IN THE SUPREME COURT OF NEW ZEALAND SC 35/2016

BETWEEN **MICHAEL MARINO**
Appellant

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

Hearing Resumes: 26 July 2016

Coram: Elias CJ
William Young J
Glazebrook J
Arnold J
O'Regan J

Appearances: D A Ewen and G K Edgeler for the Appellant
B J Horsley, D J Perkins and T P Westaway for the Respondent

CIVIL APPEAL
[RESUMES PART-HEARD FROM 6 JULY 2016]

ELIAS CJ:
Yes, well this is a resumed hearing. You appear Mr Ewen and Mr Horsley. Thank you. Mr Horsley, I think really we should hear from you first.

MR HORSLEY:

Yes, I thought that would be the case. Thank you Your Honour. Your Honours have had hopefully the opportunity to read the supplementary submissions that were filed only on Friday.

ELIAS CJ:

Yes we have.

MR HORSLEY:

Those submissions deal with the last of the issues that we were confronting, which is effectively the interpretation of proceedings being all proceedings ie all charges, whether related or otherwise, that are on foot from the time of an initial arrest right through until final disposition and those submissions, I hope, set out where this Court's thinking may have been at the conclusion of –

WILLIAM YOUNG J:

Can I just suggest. I'm not sure whether you've entirely captured that, but before we come to the current Act, could you look at these, section 81 of the 1985 Act, which is the start of your bundle of authorities?

ELIAS CJ:

Sorry, what are you looking at?

WILLIAM YOUNG J:

The respondent's bundle of authorities, section 81 of the Criminal Justice Act.

MR HORSLEY:

Yes Sir.

WILLIAM YOUNG J:

So this was a provision that required physical notations to be made on warrants of the time that was spent in custody.

MR HORSLEY:

Yes Sir.

WILLIAM YOUNG J:

So under subsection (1), superintendent's of penal institutions had to keep a record of time spent in custody on remand. Do you see that?

MR HORSLEY:

Yes Sir.

WILLIAM YOUNG J:

And then subsection (3), "On receiving the warrant of commitment for any sentenced offender, the superintendent shall cause any period during which the offender was detained… on remand… to be determined and entered on the warrant of commitment."

MR HORSLEY:

Yes.

WILLIAM YOUNG J:

Now warrants of commitment tend to be issued in relation to single sentencing occasions, in other words, 20 charges, one warrant.

MR HORSLEY:

Ah –

WILLIAM YOUNG J:

Well if you look at page 125 of the case on appeal, that's Mr Marino's warrant.

MR HORSLEY:

Yes Sir.

WILLIAM YOUNG J:

And as you can see there's a single warrant.

MR HORSLEY:

Yes Sir, there is in that case.

WILLIAM YOUNG J:

Okay, under the, it wasn't mandatory for there to be a single warrant, but it was permissible under the Criminal Justice Act.

MR HORSLEY:

Yes Sir.

WILLIAM YOUNG J:

So if this warrant, if this had happened under the 1985 Act, the Commissioner would have seen this total of 22 months, and then he would have deducted from that time spent on remand.

MR HORSLEY:

Yes Sir, for the particular charges. So the periods of remand –

WILLIAM YOUNG J:

So all the charges that were listed, the Commissioner would have, the superintendent would have looked at the charges, worked out the amount of time spent on remand, and deducted that from the 22 months.

MR HORSLEY:

For the perverting the course of justice charge you would have looked at the, you would have had the calculations, *Goldberg v R* [2006] NZSC 58 is a good example of this actually where, and that was looking at section 81 of the Criminal Justice Act in *Goldberg* and from memory – *R v Coward and Hall* CA182/87, 18 December 1987, sorry, those two were both remanded in custody initially for 10 days on manufacturing of heroin charges. They were released on bail and there were other offences committed, for which they were actually subsequently imprisoned. Those offences did not calculate the 10 days worth of remand that was on the heroin charges, and they got a credit for the remand that they had in custody on those subsequent charges, and the error that arose was that when the Judge was calculating, for the purposes of noting on the warrant of commitment for Messrs Coward and Hall, the calculation for the heroin charges, he did not count the subsequent period

where they had gone back into custody. he only gave them the initial 10 days. So that engaged two warrants of commitment, or would have done, and it was said that the calculation was incorrect because, in fact, all of the pre-sentence detention, that was applicable to the heroin charges, was not properly calculated.

WILLIAM YOUNG J:
But just looking at Mr Marino's warrant for a moment. Why wouldn't all the, under the 1985, why wouldn't all the pre-sentence detention just be totalled up and set-off against the 22 months, because that seems to me to be what section, subsection (3) means.

MR HORSLEY:
Because of the assessment that's made of subsection (2) which –

WILLIAM YOUNG J:
No, it's not subsection (2), that's something else.

MR HORSLEY:
Sorry one –

ELIAS CJ:
Section 81?

WILLIAM YOUNG J:
Section 81(1) is the first one.

MR HORSLEY:
Yes.

WILLIAM YOUNG J:
But at that stage the superintendent doesn't know what's going to happen the superintendent is just recording time in custody.

MR HORSLEY:

That's on the warrant of commitment, the subsection (3).

WILLIAM YOUNG J:

Yes, on subsection (3) you've got to record on the final warrant of commitment the time spent on remand.

MR HORSLEY:

Yes. And the period that you're calculating it on is referenced back to subsection (1).

WILLIAM YOUNG J:

Yes.

MR HORSLEY:

And in particular that is the period you will see beneath (b) where at any stage of the proceedings leading to the person's conviction or pending sentence –

WILLIAM YOUNG J:

Sorry, but what I'm suggesting is on a warrant of commitment like this there's no need to break up the sentences between the different offending. There's one warrant of commitment, one sentence, and one period of remand, providing the remand is referable to one of the charges on which the offender was sentenced. It's just globalised.

MR HORSLEY:

It is, but it's not, albeit that for the purposes of Mr Marino there is a single warrant of commitment, that warrant of commitment has with it separate calculations for the separate offences. For instance you don't globalise it if Mr Marino had been subsequently –

WILLIAM YOUNG J:

I'm not interested in separate sentencing occasions, I'm just interested at the moment in –

MR HORSLEY:

Sorry Sir, I meant subsequently on appeal had been acquitted on one of those charges.

WILLIAM YOUNG J:

Well there'd be another warrant of commitment.

MR HORSLEY:

There would be another warrant of commitment but you'd have to calculate the pre-sentence detention and the remand periods and your end date, for the purposes of each of those sentences.

WILLIAM YOUNG J:

But where would you do that in section 81?

MR HORSLEY:

In section 81 it comes in, and this is the *Taylor v Superintendent of Auckland Prison* [2003] 3 NZLR 752 (CA) interpretation of the meaning of –

ELIAS CJ:

But leaving *Taylor* aside.

WILLIAM YOUNG J:

Leave *Taylor* aside.

MR HORSLEY:

Why, well, where I get separate interpretation, or separate calculations for each sentence, in determining the length of any sentence, you must go back to whether the, again whether any part of the period is in relation to the charge on which you were eventually convicted –

WILLIAM YOUNG J:

Well here it all was. Here, all the periods were in relation to charges on which he was eventually convicted. So he's, on the face of it, squarely within subsection (1).

MR HORSLEY:

And this is where you do have to go to *Taylor* because –

WILLIAM YOUNG J:

But *Taylor* is not concurrent. *Taylor* is a sort of separate sentencing occasions, it's a very different case, and it's confusing I think in the context of what is, to my way of thinking anyway, a reasonably simple, if slightly oddly worded, provision.

MR HORSLEY:

Well *Taylor* is concurrent because it was concurrent sentences that were imposed I think in *Taylor* but –

WILLIAM YOUNG J:

No, they were cumulative sentences.

MR HORSLEY:

I thought the issue in *Taylor* was that they were imposed whilst he was already serving a term of imprisonment, but it was concurrent sentences imposed on those.

WILLIAM YOUNG J:

They were cumulative. A total of 15 years cumulative.

MR HORSLEY:

Yes. But that *Taylor* analysis has been applied –

WILLIAM YOUNG J:

I understand what the current interpretation is.

MR HORSLEY:

Yes.

WILLIAM YOUNG J:

I'm really just trying to say, it's quite a, the section, the current provision is quite difficult because I think there might be a drafting error, or an infelicity in it, but if you go back here, I think that does give you a pretty good steer of what the scheme was intended to achieve, and it does seem to me the most natural way of reading section 81 is that there's a global sentence, which is the one noted on the sentence of commitment, on the warrant of commitment, that period of remand, referable to any of the charges on which that offender was sentenced, is counted up and noted on the warrant of commitment under subsection (3), and there's therefore a global deduction. See this is a system that was, that's really the, affected by the thinking of the schemes that precedes it, where the Judge had to count the days.

MR HORSLEY:

Yes, yes, and we've had variations on that theme. But in all cases, and I suppose one of the difficulties is, is that that's all well and good because you've looked at the Marino warrant of commitment which has all of those in one warrant.

ELIAS CJ:

But what does the reference to, "relates to any charge", what does that mean otherwise?

MR HORSLEY:

That's the analysis that we've given of the various stages through which a proceeding can take, which is that you could be arrested –

GLAZEBROOK J:

How on earth does the superintendent know that? When you're looking at somebody who has to, without an intimate knowledge of everything, and certainly without the time, I would have thought, to trawl through sentencing notes and previous history of commitments.

MR HORSLEY:

Do you mean under the 81 calculation?

GLAZEBROOK J:

Well just generally, how, why would, well I mean we come back to why on earth would Parliament make a distinction of this kind that's totally arbitrary between cumulative and concurrent sentences, but apart from that, why would Parliament assume that, in calculating something that should be easy, the superintendent has to trawl through things and come to legal decisions in respect of relationship between charges?

MR HORSLEY:

Well that is definitely a difficult calculation, but it is one that is necessary, and under the Act Parliament was trying –

GLAZEBROOK J:

But why would we interpret something that can have two interpretations, to have an interpretation that creates arbitrary results, and an awful lot of work for a superintendent and assume that that's what Parliament meant to do when Parliament, in the history, doesn't say anything of the sort.

ELIAS CJ:

I just wonder whether I, I think that there are two points that are being put to you. One is the policy one, which so far I haven't really heard an answer to, but the other one is the textual one on the interpretation of section 81, which Justice Young is putting to you, and I think we still need to get an answer on that because you may, then, have an explanation as to why the current provision should have changed so radically. But for myself, on the text of section 81, I would have thought that that was entirely against the argument that you are advancing, that all the periods on remand are referable to specific charges, because of the way it brings in any stage of proceeding, any charge, whether you were originally arrested on it, and so on, whether you were convicted or not. Just on its text what is the argument that section 81 means, that you must calculate the period according to each charge.

MR HORSLEY:

I'll just sort of reverse that slightly Your Honour because I think it makes it easier, and that is that the whole premise, whether it be under the Criminal Justice Act, Sentencing Act, or Parole Act, is that prosecutions commence with the laying of a single charge, albeit that at the indictment stage those charges can be amalgamated, we always commence with one single charge. The structure of the Sentencing Act is that a sentence must be passed properly on each offence. Not on each sentencing occasion, but on each offence. And likewise for the purposes of calculating, in particular, concurrent charges, it is important that the period on remand with which you have had in relation to a particular charge, is captured and attributed on each concurrent sentence, because with concurrent offences they will have differing starting dates, they will have differing parole eligibility dates, and they will have differing sentence end dates. That changes when you impose a cumulative sentence. When you impose a cumulative sentence –

ELIAS CJ:

I think we really all understand that. What we're asking is about the meaning of section 81(1) which in the text below (b) seems to be looking at the proceedings as encompassing a number of charges.

MR HORSLEY:

Well that's where I think we differ because in our submission the proceedings is in fact the single charge and the course that it takes throughout the period of its life.

ELIAS CJ:

Well what's the point of referring to any other charge on which the person was originally arrested, for example. Because on your interpretation that's not reached, because that's already the not referable to the sentence that is imposed.

MR HORSLEY:

No it's very much referable. If this, forget about multiple charges. If you look at section 81, and the wording of section 81 largely carry through into the Parole Act as well and those types of stages of the proceedings, sorry, the stages of the proceedings referenced in section 81(1), are directly referable to section 92 of the Parole Act and we still cover now those three stages of the proceedings.

ELIAS CJ:

Well what does it mean. Can you just say what section 81(1) means, that's all I'm asking.

MR HORSLEY:

Yes, so section 81(1) means that on a single count you are entitled to credit, or a single offence, you're entitled to credit for the period that you spent on remand in the circumstances that that charge takes as it goes through its life. So if you are arrested on an assault charge, that subsequently becomes a murder charge, and then you are finally convicted of manslaughter, that charge has changed, fundamentally changed in terms of how it looks on the face of it, but you're entitled for your remand credit for the very stages of the proceedings as it went through its life.

