20 **MR MANDER:**

In my submission, on the Court of Appeal authority, at the time Justice Heath's allowance of 10 percent was in accordance with authority.

ELIAS CJ:

Yes.

TIPPING J:

Well, my brother Anderson has confirmed my mental arithmetic, almost quite closely, but to get between 10 and 15 percent, actually slightly nearer 15 percent on the eve of trial, was totally conventional.

5 **MR MANDER:**

Indeed Sir.

TIPPING J:

On any –

MR MANDER:

10 Yes.

TIPPING J:

– I would have thought and there was no cause for anything more for remorse, because there wasn't much.

MR MANDER:

15 No.

TIPPING J:

And the real question then is, you know, was the starting point too high and I don't think it's been really put to us on that basis.

MR MANDER:

20 No, in my submission, there was nothing to distinguish the culpability of the two offenders and simply put, the appellant did not have the mitigating factors to rely upon, which the co-offender did have and which were clearly articulated in Potter J's sentencing notes. The other factor, which is quite important –

25 **ELIAS CJ:**

Sorry, *Wilson* is 22 to 32 percent. Was it *Wilson* you were referring us to?

TIPPING J:

What, on the eve of trial?

ELIAS CJ:

I don't know. But it too adheres to the line that you can't have a discreet
5 allowance for remorse. It's inherent within a plea of guilty, which doesn't
really seem to follow the statute.

MR MANDER:

There's no question Ma'am that the Court of Appeal was including remorse,
prior to *Hessell* in the discount.

10 **ELIAS CJ:**

Yes, yes.

MR MANDER:

The only other factor that just needs to be appreciated is that the co-offender
had also spent five months on remand in prison. So her sentence was one of
15 five months, effectively five months' imprisonment, plus
12 months' home detention, plus six months' standard conditions of
supervision, after she had completed the home detention sentence, in order to
ensure that she followed through with the SAFE programme and her
counselling.

20 **TIPPING J:**

So the five months effectively got taken off from the starting point?

MR MANDER:

No, it hadn't been.

TIPPING J:

25 It hadn't been?

MR MANDER:

No allowance had been made for it, but the sentence of 12 months' home detention was made in the knowledge that she had served five months on remand.

5 **TIPPING J:**

Oh, I see, sorry, I understand.

MR MANDER:

If there are no other matters that the Court wishes to hear me on, those are my submissions.

10 **ELIAS CJ:**

Thank you very much Mr Cameron, Mr Mander sorry.

MR LITHGOW QC:

Just going to enumerate these points. The last point is that paragraph 135 of the submissions on behalf of Mr Hessell, the submission was that the starting point was too high and it should have been lower than his female co-offenders' starting points. So, they both had the starting point of three years, but the submission was made in the submissions that that was too high.

TIPPING J:

20 Sorry, I'd overlooked that Mr Lithgow.

MR LITHGOW QC:

It doesn't alter either aspects of what's been said. Now, just going through these things very briefly, *Hessell* in August 2009, the Disclosure Act came into force on the 29th of June 2009, the Practice Note 29 June 2009 and the New Committal Regime 29th of June 2009. So, *Hessell* came out on the assumption that that was all going to work like clockwork. The 50 day callover in the Wellington District Court is also to sort out other aspects of the clumsiness of some of those things, such as, is in fact disclosure all sorted

out? Do the police need more time? So it is simply a very practical grabbing of the case by the throat, including the question of, "Are you going to plead," and sentence indication.

5 Second point, is the whole thing unsustainable in a principled way because it's not applicable to murder, or it can't be made applicable and of course the reason it can't be made applicable is really the statutory interference, and I'm using that expression technically. Of course that goes right through the system, because for an excess breach alcohol for example, for many people
10 the greatest penalty is the mandatory minimum disqualification, and although under *Hessell* you can get a discount on your fine, you cannot have your disqualification reduced on that basis. So the fact that those distortions are there, in themselves, shouldn't disqualify, and there is of course the observation that the minimum sentence now for murder is nil, as it is with most
15 offences in our calendar, and Parliament has promised that sentencing will take account of the importance of provocation, but has provided no tools with which to do it, so the whole murder sentencing thing has become quite distorted.

20 Bargaining, as the Crown calls it. Your Honour talked about a prize. But if we just take – the Crown used an example of an assault, why don't they just admit it? They either hit them or they didn't, and a very, very, common example in our Courts would be an argument between husband and wife, one or both of them is arrested, one or other of them or both is a taxi driver, if they
25 simply plead guilty, their domestic economy is destroyed because if the husband pleads guilty to male assaults female, his taxi licence will be taken, no ifs, no buts, maybe, but if they go to a hearing and discuss what's actually required, whether counselling may assist, whether a conviction for Summary Offences Act assault, is appropriate to the circumstances, they can
30 take control of their own future, otherwise can be a very blunt instrument, and there's examples like that all through the system.

Why did the Court of Appeal do it? You can look at the case in the casebook of *R v AM* (2010) 24 CRNZ 540 (CA), which is the wide analysis of sentencing

for sexual offences, both of them were initiated by the same Court of Appeal Judge, amicus selected, and it was really two capture the work of the sentencing counsel and that is a fundamental problem that Parliament let that all go. It was all set to go, it was even in the Sentencing Act that the guidelines would be binding from the sentencing counsel, but there was no such enactment, but the Court of Appeal took it upon themselves to capture that material and the temptation is obvious and unremarkable, but there is a very good question as to quite what authority they could have for that.

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10 The Crown proposition that you can plead guilty and then go to a facts hearing. At a status hearing a Judge will say, turn to the prosecutor and say, "That matter's disputed, can you prove it?" He will look at the file or look at the OC and that decision will be made in moments. Adjourning a matter for a formal facts hearing is a completely different situation, leading to much greater delay and much greater time and much more formality.