ELIAS CJ:

But it's clearly not simply referring to charges that morph into different charges because it includes any charge on which the person, whether or not the person was actually convicted. So he's not being sentenced on that charge.

MR HORSLEY:

Well yes he is because if you take my example you are charged with an assault –

ELIAS CJ:

Oh I see.

MR HORSLEY:

You were tried on murder, and you are finally convicted of manslaughter –

WILLIAM YOUNG J:

Another way of looking at proceedings is that the proceedings that are relevant are the proceedings which are referable to all the charges on which the offender appears for sentence, and which were recorded in the warrant of commitment. Now that's not your interpretation but tell me, but apart from it not according with your interpretation, tell me what's wrong with it?

MR HORSLEY:

Sure. If you come back to –

WILLIAM YOUNG J:

Look at Mr Marino's warrant of commitment. Why can't we just construe proceedings as, for the purposes of we're dealing with section 81 now, but obviously we later have to deal with the current legislation. Why can't we just say that that refers to all the charges on which he was sentenced?

MR HORSLEY:

Because you need a separate calculation for each –

WILLIAM YOUNG J:

But that's just a reassertion of your argument. What's wrong with the – I'm not asking you to put your argument again, put your interpretation again. What I'm asking you is to say what's wrong with the view that proceedings doesn't mean look at the charging document, whatever. What I'm saying is it looks at all the charges, in respect of which there is a sentencing and a single warrant of commitment. Why doesn't that work?

MR HORSLEY:

If you do that what you are saying is that for every charge that appears as a concurrent charge in the warrant of commitment you will get the credit for all

remand periods spent from the time of your charge, your first charge, right through to this final disposition, this warrant of commitment.

WILLIAM YOUNG J:

Just as you would if the charges had resulted in cumulative sentences.

MR HORSLEY:

Not necessarily. So –

WILLIAM YOUNG J:

Just pause there. If Mr Marino had been sentenced to two months on each of the charges cumulatively, it's clear he would have got a full credit.

MR HORSLEY:

What he would have got, Sir, is a single notional sentence because of the operation of –

WILLIAM YOUNG J:

But he would have got a full credit.

MR HORSLEY:

He would have got credit on the two that you have made cumulative –

WILLIAM YOUNG J:

I'm assuming they're all sentenced cumulatively, so it's two months on each, or something of that nature, or a month on each. He gets a full credit.

MR HORSLEY:

The calculation then becomes one of a single notional sentence, as you note. Now that hasn't –

WILLIAM YOUNG J:

Can we just cut to the chase. If it is a single notional sentence, he gets a full credit.

MR HORSLEY:

Well yes and no Sir, and I don't mean to be obtuse about this because –

WILLIAM YOUNG J:

Well what's the no?

MR HORSLEY:

The no is that he can only get a credit for – perhaps it's easier to take you to –

GLAZEBROOK J:

Well if he serves three years of remand, he can only get a credit for 22 months, is that the point?

MR HORSLEY:

No. if I take you to section 90(3), when an offender is subject to –

GLAZEBROOK J:

I have to find it sorry.

MR HORSLEY:

Of the Parole Act. When an offender –

GLAZEBROOK J:

Sorry, can you tell us where it is?

MR HORSLEY:

I'm sorry, I've printed it out. It's tab 6.

GLAZEBROOK J:

Tab 6 thank you.

MR HORSLEY:

So when an offender is subject to two or more cumulative sentences that make a notional single sentence, any pre-sentence detention that relates to the cumulative sentences may be deducted only once from the single notional

sentence. So any overlapping pre-sentence detention when you impose cumulative sentences, can only be applied once.

WILLIAM YOUNG J:
But what does that mean here though?

MR HORSLEY:
When you impose concurrent sentences there is no such prohibition on counting it once, you actually run concurrent sentences, pre-sentence detention runs for the entire period. So when it relates to a particular charge. The reason why they've done that –

WILLIAM YOUNG J:
Just pause there. I don't think that's right. A series of concurrent sentences form a single notional sentence.

MR HORSLEY:
No they don't.

WILLIAM YOUNG J:
A series of cumulative sentences form a single notional sentence.

MR HORSLEY:
Yes Your Honour.

WILLIAM YOUNG J:
So just dealing with Mr Marino's case, he's appearing for sentence on 12 counts. Let's for symmetry's sake pretend it's 11 and he gets two months cumulative on each.

MR HORSLEY:
Yes Sir.

WILLIAM YOUNG J:
So he gets 22 months. All his pre-sentence detention counts, doesn't it?

MR HORSLEY:

Yes it does.

WILLIAM YOUNG J:

Okay now that's the only answer I was looking for.

MR HORSLEY:

But – and it will only count once, so –

WILLIAM YOUNG J:

But it only needs to.

MR HORSLEY:

But only –

WILLIAM YOUNG J:

The fact that he spends six months on one count, on some of them, and less on others, wouldn't matter. He still gets the whole lot, doesn't he?

MR HORSLEY:

No, that's right, because the difference is that you will get, then, of course a longer, or potentially longer, end sentence and you're right, all of that period that is spent on remand will be calculated for the purposes of pre-sentence detention. But that is because of the operation of section 90, which –

WILLIAM YOUNG J:

I would have thought it was the operation of section 90(1).

MR HORSLEY:

Well it's both Sir, because the first thing is that it becomes a notional single sentence, that's right, and the second aspect of it is that you're only allowed to count pre-sentence detention on each charge once, or the pre-sentence detention once. That doesn't apply when you impose concurrent sentences. So if I've already started a sentence, then the pre-sentence detention that is calculated on that doesn't give me a credit for the next sentence that I start.

WILLIAM YOUNG J:

Well that's assuming there are separate sentencing exercises.

MR HORSLEY:

Which again, Sir, probably brings to the fore the anomaly that's created by calling proceedings just something that happens in one sentencing exercise. Now for *Marino*, for instance, he has got pre-sentence detention that relates directly to the family violence charges. I think he has in theory, at least –

WILLIAM YOUNG J:

He must have a rough – eight months, or nine months.

MR HORSLEY:

He was remanded in custody from February right through until October. Now that remand, the full, we'll call it eight months, the full eight months of that remand he is in custody on those family violence charges. That's eight months of pre-sentence detention on the family violence charges. He then has an attempting to pervert the course of justice charge. He gets roughly six months remanded in custody on that, and he has a subsequent one laid, for similar purposes, say four months of remand on that. He's entitled, on the analysis of this, to pre-sentence detention credit for all of his periods of remand. Eight, plus six, plus four.

WILLIAM YOUNG J:

Not if he spent, I think he spent eight months in custody.

MR HORSLEY:

But where is it that it says that he's not entitled to count each one. Now under the cumulative sentences it says you may only count a period of remand once. No such calculation applies for concurrent sentences and that's because they're not added together. They run simultaneously.

GLAZEBROOK J:

No, but don't you look at just the definition of pre-sentence detention for that. If you've only spent eight months then you haven't spent 15 months. It can't be pre-sentence detention – I suppose the difficulty is that if you were in your alternate universe where you have proceedings for each charge.

MR HORSLEY:

To be fair Your Honour it's the current universe, and this is the interpretation –

GLAZEBROOK J:

Well it's the one that's been –

MR HORSLEY:

– that the Court of Appeal have put on it for the last 12 years. And the reasons for that are because pre-sentence detention has to be calculated separately on each charge when you are running concurrent sentences, otherwise it does not work.

GLAZEBROOK J:

Well why, I mean I'm still having difficulty seeing why it doesn't work, and why there should be this policy issue between – I think at one stage you started to say what changed when you had cumulative sentences, and why there was this distinction. So is your assertion that if you didn't do this you would get double-ups in concurrent sentences, when you don't get double-ups in cumulative sentences, is that the only distinction you're making?

MR HORSLEY:

No, there are a number of points that I –

GLAZEBROOK J:

All right, so why don't – because if we understood the policy reasons why you would have this it would not seem arbitrary, which at the moment it does, the distinction I mean. And *Taylor* is in a totally different context where, in fact there was an attempt to get a triple dip.

MR HORSLEY:

Mmm. The policy reason for it, calculating concurrent sentences separately and applying the pre-sentence remand that applies to those, is because they are separate running sentences. Now take, for instance –

GLAZEBROOK J:

Although I would have thought cumulative are even more separate running sentences, which is why they are cumulative and I mean the other arbitrariness about this is that because of the totality principle, you can have an upload on the main charge, and an actual downgrading of the other charges, which probably happened here. So if it had been a separate sentencing exercise for Mr Marino on the domestic violence charges, he wouldn't have been landing up with whatever he landed up with if you look at that in terms of a concurrent sentence, would he? He would have had something more than that. So the loading has been on the more serious charge so it's totally, even more arbitrary in terms of calculation isn't it? Because of the totality principle. Same with cumulative sentences of course.

MR HORSLEY:

Certainly, section 85, when you're applying totality, does provide for separate considerations to come into effect when you have multiple short-term cumulative sentences, and they wouldn't properly reflect the sentencing, and the proposition that each sentence must receive a proper sentence would be impinged upon if you didn't have some sort of totality adjustment. It would result in unfairness, that's true. So there are adjustments that need to be made throughout the course of it. Perhaps something slightly outside of *Marino* is – to give example to this. If somebody is arrested on a charge of assault and they spent two months in custody on that charge, they then abscond – once they are on bail, sorry. They are bailed and they abscond. They spend some two months, two years perhaps even, at large and then commit and are rearrested on an aggravated robbery. The person pleads guilty to both of those charges immediately. On the analysis that the proceedings commenced on that first arrest and that all pre-sentence detention will be credited to those concurrent sentences to both of them, the

person gets two months deducted from his aggravated robbery charge despite the fact that he had not even committed that offence at that stage.

WILLIAM YOUNG J:
But why does that matter if the sentence on the aggravated robbery charge reflects the totality of the offending, which it will do?

GLAZEBROOK J:
And in any event, in that situation one would have expected cumulative sentences because they're totally unrelated and are split in time.

WILLIAM YOUNG J:
But if they are concurrent, the aggravated robbery charge will presumably be the lead charge.

MR HORSLEY:
Yes.

WILLIAM YOUNG J:
And the sentence on that will reflect the totality of offending and thus the criminality in relation to the earlier offending. So what's unjust about the pre-sentence detention counting?

MR HORSLEY:
So say he gets six years for the aggravated robbery and the assault itself was worth a month. There's an uplift of two weeks on the aggravated robbery to take into account totality, yet that person gets two months credit for completely distinct offending against his robbery.

WILLIAM YOUNG J:
But he would – I mean, this may just be rub of the green because that would happen if cumulative sentences were imposed.

MR HORSLEY:
If a –

WILLIAM YOUNG J:

If a cumulative sentence of one day was imposed for the early result, the offender still gets a two-month deduction.

MR HORSLEY:

Yes, they would.

WILLIAM YOUNG J:

So, I mean, in the end, I mean, there are going to be – I mean, I suspect whatever interpretation is adopted there are going to be some rough edges but the *Marino v The Chief Executive of the Department of Corrections* [2016] NZHC 459 and *Booth v R* [2015] NZCA 603 cases are very rough edges indeed.

MR HORSLEY:

They are rough edges, Sir, because –

WILLIAM YOUNG J:

But they're also, I must say they seem to me to be more likely to occur than some of the other problem cases.

MR HORSLEY:

Well, in the intervening period that we've had since the resumption of this hearing we have looked at some of the consequences of a different interpretation and –

WILLIAM YOUNG J:

The instructions apply only to concurrent sentences imposed on a single sentencing occasion. This would be the only change, wouldn't it?

MR HORSLEY:

No, Sir.

WILLIAM YOUNG J:

Why?

MR HORSLEY:

Because the proceedings will capture everything from arrest.

WILLIAM YOUNG J:

The focus is proceedings leading to a single sentencing occasion

MR HORSLEY:

No, it's –

WILLIAM YOUNG J:

No, no, well, that's the proposition you were – that's the case you're already meeting.

MR HORSLEY:

That is proceedings leading to a single sentencing…

WILLIAM YOUNG J:

Occasion. You see, if it's concurrent sentencing –

MR HORSLEY:

So if Mr Marino was sentenced on separate days for the attempts to pervert then he wouldn't get the credit.

WILLIAM YOUNG J:

Maybe. I'll just think that through.

ELIAS CJ:

It's at any stage during the proceedings leading to the sentence.

WILLIAM YOUNG J:

Well, I think he would get the credit actually.

GLAZEBROOK J:

Yes.

MR HORSLEY:

So in that case it must cover separate sentencing occasions.

ELIAS CJ:

If it's been part of –

GLAZEBROOK J:

If you're still in prison presumably.

MR HORSLEY:

Well, I don't why you would need to be in –

GLAZEBROOK J:

Well, because we don't even have the totality principle if you've finished your sentence, so you don't get it…

MR HORSLEY:

But you don't get a credit for remand when you're actually sentenced as a prisoner.

GLAZEBROOK J:

No, no, that's right.

MR HORSLEY:

So if you're serving a term of imprisonment you don't get a credit anyway.

ELIAS CJ:

It's not pre-sentence detention then.

MR HORSLEY:

No. So this will cover –

GLAZEBROOK J:

No, but it's – you will still have to have had the single sentencing that arose out of that pre-sentence detention, is the point I was making. Obviously the time spent as a prisoner doesn't count as pre-sentence detention.

MR HORSLEY:

Say he pleaded guilty and was sentenced on that first attempt to pervert –

GLAZEBROOK J:

Well we're not really looking at that situation here.

MR HORSLEY:

Well I think we are Your Honour because what the definition is on a broad interpretation is every, and this is the very point that you've been making to me, is that this needs to cover every charge that occurs from the start of –

GLAZEBROOK J:

But you have to have had pre-sentence detention in relation to it though, don't you?

MR HORSLEY:

Well, yes, because otherwise there's no point in this discussion, obviously.

GLAZEBROOK J:

So if you commit something afterwards, when you are no longer in pre-sentence detention either because you've been released from prison or you're in prison, then that's a totally sentencing exercise, isn't it, and couldn't be linked back to the proceedings. Where you did have pre-sentence detention.

MR HORSLEY:

So the arbitrary nature of that is that if Mr Marino had defended the attempting to pervert the course of justice charge, and was sentenced on a slightly

different day, say a day after, then he would not be entitled to any of this credit.

GLAZEBROOK J:

No, no, I think we were saying he would be entitled to the credit because the charges related to the pre-sentence detention. Whereas if he had tried to do it once he was a serving prisoner, tried to pervert the course of justice, perhaps for an appeal, then that wouldn't come within the same proceedings.

MR HORSLEY:

Yes, but if there are, for any reason whatsoever, any of his charges happen to be split off and sentenced on a different day, as I understand Justice Young –

WILLIAM YOUNG J:

Well it maybe that you might have a difficulty on that basis.

MR HORSLEY:

Sorry on what?

WILLIAM YOUNG J:

I'm not, I mean that may be one of the rough edges that I actually had in mind. I mean he would have had a difficulty under section 81 of the Criminal Justice Act.

MR HORSLEY:

Mmm.

WILLIAM YOUNG J:

Maybe, anyway.

GLAZEBROOK J:

All I was saying is that's not this case.

WILLIAM YOUNG J:

Yes.

GLAZEBROOK J:

Because he was sentenced on the same day.

MR HORSLEY:

That's true Your Honour but one of the things I think that we were talking about when we decided to adjourn this, was to look at whether there were anomalies that were going to be created by a broader interpretation. That's certainly one of them.

GLAZEBROOK J:

Well it may be unless you do the job lot in terms of proceedings, that anything related to pre-sentence detention, that you look at the final outcome, and even if that happens after you've been a serving prisoner for five months because in your example he pleaded guilty to assault straightaway and defended the agg rob.

MR HORSLEY:

That makes it very difficult to work out what the proceedings are, and it certainly makes it very difficult for the receiving officers to make that calculation, which is one of the consequences –

GLAZEBROOK J:

Well not terribly difficult because you know they've been in pre-sentence detention, you know what pre-sentence detention is. It's before, it's only before the –

MR HORSLEY:

That they will now be relating to completely different –

GLAZEBROOK J:

No, no, it's before the first sentencing exercise.

MR HORSLEY:

It would also apply, in my submission, to acquittals because if a charge is laid at some time after the initial assault, but before, or if the initial charge and then a subsequent more serious charges are laid, but you're acquitted of this first ones, they also form part of the proceedings. That was your initial arrest, that was your remand in custody, and that should also be given a credit.

ELIAS CJ:

Well hang on actually isn't the better example if the subsequent charges are the more serious ones –

MR HORSLEY:

I think that's what I –

ELIAS CJ:

– and you wouldn't really have the remanded in custody for the more trivial charges, for that, or you wouldn't have been sentenced to the length of time spent in custody for the, and you're not for the less serious charges.

MR HORSLEY:

So, Your Honour, this anomaly only arises in situations where the subsequent charge becomes the lead offence and is more serious than the first period that you were remanded in custody for. So that's the exact situation. So if I am charged with an assault, and I am then bailed, and that charge is still outstanding, but whilst I'm on bail I commit a rape, then if I am subsequently convicted of both of those on your analysis those are part of the same proceedings, even if I'm sentenced to concurrent sentences, my rape charge should get a credit for the initial remand on the assault charge. Likewise they are still part of the same proceedings. I was initially arrested on the assault, but if I'm acquitted of that, I should also be entitled to a period of, that period that I've spent, because that forms part of the entire proceedings.

Now I think my learned friend Mr Ewen has, in fact, provided a table in which he expressly acknowledges that that is one of the consequences, as he sees

it as well, as proceedings being defined as anything, any charge that occurs form the date of initial arrest through to final disposition. Of all other charges, whether related or otherwise.

GLAZEBROOK J:

But that naturally happens with cumulative charges which by their very definition are unrelated.

MR HORSLEY:

It wouldn't happen in the case of an acquittal Your Honour. There'd be no sentence imposed on that. But it will happen now with concurrent sentences.

GLAZEBROOK J:

Well I'm not sure, because pre-sentence detention in terms of definition is defined as any charge on which the person, any other charge on which they are originally arrested, any charge a person faced at any time, so why wouldn't it apply to the acquittal?

MR HORSLEY:

For a cumulative sentence?

GLAZEBROOK J:

Yes.

MR HORSLEY:

Because you don't actually have a sentence that's been imposed.

GLAZEBROOK J:

But you have pre-sentence detention. Oh you mean they're acquitted of everything?

MR HORSLEY:

No, no, just –

GLAZEBROOK J:

Well they're facing five charges, they are convicted on three, acquitted on two, and they're eventually convicted on three of the charges, why isn't it pre-sentence detention?

WILLIAM YOUNG J:

Well the case that might arise is *Booth*'s case, if he had been completely acquitted in relation to the charges against B, because he's in custody in relation to her for 10 months.

MR HORSLEY:

Yes Sir.

WILLIAM YOUNG J:

He's only convicted on, in fact one count in relation to her, but had he been acquitted outright then at least on the basis of *Goldberg* he's out of luck.

MR HORSLEY:

Yes. And of course that is an accepted way –

ELIAS CJ:

Well it's only a deduction, it's not compensation. So if there's nothing to deduct it from, that is the rub of the green.

MR HORSLEY:

That's right, but it won't be the rub of the green, of course, if we take this broader interpretation of proceedings as meaning everything from the commencement of your initial arrest. You will get a credit for acquittals.

ELIAS CJ:

I must say I tend to think that it is everything, all the charges in respect of the sentence that is imposed.

MR HORSLEY:

Which is quite a different interpretation now of what the meaning is of sections, or subsections (a), (b) and (c), under section 91, because that was the very point which is how do we interpret section 91(1) and what do those things relate to.

ELIAS CJ:

No, I'm sorry, I'm talking about sentencing, the sentence being the total sentence imposed on a particular occasion. I'm still not persuaded that you're right, that there is, that for these purposes you're looking at a sentence for each charge. I don't see this as being about particular charges by the time we've got to the Parole Act. Can I just put to you the, because it isn't very well drafted at all, but section 90(1) is the principal provision, and then the interpretation is 91(1). I've tended to see (2) and (3) directed as the same problem, which is double-dipping, but in the different circumstances of two or more concurrent sentences, or two or more cumulative sentences. And that there is an equivalence that is suggested between subsections (2) and (3), which on your interpretation doesn't work.

MR HORSLEY:

Mmm. Certainly, if you were going to say that where in subsection (2) you interpret two or more concurrent sentences and the wording in (a) as being a calculation on each sentence as being each sentencing occasion –

ELIAS CJ:

Yes.

MR HORSLEY:

– then I think that that creates – that's quite an artificial and very difficult to read conclusion because that means that you don't do that calculation when you are sentencing on concurrent sentences on a single time. You don't make a calculation –

ELIAS CJ:

Well, I think you might because I think you might be sentenced on a single occasion and then you're sentenced later and it's concurrent. I think those probably are two or more concurrent sentences.

MR HORSLEY:

There's certainly subsequent occasions when you impose another concurrent sentences, another concurrent sentence.

ELIAS CJ:

Well, they're both concurrent at that stage, aren't they? As soon as you impose a sentence concurrently you do have two concurrent sentences.

MR HORSLEY:

Yes, yes.

ELIAS CJ:

And the whole purpose of (2) and (3) it seems to me is to stop double dipping in terms of the pre-sentence deduction. So that would work. You then require a separate account to be taken because – but that is looking at each sentencing occasion.

MR HORSLEY:

No, no, because the double dipping can occur on a single sentencing occasion as well. For instance, if I have had no period of remand on a particular sentence, so say I've spent six months on remand for a serious assault.

ELIAS CJ:

You're acquitted of that assault –

MR HORSLEY:

Well, forget about an acquittal.

ELIAS CJ:
– but you are convicted of something that you weren't remanded.

MR HORSLEY:
Well, this is just talking about when a concurrent sentence is imposed.

ELIAS CJ:
All right.

MR HORSLEY:
So after six months I commit yet another serious assault whilst I've been in custody. I immediately plead guilty to both of those assaults and the sentence for each is that both of those assaults were worth 12 months and I'm going to sentence you to 12 months concurrent. If you say that I should get credit for all the time that's spent on remand for both those assaults, I am immediately eligible for release on both those assaults. I have, in effect, not been punished at all for the second assault.

WILLIAM YOUNG J:
But isn't that a complaint directed to the sentence rather than the way the Act operates?

MR HORSLEY:
Well, no, Your Honour, because in fact the initial remand was only on an offence that I have already committed and I'm serving time effectively on that offence. I then commit a second offence and I should not be given credit for something that I have spent remand on for an offence I've never even done and the sentencing Judge –

WILLIAM YOUNG J:
But if the sentencing is referable to both offences I can't see what the problem is.

MR HORSLEY:

Because you have to calculate on each sentence –

WILLIAM YOUNG J:

But that's just the –

MR HORSLEY:

– the pre-sentence detention that relates to that charge.

WILLIAM YOUNG J:

That's just the argument. I mean, that's just your interpretation, but in terms of policy if the sentencing relates to two offences and reflects the totality of the offending I can't see what the problem is as a matter of policy with counting all the pre-sentence detention.

MR HORSLEY:

Because that won't then reflect the totality, I guess, is the answer, but –

WILLIAM YOUNG J:

Well, why wouldn't it? But why wouldn't it? What –

MR HORSLEY:

And as a matter of policy you should not be getting credit for time spent on remand because the – in terms of policy arguments –

GLAZEBROOK J:

But you do want a cumulative sentence where you've got totally unrelated offending, so what's the policy argument for that?

MR HORSLEY:

If I was given two 12-month cumulative sentences –

WILLIAM YOUNG J:

No, say two six-month cumulative sentences.

MR HORSLEY:

But I don't think the Judge would have done that.

WILLIAM YOUNG J:

So, but, sorry, but why wouldn't the – why does it make a – I mean, I must have missed something. Why does it make a difference to the Judge whether it's 12 months concurrent on two charges or six months cumulative on two charges? I mean…

MR HORSLEY:

Because the 12-month sentence is to reflect properly the second offending.

WILLIAM YOUNG J:

Yes.

MR HORSLEY:

And so –

WILLIAM YOUNG J:

But in light of the first.

MR HORSLEY:

Well, not necessarily.

WILLIAM YOUNG J:

What's the totality, doesn't the totality –

MR HORSLEY:

The totality is only where imposing a single sentence, or imposing a sentence is going to effectively engage you in a manifestly excessive exercise. Normally that's when two proper sentences are going to be imposed cumulatively, so two rapes would end up with 16 years.

WILLIAM YOUNG J:

But totality applies to concurrent as well.

MR HORSLEY:

Well only when you're looking at the issues of does the lead sentence that I impose end up being manifestly excessive.

WILLIAM YOUNG J:

No because the lead sentence on concurrent sentencing usually will be manifestly excessive if you solely by reference to the criminality inherent in the lead offence. It's a totality that reflects all the offending. so –

MR HORSLEY:

Yes.

WILLIAM YOUNG J:

You're looking at me in a puzzled sort of way.

MR HORSLEY:

I'm trying to get my head around that, sorry Sir.

WILLIAM YOUNG J:

For instance in the case of *Booth*, he got more for the first count of rape, and that count of rape standing alone would have warranted.