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Your Honour is concerned that perhaps we are becoming, in like a sack full of snakes, tangled up with the criminal simplification project. Criminal simplification is very similar to the water-tight homes legislation, it means probably the opposite of what it's called. It's enormously complex, no fixed date, who knows when it's going to come about, and I just invited Your Honours to put that to one side, because although we have draft material, we just don't know. And assuming that we might – it might go one way or the other, has real problems for Courts I suggest.

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The fundamental problem we see with the Crown approach is firstly, and the Court of Appeal approach, firstly is that it's very disrespectful to the role of defence counsel, and it's also very mean with Judge time. The use of Judge time is considered some, almost an impertinence by an accused person, whereas I submit that it's a good use of Judge time to spend half an hour to avoid a one week trial, and that should, that kind of initiative should be encouraged and applauded. Your Honours said it's becoming like civil litigation. Now this is worth thinking about, because over the last 30 years I'm sure, as Your Honours are all aware, it's not just in criminal cases that

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there has been a move away from resolution by a Judge or jury making a decision, but it has permeated every aspect of Court process. It's actually become part of the High Court rules for civil litigation, but it's the same thoughts and processes at work that the parties have a property interest in sorting it out themselves, if a proper resolution can be achieved, not a corrupt one, but a proper one and so that's throughout the entire English speaking, English law.

The Crown suggests you shouldn't be able to get maximum discount after committal. I just invite Your Honours to recall and believe that committal isn't anything anymore. What we used to call committal, is a piece of paper moving from one plastic tray to another, with a staff member who needs no particular skill or designation, because they don't read the file, nobody reads it.

Now related to guilty pleas under the Sentencing Act, I think Your Honours have made a mistake there in the understanding of section 9(2)(b) and section 9(4)(b), if I heard correctly, members of the Court think that section 9(4)(b) says that no one factor is to be taken any higher than any other. Now that's not actually what 9(4)(b) is about, 9(4) is about nothing about the list of factors, prevents the Court from taking into account any other aggravating or mitigating factor the Court thinks fit, and (b) simply deals with the fact that these ones are on a list does not imply that the listed ones must be given greater weight than any other factor that the Court may take into account. So, with respect, I think that is the better reading of that provision.

ELIAS CJ:

Well it's not what it says, but that's all right I've recorded your submission.

MR LITHGOW QC:

I'm sorry, you say it's not what it says?

ELIAS CJ:

Implies that a factor referred in those subsections –

MR LITHGOW QC:

Yes, must be given greater weight than any other factor and what they mean by any other factor is what they're talking about in (a), that is ones taken from
5 outside of the statute.

ELIAS CJ:

Well, I can't read it like that, but perhaps I'll look at it and come your way.

10 MR LITHGOW QC:

Well even if it – even if it is the other way Your Honour, it doesn't say obviously, that they all have to be treated equally, that can't be right, because that's quintessentially what the Judge is to do, is to decide which ones are relevant and some are bigger than others.

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Remorse, if you look at tab 26 of the Court of Appeal decision of course we can see that the Crown's position at the Court of Appeal was in support of remorse being separate, it isn't now. Restorative justice principles are dealt with separately from remorse under the Sentencing Act because remorse is
20 separated out from those matters in section 10 which were recycled by the Crown as demonstrated remorse or exceptional remorse.

TIPPING J:

I'm not clear whether you support remorse being eliminated, or whether you
25 support it being included in the plea of guilty factor, or it's a conditional that you'd support it being eliminated as long as you didn't lose your 30 percent discount for the plea alone.

MR LITHGOW QC:

30 33 percent discount.

TIPPING J:

Sorry, 33. I think it's the latter, isn't it, because that's what Mr –

MR LITHGOW QC:

Well, that is counsel's submission.

TIPPING J:

5 That's what Mr King said, and I heard him loud and clear, but I'm not hearing you loud and clear in reply.

MR LITHGOW QC:

10 Counsel's submission is that it shouldn't go down, by taking remorse out and treating it separately. The submission –

TIPPING J:

What shouldn't go down? The allowance for the plea of guilty?

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MR LITHGOW QC:

Yes.

ELIAS CJ:

20 You want to retain the 30 percent.

MR LITHGOW QC:

Yes.

25 **TIPPING J:**

You want your cake and eat it.

MR LITHGOW QC:

30 Well, we want, I want to invite you not to be anxious about some figure which is unpalatable to the public, because most of our crimes start from zero and go to a ceiling. If every factor in any given case applied, or most of them, then in many occasions we do get down to zero and end up with a discharge without conviction. There will always be such cases. And so, being concerned that perhaps some people are getting 50 percent, which is quite

modest with serious assistance to the police, for example, or in cases sometimes where people admit sexual offences that haven't even been the subject of a complaint, very high discounts, even leading to non-custodial sentences for quite serious offending. So, there's nothing the matter with that
5 and, as counsel, I feel obliged to first follow the black letter law, as much as it's easy to try and bargain with the Court. But that's – it is a separate heading and I don't think we can just negotiate that away.

The proposition that you can't get away from a sentence that is appropriate for
10 the offence doesn't really capture the New Zealand law. The New Zealand law is appropriate to the offence and the offender, taking into account all those factors in the Sentencing Act. So, it is not just written gold what a sentence should be, it is never divorced from the offender.

15 Unless there was any other matter?

ELIAS CJ:

No, thank you, Mr Lithgow. Thank you, Mr King. Thank you, counsel, we'll reserve our decision in this matter. Thank you for your assistance.

20 **COURT ADJOURNS: 4.53 PM**