MR HORSLEY:

Yes.

WILLIAM YOUNG J:

So the totality, so in that sense it was a manifestly excessive sentence, you'd solely in light of that offending.

MR HORSLEY:

Yes, if, yes if you take that artificial constraint, of course that's what totality brings you down to, but the totality brings you –

WILLIAM YOUNG J:

In that case it brings you up.

MR HORSLEY:
Only because we say that if you're imposing a lead sentence it should reflect the totality of offending, that's right, on a concurrent sentence. It could have been dealt with in other ways of course.

So I think, Your Honours, that there are policy reasons for calculating each sentence as having its own separate pre-sentence detention calculation.

GLAZEBROOK J:
I can understand those policy reasons, but what I don't understand is why they don't apply to cumulative sentences. I can understand you can have a policy reason of that nature, but then why would you have a provision that says that if you impose cumulative sentences, there's a difference. When, by their very nature cumulative sentences are only applicable to very different types of offending. Because if it's similar offending then it should be cumulative, similar offending at similar times et cetera, then it should be cumulative. So the policy reasons that you're indicating seem to me to be very much stronger on cumulative sentences, and yet on the Crown's interpretation cumulative sentences get an advantage. Which in policy terms I would have thought, even stronger policy terms, to say they shouldn't be calculated that way.

MR HORSLEY:
I think the difficulty is, is that *Marino* and *Booth* both have engaged circumstances where there is a so-called anomaly in the sense that the Judges may have, and we don't know for sure, expected that pre-sentence detention would have been credited.

GLAZEBROOK J:
I'm not really, I'm asking you, not this particular case. What I'm saying is, why are the policy reasons, which seem to be much stronger in respect of cumulative sentences, not applied to cumulative sentences?

MR HORSLEY:
I'm not sure I understand what those policy reasons are.

GLAZEBROOK J:
Well, your policy reason is you shouldn't get credit for anything that you didn't spend time on pre-detention with. Now – because they are different occasions and different sentences. Now the reason I say it's even stronger with cumulative is that not only shouldn't you get credit because they should be dealt with separately but in fact you're dealing with totally disparate offending that doesn't merit having a cumulative sentence. So you're in fact getting credit on a, I don't know, an aggravated robbery as against theft.

MR HORSLEY:
Mmm. But –

GLAZEBROOK J:
Or on a totally separate occasion and a totally different time and totally different circumstances.

MR HORSLEY:
Yep.

GLAZEBROOK J:
So the policy reasons seem much, much stronger in – your policy reason seemed to me much stronger in respect of cumulative.

MR HORSLEY:
So the differences, I suppose, is that when you impose a concurrent sentence on one that you're already serving you start serving that sentence immediately. If I impose a cumulative sentence I have to wait right through until the end of my sentence before I start serving it, which is why you have to have the calculation of a single notional sentence and that's just how it works for the calculation. If it all happens on a single sentencing occasion then there is no strong policy reason necessarily why in some circumstances you

shouldn't get the same credit that you would have got for a cumulative sentence. I accept that and I think we accepted that in *Booth*. That's important for Judges to know what the consequences of imposing sentences are, but there are serious ramifications if we treat concurrent sentences as being like a single notional sentence and we treat the proceedings as encompassing everything from the arrest on an initial charge right through to the final disposition of all charges, whether related or not.

GLAZEBROOK J:
Right, so what are your serious consequences?

MR HORSLEY:
You will be giving credit to people who are acquitted. You will be giving credit for entirely unrelated offending in circumstances where that might not have been intended.

GLAZEBROOK J:
But you do on cumulative, so that's fine on cumulative. It's just not fine on concurrent when there are much stronger policy reasons for not giving the credit on cumulative as I just put to you.

MR HORSLEY:
Yes. You will also have an inability it appears to calculate the pre-sentence detention and release dates on each individual concurrent sentence as it's required to be done. So the Act requires each sentence to be separately calculated for the purposes of concurrent sentences.

WILLIAM YOUNG J:
But it's not – it's just a – it would be a mechanism for deciding when those sentences start. It wouldn't be inconsistent with the Act. It's just applying the Act to what the commencement date is.

MR HORSLEY:

But if you apply it to the commencement date you're artificially actually starting the commencement date of that sentence.

WILLIAM YOUNG J:

But you always do when you allow for pre-sentence detention because you always have –

MR HORSLEY:

No, no, no, sorry, Sir. In the *Marino* case, for example, you're actually backdating the commencement date of the offence to the date of original arrest which might not have even been at a time when you've even committed that offence.

WILLIAM YOUNG J:

I see, okay. All right, well, I understand that. So in *Goldberg*, for instance, which is another case where there's an acquittal, that that's really a sentence appeal but – so it seemed to have been argued on the presupposition that *Goldberg* wouldn't get it, wouldn't get an allowance for – he's in custody on charges of rape. While in custody he tries to defeat the course of justice. He then is effectively acquitted or the charges of rape are abandoned and he wants to be credited with the time he spent in custody on the charges of rape in relation to the sentence later imposed for attempting to defeat the course of justice.

MR HORSLEY:

Yes.

WILLIAM YOUNG J:

And now he – and, as I said, that was a sentence appeal. He – how would you see his claim to a, the pre-sentence detention work in relation to the arguments that have been advanced? On the face of it he's acquitted so he's got nothing to deduct it against.

MR HORSLEY:

Yes. He – his prosecution was actually stayed, I think.

WILLIAM YOUNG J:

Yes.

MR HORSLEY:

He would be entitled to a credit, of course.

WILLIAM YOUNG J:

Why?

MR HORSLEY:

Because he was originally arrested on a charge of rape. Before the final disposition of that another charge occurred which was the…

GLAZEBROOK J:

Sorry, can I just check, is that on the Crown analysis?

MR HORSLEY:

No, it's on your analysis, Your Honour.

WILLIAM YOUNG J:

Not so much on my analysis because I would say the proceedings in relation to the perversion of justice charges only could be regarded as being commencing when those charges were laid because those were the charges on which he was sentenced.

MR HORSLEY:

And isn't that exactly where the problem lies, Sir, because if those charges only commenced at the time he was arrested and charged for those offences –

WILLIAM YOUNG J:

Because those were the charges on which he was sentenced. The proceedings in relation to the charges on which he was sentenced only commenced when those charges were laid.

MR HORSLEY:

Correct.

WILLIAM YOUNG J:

He wasn’t sentenced on the rape because he wasn’t convicted on the rape.

MR HORSLEY:

Correct.

GLAZEBROOK J:

Although you do have the other two (b) and (c).

WILLIAM YOUNG J:

I understand that there’s – that it’s –

GLAZEBROOK J:

There’s another argument.

WILLIAM YOUNG J:

Yes.

MR HORSLEY:

So that would be a variation on the definition of proceedings, which is to say that proceedings don’t actually cover everything from your initial arrest through to all other related charges.

WILLIAM YOUNG J:

Well, as a proposition –

MR HORSLEY:

But actually they only count for the particular charge upon which you are sentenced.

WILLIAM YOUNG J:

And related charges.

MR HORSLEY:

Isn't the first one a related charge?

WILLIAM YOUNG J:

No, I would say charges that are laid in substitution. So the murder, he's sentenced – charged with murder and aggravated robbery, convicted of manslaughter and aggravated robbery. I would treat the pre-sentence detention starting with a remand on the murder charge –

GLAZEBROOK J:

But if that's the Crown's argument though.

WILLIAM YOUNG J:

Well, yes, but because I would treat the manslaughter as – I understand there's an issue there but I would treat that as encompassed in the proceedings referable to the charges on which he was sentenced.

MR HORSLEY:

Mmm, which as Your Honour, Justice Glazebrook, points out, that is the Crown argument that that is the definition of proceedings and –

WILLIAM YOUNG J:

Well, yes, but of course then – but applying that to the cases of *Marino* and *Booth* that argument gets them their pre-sentence allowance.

MR HORSLEY:

Well, it only gets it, Sir, because –

WILLIAM YOUNG J:

They're sentenced on one occasion.

MR HORSLEY:

– don't forget you're also giving them credit on family violence charges.

WILLIAM YOUNG J:

Yes, because they're sentenced on one occasion on that interpretation they get a credit.

MR HORSLEY:

So the proceedings are any charge on which you're originally arrested –

WILLIAM YOUNG J:

I would say it's the proceed –

MR HORSLEY:

– so long as it's still alive

WILLIAM YOUNG J:

No, well, I'd say it's the – what constitutes proceedings is to be looked at in retrospect by reference to the charges on what your sentence – the charges on which you were sentenced, and that's why I thought section 81 of the Criminal Justice Act was helpful because it suggested that – it gave you an idea of a warrant of commitment approach referable to what had gone before, a manual system, a sentence imposed on a day, pre-sentence detention in reference to the – that's referable to the charges on which you were sentenced is deducted.

MR HORSLEY:

Mmm. The difficult with that is that the warrant of commitment didn't necessarily always encompass every charge.

WILLIAM YOUNG J:

Well, I agree with that but that would suggest that if it could, I mean, it could hardly turn on whether the registrar in the District Court used one warrant or two warrants.

MR HORSLEY:

No, which again, Sir, just seems to show the arbitrariness of relying perhaps on a warrant.

GLAZEBROOK J:

Well, I'm not sure because I certainly have never signed more than one warrant of commitment.

WILLIAM YOUNG J:

In my experience was there was only ever one warrant.

MR HORSLEY:

Mmm.

GLAZEBROOK J:

Because it just is too confusing for the prison if you send more than one warrant so I should expect it would be sent back from the prison because they wouldn't be able to work out the – I mean, obviously if it's on different days you might.

MR HORSLEY:

Well, even the same day, Your Honour, you could be sentenced in the High Court and the District Court.

WILLIAM YOUNG J:

Well, that might happen. These are – there are complications and your example of say the charges against *Marino* being dealt with on different days, family violence dealt with in say June, other charges dealt with in October, well, then that may be an anomaly.

MR HORSLEY:

So the anomaly that we are concerned with is one that I suggest can be readily fixed at sentencing which is by sentencing Judges being aware of pre-sentence detention periods that have been had or served on the various charges, and that if you –

GLAZEBROOK J:

Well, and then artificially changing from cumulative to – and then if you, if the Judge doesn't because they're somehow not aware of it then you'll end up with the situation we've got, when actually the Crown, I think, in at least *Booth* case – not Mr Marino's case I think was actually asking for cumulative sentences and they could easily have been imposed.

MR HORSLEY:

Mmm, and they could have been, and isn't that where that's probably the correct answer is that Judge's should be structuring those sentences at the start?

WILLIAM YOUNG J:

But the whole of this legislation was, of course, brought in, this scheme was brought in because Judge's, from recollection, didn't do a very good job when they were required to count the days.

MR HORSLEY:

Well, that's correct, Sir, and I think what we're seeing here is that we're trying to do a legislative fix because of a couple of anomalies that have arisen.

WILLIAM YOUNG J:

But they're not quite just a couple. Your figures indicate it's not an uncommon problem.

MR HORSLEY:

Well, our figures indicate that there are, I think, approximately 49 people –

ELIAS CJ:
At present.

MR HORSLEY:
– in a muster of some seven and a half thousand prisoners that might be affected by this.

WILLIAM YOUNG J:
But they're likely to be the short-term people, aren't they?

MR HORSLEY:
Well, that's right, but it's a very – and it's a very small problem.

WILLIAM YOUNG J:
But they're going to be turning over all the time.

MR HORSLEY:
Well, yes, and some of those days might be anywhere between one and seven days, of course –

WILLIAM YOUNG J:
Yes.

MR HORSLEY:
– because other charges are laid that are more serious seven days down the track, sort of thing. So we're trying to fix here, in my submission, something which is an anomaly, there's no doubt about it. Some people might suggest that not getting a credit for an acquittal seems very strange when you get a bigger discount for actually being convicted. That's also an anomaly, but the concern that we're raising is that the interpretation that has been on foot for the last 12 years or so of pre-sentence detention and how it's calculated and that it relates to calculating a sentence and the pre-sentence detention that is directly referable to a charge as it goes through its various iterations is one that is an interpretation that has been applied by the Court of Appeal as well.

Parliament has not seen fit to interfere in 13 years after very high profile cases involving this interpretation, and now if we change –

GLAZEBROOK J:

Well, sorry, what are the high profile cases involving the interpretation because if you're –

MR HORSLEY:

Taylor, *Te Aho v R* [2013] NZCA 47.

GLAZEBROOK J:

Well, *Taylor* was trying to get a triple dip on a cumulative sentence so that actually has nothing to do with this, does it?

MR HORSLEY:

Well, it does, Your Honour, because the interpretation of what the proceedings means is directly referable no matter whether it's a triple dip attempt or a double dip or whatever.

GLAZEBROOK J:

But I can't imagine Parliament thinking, "Oh, gosh, we've got to change the interpretation because Mr Taylor should have been able to triple dip," so it's not surprising that they didn't change it, is there?

MR HORSLEY:

Goldberg. Well, in fact, every single case that has hit the Court of Appeal has the very same interpretation.

ELIAS CJ:

There're not that many of them.

MR HORSLEY:

Well, there's at least a dozen, Your Honour.

WILLIAM YOUNG J:

Are there?

MR HORSLEY:

There's certainly, I think, six Court of Appeal decisions and there are some quite reasonably well-cited High Court decisions as well, so we are talking about –

ELIAS CJ:

Where do we find reference to those six Court of Appeal decisions? Are they just scattered? Are they collected somewhere?

MR HORSLEY:

Actually, in both the *Booth* and *Marino* judgments they reference back to a number.

ELIAS CJ:

Yes.

MR HORSLEY:

So you do have – even if we take the present ones, *Booth*, *Marino*, *Te Aho*. *Kahui v R* [2013] NZCA 124, *Costello v R* [2015] NZCA 512, *Goldberg*.

GLAZEBROOK J:

My understanding is most of them are relatively recent though so it's not –

MR HORSLEY:

Coward and Hall. No, they're not, Your Honour. *Coward and Hall* was under the 1981 – the 1985 Act. *Taylor's* old. *Goldberg's* relatively old. *Te Aho* is more recent. So we do have an established body of law which has consistently this so-called anomaly, and it is an anomaly, sorry, I shouldn't call it "so-called", as being the correct interpretation, and the concern is, which is exactly where we got to last time, that a reinterpretation of these proceedings will lead to other anomalies, and Your Honour, Justice Young, accepts that as

well, that there will be anomalies and it will be difficult to work out how we apply this.

GLAZEBROOK J:
I still haven't got these other anomalies. The acquittal one. Is there anything else?

MR HORSLEY:
The separate sentencing occasion.

GLAZEBROOK J:
Well, it depends what that means.

WILLIAM YOUNG J:
Assume that in the case of Mr Marino he'd been sentenced in June for the family violence charges to 12 months imprisonment and then concurrently in October to 22 months on the other charges, then on the view that proceedings is referable only to the charges on which the offender is sentenced there wouldn't be a credit for the 22-month sentence. That's the anomaly, one of the anomalies.

MR HORSLEY:
Mmm.

GLAZEBROOK J:
Although he would have already had a credit on the other proceedings for the whole period.

WILLIAM YOUNG J:
Yes, except it won't help him because the 22 months starts on the –

MR HORSLEY:
Yes.

WILLIAM YOUNG J:

– on the 27th of November.

MR HORSLEY:

Correct.

WILLIAM YOUNG J:

Or, sorry, does it?

GLAZEBROOK J:

No, no, I don't think that's right.

WILLIAM YOUNG J:

No, it would start…

MR HORSLEY:

He'll get whatever pre-sentence detention only applied to that charge.

WILLIAM YOUNG J:

But, sorry, yes, subject to that it would start on the 27th of October, so if he had no pre-sentence detention on the…

MR HORSLEY:

If you have no pre-sentence detention your sentence starts from the date of imposition. There's no artificial retrospective look.

WILLIAM YOUNG J:

So it doesn't go back to the start date of the earlier concurrent sentence?

MR HORSLEY:

No.

WILLIAM YOUNG J:

Right.

MR HORSLEY:

So that's one of the anomalies that arises.

GLAZEBROOK J:

Although he wouldn't have got 22 months presumably.

WILLIAM YOUNG J:

Well, it would've been – might've been different, that's right, just assuming that these facts were the same but only that, those changes.

GLAZEBROOK J:

Yes, because there would still be the totality issue in respect of them. They'd have to be related charges, in this particular case.

ELIAS CJ:

So did you –

GLAZEBROOK J:

And if they weren't maybe that's just too bad, that's what happens.

MR HORSLEY:

Mmm.

ELIAS CJ:

So did you say that *Coward and Hall* is authority for the argument that you're – I'm just having a look at…

MR HORSLEY:

Well, *Coward and Hall* had separate calculations made on each sentence. There was just a miscalculation made on the sentence but they certainly didn't imply that there would be a double credit.

ELIAS CJ:

It wasn't for each charge though, was it? It just doesn't seem –

GLAZEBROOK J:

Nobody's suggesting there should be a double credit.

ELIAS CJ:

– there's any charge.

MR HORSLEY:

Well, I think that's exactly what we're suggesting, that there will be a double credit in effect.

GLAZEBROOK J:

Well, the Crown might be suggesting it but that's certainly not what the Court's suggesting.

MR HORSLEY:

No.

ELIAS CJ:

I just can't read *Coward and Hall* in the way that you suggest.

MR HORSLEY:

So *Coward and Hall*, Your Honour, the difficulty was with the calculation on the heroin charge but the – they had got the credits for the remand that they spent on the subsequent offending but they didn't get, on the subsequent offending, they didn't get the initial 10 days' credit for the remand on the heroin charges. They didn't get that. But then when you came to calculate the heroin charges they only got the 10-day credit, from memory. They didn't get the other period that they were actually serving. They were back in custody on remand for their heroin charges, and because it was already credited they didn't get that. Now that was an error because in fact they were serving time on remand for all of their charges during that particular period. But on your analysis, if proceedings are everything from the date of initial arrest, those 10 days for the heroin charges should have been credited to those other offences as well.

ELIAS CJ:

Well, their concern – well, the Court seems to be concerned that the benefit of remand periods imposed over the stipulated time should not be lost –

MR HORSLEY:

That's right, Your Honour.

ELIAS CJ:

– by applying them only to their relevant shorter sentences.

MR HORSLEY:

But that's because they were in fact in remand on both at the same time, and if you only applied it to the one that they were – that they first got sentenced on, that meant that you didn't get a credit for the fact that actually you were serving time for all four charges or whatever it was. But they weren't suggesting that you got credit for offending that had not yet occurred for your original remand.

ELIAS CJ:

Oh, yes, not dealing with that, no.

GLAZEBROOK J:

This is why I have difficulty in seeing this because Parliament's not going to look at that either and think, "Oh, there's a major anomaly that should be fixed," because in fact they did credit for the lot.

MR HORSLEY:

Not in *Coward and Hall*.

WILLIAM YOUNG J:

Yes, they did.

GLAZEBROOK J:

Well, they did, in fact.

MR HORSLEY:

Well –

GLAZEBROOK J:

So the point here doesn't arise. It's not the –

MR HORSLEY:

But in *Coward and Hall* the only reason – yes, you're right. The only reason they get credit for it all was because the lead offence was the one that they were first charged with. If the lead offence had not been –

GLAZEBROOK J:

I know. I very much understand that. It's just that this, that that didn't throw up this anomaly that Parliament, that you say Parliament deliberately decided to keep.

MR HORSLEY:

I'm just – well, I suppose so. I'm just saying that this issue of how you calculate remand has been around for a long time, 13-odd years.

GLAZEBROOK J:

Well, certainly because everybody's mucked it up so frequently.

WILLIAM YOUNG J:

It's not the easiest sort of exercise to get one's head around.

MR HORSLEY:

No, Your Honour.

WILLIAM YOUNG J:

And the outcome in *Taylor* is obviously right.

MR HORSLEY:

Mmm.

WILLIAM YOUNG J:
But beyond that it hasn't really been given a lot of analysis, has it? And by the time *Taylor* was decided the Sentencing Act and Parole Act had already been enacted. So there's never been another look at it.

MR HORSLEY:
Yes, that's right but to be fair I think the High Court Judges have applied this in exactly this way consistently –

WILLIAM YOUNG J:
But they've been –

MR HORSLEY:
– including in habeas applications which they look at as well.

WILLIAM YOUNG J:
But they've been following *Taylor*, haven't they?

MR HORSLEY:
Well, yes, and they've been calculating sentences and this relatedness inquiry has been applied consistently and been applied administratively throughout that entire period. So I think that the difficulty that we have here is that there is no doubt that a different interpretation, one that says that the proceedings are everything from initial arrest on whatever charge right through till final disposition, have real problems because you will then have to further define that as being that only occur on a particular sentencing occasion or that do not take into account charges for which you were finally acquitted of. They would appear to give a double counting for concurrent charges because there's no exclusion from double counting for concurrent charges.

GLAZEBROOK J:
But there is an exclusion because pre-sentence detention has one meaning.

MR HORSLEY:
And you get a credit for pre-sentence detention.

GLAZEBROOK J:
So if you look at the definition of pre-sentence detention you only get a credit for the time that you've spent in custody. There's nothing that says you get a credit for the time you've spent in custody five times, because the definition of pre-sentence detention is the time you've spent in custody in relation to the charges on which you were eventually convicted. Anything else, or whatever it says. So I don't get out of that that you have to double it up unless the Crown's interpretation is right, but if the Crown's interpretation of proceedings isn't right and the proceedings is the job lot then the only type pre-sentence detention in relation to those is, I can't remember in Mr Marino's case, the six months or whatever it is.

MR HORSLEY:
Well, no, it'll have to be right from the family violence.

GLAZEBROOK J:
Well, it can't be six plus four plus everything because pre-sentence detention under the definition is the job lot.

MR HORSLEY:
Mmm. So Mr –

GLAZEBROOK J:
And that can't be more than six months.

MR HORSLEY:
No, no, no, I understand that.

GLAZEBROOK J:
So there's no double dip.

MR HORSLEY:

If that is read into it as well, that –

GLAZEBROOK J:

Well, I don't think you're reading anything into it because that's what the words say. The definition of pre-sentence detention.

MR HORSLEY:

There is an argument, of course, that when it is specifically defined in subsection (3) of section 90 that we've got two or more cumulative sentences you can only deduct once, that has not been used in the sense of concurrent sentences and so it may be deducted more than once.

ELIAS CJ:

Well, no, unless subsection – subsection (2) is the provision that achieves the same result in respect of concurrent sentences.

MR HORSLEY:

Well, only because it applies it to each concurrent sentence and each sentence on every offence, so you have an offence and you have a sentence and that's how –

GLAZEBROOK J:

Well, you only get six months because that's the absolute maximum pre-sentence detention there is, whereas if you didn't have it for cumulative sentences then you would get it more than once.

ELIAS CJ:

Because it's a single notional sentence.

MR HORSLEY:

And this is treating this like a single notional sentence because you're calculating all of the remand –

GLAZEBROOK J:

No, no, you just – but you only get it in respect of each of these ones. You only get six months at the maximum because that's the only pre-sentence detention there is.

MR HORSLEY:

So you will have to –

ELIAS CJ:

But it's not referable to each charge.

MR HORSLEY:

It's not.

ELIAS CJ:

Well, that's – your argument that it is a sentence on each individual charge stands in the way of making sections, subsections (2) and (3) of section 90 equivalent.

MR HORSLEY:

Yes, because if you apply pre-sentence detention in the context of a concurrent sentence only to the pre-sentence detention that related to the particular charge, that's how you calculate each of those charges start and ends dates and parole eligibility dates.

ELIAS CJ:

Well, that's your argument.

MR HORSLEY:

And they change as you go along.

ELIAS CJ:

Yes, that's your argument, but it is possible to see subsections (2) and (3) as achieving equivalent outcomes if pre-sentencing detention relates to the sentence imposed which may be a concurrent sentence because

subsection (2) of section 90 indicates that. Two or more concurrent sentences. It's not concerned with – well, I suppose it's…

MR HORSLEY:

So if you've got two or more concurrent sentences imposed on a –

ELIAS CJ:

Well, it doesn't say two or more sentences. It says two or more concurrent sentences.

MR HORSLEY:

Yes, so if you have two or more concurrent sentences imposed on a single day, as I understood it you would treat that as a single notional sentence and the pre-sentence detention is not calculated on each of those concurrent sentences, it's composed – it's calculated –

GLAZEBROOK J:

Well, it might be calculated on each but you only get six months because you can't get any more pre-sentence detention than you have already served.

MR HORSLEY:

If we –

GLAZEBROOK J:

So you get six months on the perversion of the – each of the perversions of the course of justice, you get six months but you can't use it on the assault charges, and the sum total is six months, because you can't have more pre-sentence detention than you actually served.

MR HORSLEY:

Yes, yes.

GLAZEBROOK J:

So just by its very nature you can't, whereas if you didn't have single notional sentence and not counted more than once for cumulative you could because they are separate sentences.

MR HORSLEY:

But the point, if we move away from the adding of the pre-sentence detention, the point is that if you have two or more concurrent sentences imposed on a single occasion then there is no point, I take it, to the amount of pre-sentence detention applicable to each sentence must be determined. That becomes redundant.

WILLIAM YOUNG J:

Well, the expression "two or more" is an unusual expression here because all concurrent sentences imply at least two offences, don't they?

MR HORSLEY:

Well, that's why you have to have two.

WILLIAM YOUNG J:

Yes, but why not just say this – the offender is subject to concurrent sentences? Is two or more just a tautology?

ARNOLD J:

I'd wondered actually if it, what it meant to say was two or more sentences that are concurrent, two or more sentences that are cumulative, and they were just trying shorthand and may –

WILLIAM YOUNG J:

But sentences always are, concurrent sentences are necessarily two or more.

MR HORSLEY:

Yes.

WILLIAM YOUNG J:

So in the corresponding section of the 1985 Act it was two or more concurrent sentences but it was just cumulative sentences. So the two or more was only – and which actually rather supports my warrant of commitment, single sentencing occasion theory, and the cumulative sentences it doesn't – that was unnecessary because it's clear whether the cumulative sentences are imposed on a single occasion or on other occasions they're still a notional sentence.

MR HORSLEY:

Yes.

WILLIAM YOUNG J:

And if you, again, just looking at section 75, well, that's a bit odd because it talks about cumulative sentences but it talks about one being the earlier and one being the later, which suggests that whoever was drafting this thought they were dealing with different sentencing occasions.

MR HORSLEY:

But that – that's right because you –

WILLIAM YOUNG J:

I think it's – it's just an oddity, I think. I don't think it takes you anywhere but on the whole cumulative sentences are not imposed in sequence but rather at the same time. "On each of these charges I sentence you to 12 months imprisonment to be served cumulatively."

MR HORSLEY:

If there's a single sentencing occasion but cumulative sentences are used –

WILLIAM YOUNG J:

Yes, I know, I know, but – so what I'm saying is this suggests a reference to separate sentencing occasions, the earlier and the later, that that's what the draftsman had in mind.

MR HORSLEY:
In section 75?

WILLIAM YOUNG J:
Yes, because they talk about the later sentence and the earlier sentence.

ELIAS CJ:
And an earlier sentence being part of a series of cumulative sentences.

MR HORSLEY:
But that's solely for the purposes of calculation.

WILLIAM YOUNG J:
Yes, but it must be that it's – cumulative sentences imposed simultaneously and not sequentially are also a notional sentence. So in my example –

MR HORSLEY:
But by their very nature they're not – they are imposed sequentially.

WILLIAM YOUNG J:
No, but I sentence you, Mr Horsley, to 12 months imprisonment on both charges to be served cumulatively.

MR HORSLEY:
Then –

WILLIAM YOUNG J:
Now neither is the earlier sentence or the later sentence; they are both imposed at exactly the same time.

MR HORSLEY:
Except that that's not how they are treated because, of course, you have to have one sentence starting and then another one being added on. So they are a start –

WILLIAM YOUNG J:

Would you say – how would the warrant of commitment be expressed? Wouldn't it just be 22 – wouldn't it just be 24 months?

MR HORSLEY:

Yes, that's the net effect of it.

WILLIAM YOUNG J:

I mean, you wouldn't say that you –

MR HORSLEY:

But on the –

WILLIAM YOUNG J:

– I impose – "I sentence you to 12 months imprisonment for burglary and for assault. The sentence is to be served cumulatively." The warrant of commitment wouldn't say, well, the burglary is to be served first and then the assault.

MR HORSLEY:

Well, it will because –

WILLIAM YOUNG J:

Won't it just –

MR HORSLEY:

– depending on what you were remanded in custody – well, it depends on your remand in custody, of course, but if you were remanded in custody on your start date for the effect of that sentence will be from your first remand in custody and that might be on the burglary charge so you'll start running your burglary charge sentence from there, and then when the other charge kicks off that's when it –

WILLIAM YOUNG J:

What if they're on the same date? Say the remand in custody's on the same date, which is the earlier and which is the later sentence?

MR HORSLEY:

Well, just whichever one happens to run – well…

WILLIAM YOUNG J:

How do you decide?

MR HORSLEY:

The longest sentence will start first and if they're the same then it doesn't matter.

WILLIAM YOUNG J:

Okay, so you're probably just leading. It just seemed to me that it's just an unusual term of phrase to use then.

MR HORSLEY:

I think that's simply because they are sequential and it just, as a result, runs through.

ELIAS CJ:

Well, we should take the morning adjournment. Now have you, subject to any further questions from the Court, are there other matters you want to address us on, Mr Horsley, or have you concluded?

MR HORSLEY:

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

ELIAS CJ:

Yes, of course. Yes, thank you.

MR HORSLEY:

Thank you.

COURT ADJOURNS: 11.31 AM
COURT RESUMES: 11.50 AM

MR HORSLEY:
Your Honour, I don't have anything more specific to address you on. I think that the supplementary submissions as filed do draw out some of the anomalies that could arise in this. One of the strong points that we would make is that this is a matter that is, in my submission at least, one that sentencing Judges should be more aware of. It is complicated and we have seen that there are various scenarios that can take place that are as anomalous, in my submission, as the *Booth* and *Marino* situations, and my learned friend, as I mentioned before, has provided a table where he details all of the different ways that proceedings can be analysed, including that proceedings on the broader interpretation will cover acquittals. That in itself is a significant policy change that has, in my submission, serious ramifications for how we do sentence people and may arise in various circumstances. The long and short of that is that this is a problem which is, in my submission, best addressed by legislative fix if necessary but certainly by policy makers and Government carefully analysing this case and these submissions with a view to seeing whether these anomalies can be fixed because they will need quite extensive, in my submission, legislative fix including further refinement of the definition of proceedings which will largely come down to legislative drafting. In the current environment, in my submission, the interpretation that has been applied of the proceedings has been limited to the particular offence and calculations made on the particular offence and the related mis-inquiry there is correct, albeit that it does lead to this anomaly of a lead offence being imposed on a sentencing occasion where there was pre-sentence detention on a more minor offence and a difference between concurrent and cumulative approaches in that one situation.

Equally, I've said that this is a sentencing exercise. We do know that Judges consider the effect of cumulative sentences in particular when they're looking at imposing such a sentence and the ramifications of that. I think it is unfair on District Court Judges and High Court Judges who have been imposing

these sentences to suggest that they did not understand that pre-sentence detention that was served on unrelated offending might not be covered and there seems to be a mix of that. There are situations where Judges have been very conscious of the fact that people have served their sentence and they have convicted and discharged. Equally, there are others who have been under a misapprehension that the concurrent sentences will take into account all concurrent sentences. That seems to be a knowledge and/or educative approach to sentencing to be taken by both prosecutors, defence counsel and Judges in imposing these sentences in the interim but, in my submission, the interpretation that they're currently applying is correct albeit that sometimes it leads to anomalous situations, and I think that our submission that was made in *Booth* that in fact pre-sentence detention can be taken into account on charges other than the lead charge is correct, that is one way of dealing with it, and also that higher Courts can look at it as an appeal based on whether that sentence has, as a result of the imposition of concurrent versus cumulative, ended up being an appeal that now has, or a sentence that is now manifestly excessive.

ELIAS CJ:
Do you mean that it's an appeal point if –

GLAZEBROOK J:
No, only if it's manifestly excessive, because you're serving more within the – well, I couldn't quite understand when that would apply, given the Crown's very stringent submissions in Mr Booth's case.

MR HORSLEY:
It might not apply to Mr Booth, that's correct, and in fact – but again that's a submission that –

GLAZEBROOK J:
Well that's what you were arguing so if it doesn't apply to somebody who's going to be serving 12 years whatever, instead of 11, nine, then it's difficult to see when it would apply.

MR HORSLEY:

Well certainly shorter term sentences, the effect of longer periods of remand will be more dramatic, and in those cases it's more likely.

WILLIAM YOUNG J:

In percentage terms.

MR HORSLEY:

Yes, yes Sir. In those circumstances it is more readily appreciable that a manifestly excessive sentence may have been inadvertently applied. But I do understand that this is complex –

ELIAS CJ:

But manifestly excessive is necessarily a comparative assessment, at least in part, and if there is disparity between a result according to whether a sentence is imposed cumulatively or concurrently, it could well be argued that that is, in itself, manifestly excessive. Sorry, I'm just still a bit hung up on that rather startling idea that you raised.

MR HORSLEY:

The idea that we could look at is as a manifestly excessive sentence or – I did raise it in *Booth* Your Honour and it is something that we –

GLAZEBROOK J:

From memory you said that it rarely applied, but you've just said it could apply in shorter term sentences.

MR HORSLEY:

Which is, I think, consistent with what we discussed in *Booth* as well.

GLAZEBROOK J:

Yes.

MR HORSLEY:

But it comes back to one of the earlier points I made which is that there are sentencing occasions where Judges are very conscious of the fact that a person has spent time in custody, and quite deliberately will imposed concurrent sentences to reflect how they want a sentence constructed. So my example that I gave of someone who spent six months in remand for an assault charge, but then commits a further serious assault, the Judge, in imposing a 12 month sentence concurrently, may well be very conscious of the fact that that means the earlier charge, he has had time served, and that reflects properly the criminality of that first offence, and that the second 12 month period I'm imposing is for your new offending and you warrant another six months in custody, which is the net effect of the 12 month sentence. So Judges will be conscious of this, many times, and that is where the Crown says, this really bites. It's at sentencing but there is no need to change the interpretation of how these rules apply so much as to educate and if that is still a problem, or even if it is a problem right now where sentences –

ELIAS CJ:

But the sentence imposed by Judge Spear was quite clear on its face. He thought that it wouldn't matter a scrap whether it was imposed cumulatively or concurrently.

MR HORSLEY:

Well that's an interesting example, Your Honour, because I think you're right to say that he thought that the two attempting to pervert the course of justice charges would be served concurrently and their time spent on remand would be credited to each equally, so that it wouldn't make a difference whether, how he constructed that sentence.

WILLIAM YOUNG J:

But he also thought he was about, he thought his release was imminent, which is more consistent with a February release date than a June release date.

MR HORSLEY:

Yes, yes, and so he obviously thought that –

WILLIAM YOUNG J:

He'd get –

MR HORSLEY:

– well, obviously, he probably thought that the remand period commenced from the date of the first attempting to pervert the course of justice charge. One thing that I don't think he did consider was that if this definition of "proceedings" is correct, the earlier remand, which was the month that was spent from February until the first attempting to pervert the course of justice charge, would also be another credit, and that a further month would have been deducted. So, yes, I think he thought that the concurrent charges on the attempting to pervert were going to run exactly together, but I don't think he considered that that meant that also the earlier remand on the quite separate family violence charges, would be credited against the attempting to pervert charges.

WILLIAM YOUNG J:

I read his sentencing remarks rather differently actually. Can I, just one related question. The Corrections' position, as I understand it, is that the detention in his case started in relation to the perversion of justice charges at the time when those charges were laid, is that right?

MR HORSLEY:

Yes.

WILLIAM YOUNG J:

It doesn't matter, on the Corrections' view, whether he was actually ever remanded in custody on those charges, which as I understand, just looking at the documents, he never was. Or may not have been.

MR HORSLEY:

But he was charged with those –

WILLIAM YOUNG J:

Say he’s charged in February, remanded through until July.

MR HORSLEY:

Yes.

WILLIAM YOUNG J:

In the meantime other charges are laid.

MR HORSLEY:

Yes.

WILLIAM YOUNG J:

He doesn’t necessarily appear in Court in the middle, does he?

MR HORSLEY:

Well he’ll have to appear in Court to plead to those charges.

WILLIAM YOUNG J:

Yes, I know, but he may not appear until he pleads guilty, until July.

MR HORSLEY:

Well, once the charges are laid he’s effectively remanded in custody on those charges.

WILLIAM YOUNG J:

But as I understand it that’s the Corrections’ interpretation –

MR HORSLEY:

Which is a most generous one.

WILLIAM YOUNG J:
Yes, but it doesn't depend on him actually appearing in Court on those charges.

MR HORSLEY:
No it will commence, I think, from the date those charges are laid, which is –

WILLIAM YOUNG J:
So if summons, for instance, were issued, because the police don't care because they know he's in custody anyway, he would still be in custody on those charges from the date of commencement, date that they were laid.

MR HORSLEY:
I don't know the answer to that Sir, because I'm not sure whether a summons, because if a summons were issued he would be, he would have to comply with that immediately.

WILLIAM YOUNG J:
Well say the summons is issued to appear in Court in July, on the date that he's already remanded to.

MR HORSLEY:
I'm not sure that that could apply Sir but say it was, I would expect that you're running, his remand in custody is effectively from the date that he was charged –

WILLIAM YOUNG J:
Even, but, sorry, I just want to get it without sort of too much in the way of qualification. The position is, that he is, the custody is referable to these charges, irrespective of whether he appears in Court on them. Irrespective of whether there's a formal remand.

MR HORSLEY:

Yes, but I'm not sure practically how that exactly works, but, yes, that is certainly how it was applied. In calculating these remand periods it is taken from the date –

WILLIAM YOUNG J:

The charge is laid.

MR HORSLEY:

Yes.

WILLIAM YOUNG J:

Okay, thank you. And I think actually it follows from *Taylor* but I'm not sure.

MR HORSLEY:

Yes, because he's in custody on a related charge at that stage.

WILLIAM YOUNG J:

Well, no, I don't think it's got to be related. I mean I think it's just that providing he's in custody, and there's a charge laid, I think the appropriate summary I think, and I think it was in *Taylor*, the Court thought that the custodial period was referable to that charge.

MR HORSLEY:

To both, yes. Yes Sir, that's correct, yes. Just to run that through the complicated once more Sir. So Your Honours, again, I assume that my learned friend will take you through his chart, but that certainly does seem to indicate that he accepts the proposition that acquittals will be counted under this broader interpretation. I can't quite work out where it will, where circumstances where they're not a single set of proceedings apply, but again perhaps I can leave that to my learned friend to explain. But subject to that, unless Your Honours, have any further questions for me, those are my submissions.

ELIAS CJ:
Yes, thank you Mr Horsley. Yes Mr Ewen.

MR EWEN:
If I can just deal with Justice Young's point that's just been made before I forget about it, what happened in this particular case, as you can see from the prior warrant of commitment, he was remanded on the domestic violence charges through to the 18th of March and the hearing date endorsed on the charging document for the first attempts to pervert is the 18th of March. We don't actually have on this charging document the filing date which is also – because the filing, what is frequently, the police wouldn't bother issuing a summons for someone in custody, they would simply file the document, and it's their usual practice to put it through to the next remand date, it just saves the duplicity of hearings. But in all probability this document would have been filed in advance of the 18th of March. That is certainly what I've encountered in other cases where further charges have been laid. Usually the officer in charge gives you a ring and tells you that there's more in the pipeline, so you've got the heads up for the next appearance that there will be more.

WILLIAM YOUNG J:
So the first appearance on the first of the perversion of justice charges would have been the 18th of March?

MR EWEN:
It's the 18th of March, which was the remand date on the domestic violence charges.

WILLIAM YOUNG J:
What about the second one?

MR EWEN:
Well the second one came in by an amended Crown charge notice. There was never actually a charging document filed. So that would have

been deemed to be laid when the Crown filed the amended charge notice. But of course in respect of –

WILLIAM YOUNG J:

So that's on the 2nd of July?

MR EWEN:

Yes, Your Honour, I think so, and that's when effectively time was ran on the sentence.

GLAZEBROOK J:

And that probably would have been a remand date as well, would it?

MR EWEN:

I assume so Your Honour. Well it would have been a callover date because it would have been –

GLAZEBROOK J:

Yes, or it would have been dated on a day where there was a, what you're saying, dated on a day where there was some Court activity.

MR EWEN:

There wouldn't have been a date on the Crown notice charge, Your Honour, it's simply the date that they file it for the purposes of the upcoming callover.

WILLIAM YOUNG J:

I think it is actually. It's tab 18, it looks like it's 19 June.

ELIAS CJ:

Tab, sorry?

WILLIAM YOUNG J:

Tab 18.

MR EWEN:

That's the charge list, that's the list of charges that would have gone to trial, that's what a jury gets. The Crown charge notice is at tab 17.

WILLIAM YOUNG J:

Yes, that's the same date.

MR EWEN:

And of course it's a, the initial complicating factor, and I'm going to move onto section 91 in a minute, is of course he was arrested on neither of the attempts to pervert charges. So they fit uncomfortably with section 91 pre-sentence detention but I think Corrections' position is as soon as a document hits the Court, and there's a remand in custody, they will deem it to be from the filing date.

WILLIAM YOUNG J:

So I think the second charge would be taken as being laid on the 19th of June?

MR EWEN:

When the Crown filed the notice with the Court registrar.

WILLIAM YOUNG J:

Yes.

MR EWEN:

Now moving on to respond to my friend's submissions. Mr Horsley has been at pains to use the word "proceedings" throughout and said that anomalies are thrown up on my interpretation if "proceedings" means anything that you face between being arrested and being sentenced and being in custody at some stage. I struggle to see where the anomalies came in but it's never been my case that the remand credit accrues for proceedings in that widest possible sense because my case is they have to be proceedings leading to the conviction or pending sentence of the person. It has to fit. All charges upon

which a remand credit can be factored in must factor into, come within the unifying characteristic of the proceedings leading to the conviction or pending sentence.

WILLIAM YOUNG J:

I suspect it's actually leading to convictions that's critical. I think it's, or pending sentence, is a separate component.

MR EWEN:

Yeah, well, you raised this point in my, the principal submissions and I added, I didn't think that anything was added to by the conviction and now with the benefit of hindsight I think actually a great deal is added to by the addition of leading to the conviction because importantly it's leading to the conviction. It's not in respect of the conviction, and in – that is effectively the Crown's argument that it has to be at the very most that which you are sentenced on. But it's everything leading up, all the proceedings leading up that point. Now in relation to – so the Crown's principal argument that proceedings individualise to charge. There was one remark made by Justice Arnold at the last hearing which resounded in my head and I realised it, in my submission, just takes out the Crown's argument whatsoever. Paragraph 91(1)(a), of – that occurs at any stage during the proceedings leading to the conviction or pending sentence of the person, any charge on which the person was eventually convicted. The use of the word "any" in respect of charges leading to conviction presupposes more than one because for the Crown's argument to be correct the word "any" in paragraph (a) would have to be replaced with "the". The use of "any" in that context means that it is the sentencing exercise as a whole that the Court is looking at and all the charges for which the person will be for sentence are, by definition, within paragraph (a). In my submission, it is broader than that and has to be because we are looking at the proceedings leading to the conviction and that, in my submission, encompasses everything the person has faced in that set of proceedings. Now I accept that there has to be a method of ascertaining whether the charges form the same proceedings leading to the conviction or pending

sentence and in the table that I have provided I have endeavoured to do so, and if I can take –

WILLIAM YOUNG J:

Can I just ask you, two issues that I'm sort of quite interested in that probably fit into the table but if you can just bear them in mind as you go through? Assume in the case of *Booth* that he'd been acquitted on all charges in relation to B, so that's one hypothesis, and then assume in relation to *Marino* that he'd been sentenced on the family violence charges in June and sentenced on the perversion of justice charges in October. So are those – how your arguments work around those.

MR EWEN:

I'm going to deal with the *Marino* case right at the beginning, Your Honour. For a start, that shouldn't happen. He should not be sentenced separately. There is sometimes a perceived incentive on the part of prisoners to get sentenced on charges because it means they think they'll go on a serving wing where the security classification is lower, they get greater privileges. The fact is that doesn't happen. If you have charges pending that are unresolved, even very, very minor ones, I was aware of a case where an individual had been sentenced on drugs charges, he had an overhanging driving while suspended and that kept him on remand wing. The driving while suspended kept his security classification up there. There should be, and it is the current District Court, the prevailing District Court practice, not to split sentencings. If there are charges in the system, it is very much the preference of the District Court Bench to resolve all outstanding charges and then move to sentence because it does avoid the difficulties that we experience here. But if that had happened, that it in all probability would operate to Mr Marino's disadvantage, but again, as Justice Glazebrook pointed out, if he was sentenced separately on the domestic violence matters and then on the attempts to pervert later in the year, he would not have got the 22 months on the attempts to pervert. Given Judge Spear's starting point of 18 months for the two attempts to pervert, there wouldn't, in all probability, have been any uplift for violent offending. It wouldn't have been relevant.

There would have been maximum *Hessell* discount. He probably would have got about 13 and a half if he was sentenced separately.

WILLIAM YOUNG J:

Right, okay, because he would already have done some of the time as a serving prisoner that reflected.

MR EWEN:

Well, there would be…

WILLIAM YOUNG J:

Well, not necessarily, the totality, the totality principle. I mean, it's a fuzzy one.

MR EWEN:

Well, and again there is the issue in this case of on a subsequent sentencing, given that he would be by that stage a serving prisoner, whether the Court in accumulating, because it probably would be an accumulation, ought to apply totality analysis to make sure that the sentence served – I mean, what would happen, the –

WILLIAM YOUNG J:

Well, the totality, the totality principle would be best served with a cumulative sentence.

MR EWEN:

Yes, it would be certainly be easier but again if one looks at the *Taylor* High Court judgment, which is at tab 13 of the appellant's bundle, in terms of subsequent sentencing and totality, at paragraph 8, I think it's Justice Brewer, no, sorry, Justice Priestly. Justice Priestly sets out the separate sentences that were imposed.

ELIAS CJ:

Sorry, I missed the reference.

MR EWEN:

Sorry, tab 13, Ma'am.

ELIAS CJ:

Thank you.

GLAZEBROOK J:

It's the appellant's bundle which he means.

ELIAS CJ:

Right, yes.

MR EWEN:

And this, in my submission, sets out how the totality principle applies at subsequent sentencings because you can see the first sentence on aggravated robbery was one of nine years. The second sentence two years later was two years cumulative. Now that's not because, in my submission, the second agg rob deserved two years. It's because on a totality basis the two of them deserved 11 and that is how totality is subsequently applied in a subsequent sentencing, and that, in my submission, just sets out the appropriate approach to take to it, and in all probability just the easiest approach also. But all that really requires is for the subsequent sentencing Judge to have available the sentencing notes of the original Judge and that, in the District Court, is an absolute commonplace. If there is a subsequent sentencing, the Judge will send for the sentencing notes of the previous Judge so that a totality assessment can be made. So that is not problematic.

WILLIAM YOUNG J:

Well, except that it could be problematic if the Judge opposes concurrent sentences without really working out the implications of start dates.

MR EWEN:

Yes, well, I mean, so long as the next Judge has the sentencing notes from the last occasion there can be an informed assessment. Opinions will differ

about what the outcome is going to be, certainly, but there can be that assessment.

Taking the Court through to where I say from my table there will be a single set of proceedings leading to conviction or pending sentence, if charges are laid together, that's the most untroubling circumstances of all because if there's a remand in custody there's going to be a remand in custody on the lot and the remand credit is going to be the same.

Next of all I deal with the situations in which separate charges or charges separately laid may become consolidated and under the Criminal Procedure Act 2011 that's in two situations. One, the prosecutor can file a notice under section 133(3) of the Criminal Procedure Act and then unless a Judge severs under 138(4) the charges will be heard together. So there disparate charges have come together and they form the same set of proceedings. Equally, if there has been a consolidation and severance, notwithstanding the severance, in my submission they still form the same set of proceedings because whilst the trials may go in different directions and have different outcomes, they are still – they have that unifying characteristic of being the proceedings leading to. Now can that cause complications in sentencing? Yes, it can, but that exists as a sentencing complication, not a Parole Act complication.

The Crown can deal with charges under sections 189 through to 192 by Crown charge, initially Crown prosecution notice, Crown charge notice. If the charges are all comprised in the same Crown charge notice at some stage then again, in my submission, there is the unifying characteristic that these will be the proceedings leading to the conviction and pending sentence, and I've done it by reference to the Criminal Procedure Act because in my submission it's just the simplest way to make an ascertainment on the current state of the law about when charges have been dealt with together. This may not be an exhaustive list. I've done my best to have come up with as many scenarios but I would not say that this is the final word on – there may be other examples but here there is a clear delineation of situations when there will be

proceedings leading to the conviction. Now I say that includes situations where charges are withdrawn or where the person was acquitted or as the Court faced in *Kahui* where at the sentencing hearing the Judge convicted and discharged, unfortunately on the charge that had the longest remand credit, and because a conviction and discharge is not a sentence that fell out of the equation, in my submission, quite wrongly because it was a charge leading to the conviction and therefore in 91(1)(a) a charge on which he was eventually convicted. The remand credit should have stayed in because 91 does not require a sentence. 91 requires presentence detention to credit towards a sentence, but a conviction and discharge, in my submission, falls squarely within that definition and on concurrent sentences would form part of the section 90 credit.

There may be a slight anomaly about what happened – well, I suppose you can't really impose something cumulatively on a conviction and discharge because there's no sentence on which to impose it but I don't think the situation would be difficult in respect of cumulatively-structured sentence so long as that conviction and discharge form part of the sentencing exercise.

O'REGAN J:
So you'd say *Goldberg* was wrongly – well, at least it's wrong on your interpretation?

MR EWEN:
Subject to one qualification, Your Honour, no because if one looks at the timeline in *Goldberg* the attempts to pervert was not laid until after the second trial. There had never been and if the Crown solicitor for Auckland had stuck the attempts to pervert in the same indictment as the rape for the third trial that never went ahead because the Crown stayed it. Then, in my submission, on my analysis that would have – the credit for the rapes would have gone into the subsequent sentencing but on my analysis there was no unity. The attempts to pervert were not part of the proceedings leading to the conviction or pending sentence.

WILLIAM YOUNG J:
Quite a lot turns on – I suspect there would be anomalies everywhere but that would just turn on the way of the charging preferences, perhaps, of the prosecutor.

MR EWEN:
Crown practice may have a significant bearing on outcome here, but Crown practice can change at the discretion of the Crown. If the Crown needs to tidy up its house, then the Crown should do so.

WILLIAM YOUNG J:
But I mean the issue whether they were laid in the same indictment would probably depend on the Crown assessment as to whether the perversion of the course of justice charge evidence could be relied on in relation to the rape charge, as sort of consciousness of guilt evidence.

MR EWEN:
In my experience, Your Honour, is in most cases they're going to chance their arm and see if they can get away with it subject to a severance position.

WILLIAM YOUNG J:
Although they didn't in *Goldberg*.

MR EWEN:
No. I don't know from Goldberg if there was ever one indictment. If there was one, it's certainly not clear from the judgment and my reading of it, well rather Mr Edgeler's reading of the judgment because he corrected me on it, is that there was never one trial with the rape and the attempts to pervert in the same indictment.

WILLIAM YOUNG J:
I read it quickly but I didn't think they were disconnected proceedings in that sense.

MR EWEN:
And if they are disconnected then on my analysis, no, Mr Goldberg wouldn't get the credit, because there'd never been proceedings, the same proceedings leading to conviction or pending sentence.

WILLIAM YOUNG J:
What about in the case of Mr Booth, if he'd been acquitted on the charges involving B.

MR EWEN:
In my submission Mr Booth ought to get the credit.

WILLIAM YOUNG J:
Because it's a single trial.

MR EWEN:
It's a single trial, the set of proceedings leading to – it's not in respect of the conviction Your Honour, it's leading to the conviction and that, in my submission, is Parliament's intention to encompass everything that you had a liability for at trial. If you're in on one indictment, subject to the determination and/or jury, you may go to prison on the lot, you may go to prison on some, but your jeopardy is in respect of all. And that, in my submission, does no violence to the language of section 91, given the use of the word "leading to" rather than "in respect of" because the Crown's argument is very much as if section 91 read in respect of the conviction and pending sentence, and that's not what the language of the statute says.

Again I've dealt with charge of sentenced together because that's the most simple scenario of all, because the Court is going to be constrained to impose a totality based sentence, and if the Court doesn't impose a totality based sentence there's my friend 12 months and 12 months example. The remedy is a prosecution appeal against sentence on grounds of manifest inadequacy.

Now early in the piece in the first hearing Justice Glazebrook asked me if I was saying that *Taylor* was wrongly decided, and I kind of hedged my bets on that one, and that's because there are circumstances in my submission where the *Taylor* relatedness enquiry is actually necessary, but it is in precious few circumstances, and again I have tried to relate it back in terms of simplicity and concreteness of application to the Criminal Procedure Act, because in a situation where for example someone was remanded in custody on a charge of male assaults female, it comes to the hearing, the complainant can't be found, as happens more often than is probably desirable, and the police withdraw the charge. That is not a bar to further proceedings in respect of the male assaults female charge. The complainant may come to light relatively shortly thereafter and the police re-lay the charge, then on the Crown's analysis that period of time spend in custody in respect of exactly the same offending alleged, would disappear out of the equation and that, in my submission, would be manifestly unjust, and that's where a *Taylor* relatedness enquiry is appropriate but rather than, rather imprecise and misleading – and language from *Taylor* and subsequent decisions, I've tied it straight into the circumstances under which someone would be entitled to raise a special plea of previous conviction or previous acquittal, and those, the definition of those circumstances are the same offence arising from the same facts, or any other offence arising from those facts, that's the definition adopted in the Criminal Procedure Act about when you can raise a special plea. If a subsequent charge fell into that category, and there was an effectively unallocated remand credit, probably because charges have been withdrawn and then re-laid, that should come back, in my submission, into the enquiry. It does require that –

GLAZEBROOK J:

Is this in your table or it's not –

MR EWEN:

It is Ma'am. It's on the second page. Charges laid separately but in respect of –

GLAZEBROOK J:

I see, okay.

MR EWEN:

And that's –

WILLIAM YOUNG J:

So *Coward and Hall* it's the other way round, isn't it, because the charge that carried the longest, was the later, it was the later sentence that was in respect of the earliest charge, wasn't it?

MR EWEN:

Yes, *Coward and Hall* there was the offending, an initial short remand period, then a grant of bail, further offending, remanded in custody, and sentence, and then subsequent sentence, the subsequent sentencing, the remand in custody in the middle on the unrelated charges got missed out, which the Court of Appeal decided, no, that has to go back in.

WILLIAM YOUNG J:

Yes, sorry, but it was, the later sentencing was in relation to the earlier offending?

MR EWEN:

Yes, yes it was, in was in relation to the manufacturing. I put *Coward and Hall* in a separate category but just before I move off the related previous plea issue, this is also the sort of scenario that is likely to require a review and appeal to the sentencing Judge under section 92 of the Parole Act because this is the kind of information that Corrections are most likely to miss. It's not going to be on the warrant of commitment, the CRN numbers will be different, and there may well be, and that's why there is a practical need for the section 92 avenue of challenge, because it would be simple in these circumstances for that kind of remand credit to be missed and it can be quite a substantial one. There can be a month spent in remand in custody leading to

a withdrawal of charges and then if charges are already laid then that would evaporate into the legal ether.

The next category as I've said, is charges laid separately and not heard or sentenced together but where the subsequent charges have a remand credit, that's a rather poor expression of the *Coward and Hall* principle that if a charge is laid, and you're on bail, then another charge laid and you're remanded in custody, you do get the remand credit on the charge you're on bail for, for the period you're in custody, but that is the situation in *Coward and Hall* in any event. I have to say it's slightly difficult to fit *Coward and Hall* into the paradigm of proceedings leading to the conviction or pending sentence, but I'm not inviting the Court to disagree with it.

I then come down to the situation where, in my submission, there is not a single set of proceedings and that is pretty much in all the instances that the Crown have put in the supplementary submissions where they say irregularities arise.

At paragraph 27 of my friend's submission he posits the situation where you're remanded in custody on drugs charges. Six months later there's a rape charge. You plead to the drugs charge and the Crown's position is, on my analysis, you get the six month drug remand credit towards the rape. In my submission, that's simply not my case. Unless the Crown have been so unwise as to try and consolidate these into the same set of proceedings by a Crown charge notice, these charges are going to follow down totally different tracks. They are not going to coincide and they are not the same proceedings leading to the conviction or pending sentence. I can see no reason in principle why there should be the affording of the credit on the rape charge to –

WILLIAM YOUNG J:
What's the difference between this category and the immediately preceding one?

MR EWEN:

The *Coward and Hall* situation?

WILLIAM YOUNG J:

Yes, where the subsequent charge is remand credit.

MR EWEN:

Well, here that is a remand credit that accrues on a charge that's laid subsequently. So charge A, say I'm remanded on bail on the first date of my appearance but the week after I'm arrested again and this time remanded in custody, *Coward and Hall* says that I get the remand credit on my first charge because whilst that is pending I've got the second charge and then a remand in custody on that. I am deemed to be remanded in custody on that whereas in the drug/rape scenario at paragraph 27 it's the other way around. I cannot fit that scenario into my paradigm and I do not seek to do so.

GLAZEBROOK J:

And there would be an anomaly there if it happened to be a cumulative sentence but then again it's probably more likely to be a cumulative sentence in those cases, in any event.

MR EWEN:

And that's my point, Your Honour, because if there is a cumulative sentence imposed for the drugs and the rape – as there probably would be – bang, the credit goes back in anyway. It does become –

GLAZEBROOK J:

But in those circumstances it would be actually slightly odd, probably, if you didn't have a cumulative sentence because they're quite different and disparate offences.

MR EWEN:

And that is in large measure my point, the supposed anomalies the Crown tries to throw up are generally taken care of by following the guidance in the

Sentencing Act of imposing cumulative sentences in these circumstances. I can't think of a Crown solicitor in New Zealand who'd try and pack a rape and an unrelated drugs charge in the same Court charge notice. It would just be absurd and it would get burned at callover. If that happened there might be a different outcome but in my submission it's so unlikely that the Crown would adopt that practice. So there is never going to be a unified set of proceedings but again if there is the subsequent cumulative sentence the Parole Act takes care of it in a way that harmonises all. It's also why I say, and I mention in this situation, that *Goldberg*, as I understand it from the judgment, would not be covered by this scenario which is, in my submission, anomalous. It's unfortunate that Mr Goldberg doesn't get that additional period off his sentence because the entire reasoning behind this provision is not to disadvantage people by being remanded in custody but if there are outliers like that, there are outliers like that. If the Court felt so minded I'm quite sure the Court could find a way around it that did include it but again, I find it difficult to fit into the paradigm that I'm advancing that they need to have this unifying characteristic of being the same proceedings.

In terms of – my friend now candidly has to accept that there are very significant and serious anomalies thrown up by his interpretation, but equally my friend has to accept that there are other ways of interpreting the statute and even if they are not the most obvious ways of interpreting the statute then in my submission the proper approach by this Court is to strive for an interpretation that does not lead to the anomalies or at least cuts them down and in the direction of liberty, not in the direction of incarceration because that is very much the approach of the Court of Appeal in *Manga v Attorney-General* [2000] 2 NZLR 65 where, when it was invited to adopt the literal interpretation of a Parole Act provision that led to the inflation of a sentence past its face value, each member of the Court was extremely direct in what the Crown would do with the literal interpretation, that the Court had to strive to an interpretation that was consistent with liberty, that did not create the arbitrary scenarios that we've spent now two days discussing. It came up at one point in relation to the practicality of how my interpretation will work on a practical basis, because of course whilst it says that the Chief Executive

must perform these calculations on receipt of a prisoner, it is not the Chief Executive, it's done by prisoner officers, albeit reasonably senior prison officers in each prison, and it was mentioned I think by Justice Young that they'd get the sentencing notes. There is a great deal to be said of not getting the sentencing notes to prison officers at all because as soon as you do that you invite them to divine their own interpretation of what the Judge meant. All a prisoner officer should ever really need, and again it unifies with the Criminal Justice Act 1985, is the warrant of commitment. If you have a warrant of commitment specifying what the charges were then, subject to the adding in of what I'll call B and C charges in terms of section 91, everything you've got in the warrant of commitment is 91(1)(a). There may be an issue with B and C charges, but they are highly unlikely to be apparent from the sentencing notes anyway. They may, if there are B and C charges, hopefully those should be in IOMS and Corrections should be aware of them, but again if they're not then the proper remedy is a section 92 appeal. But prison officers have evinced not the greatest ability to interpret what Judges have said in sentencing notes, and if they're not needed then there's a good reason to say don't provide them.

In my submission none of the scenarios where my friend says that my interpretation will give rise to banking of credit. In my submission just banking doesn't simply arise. The closest it could be to that would be receiving the benefit for a remand credit attaching to an acquittal or a conviction and discharge, but again the Crown has already accepted that you get the benefit of charges that will be, a remand credit on charges that were withdrawn. It is far from as stretch to extend that, and in my submission doesn't actually require an extension, to say this includes convictions and discharges as per *Kahui*, and acquittals if one faced a set of proceedings where one was in jeopardy of incarceration on a charge that led to an acquittal. Again there is no argument in principle that says that that time should not be accorded to a subsequent sentence. If anything the precise opposite has more force. If you have been detained on something that you were subsequently acquitted of, and it can properly, within the paradigm of the Parole Act, be credited towards

and eventual sentence, there is every reason to say, in my submission, that it should be.

In respect of section 90(2) and (3), there are two ways of approaching subsection (2) in particular. One, that it applies to one single sentencing, and there needs to be the separate allocation between each, but I infer that the interpretation that is finding more favour with the Court is that that does refer to separate sentencing on separate days as per the *Taylor* scenario, albeit that led to cumulative sentences, but here, when you have sentences running concurrent into same, and that, in my submission, just simply doesn't cause any problems at all. It covers that very situation of the drugs and rape charges, that if there are separately opposed concurrent sentences, then there does need to be a separate allocation of the remand time in respect of each, and on concurrent sentences, no, you're not going to get the benefit of both. But that, again, is because upstream at the sentencing Court, that sort of scenario is properly dealt with by the imposition of cumulative sentences, a point touched on by Your Honour the Chief Justice at the last hearing, that in all probability the fix to these issues, both *Booth* and *Marino* is there needs to be both a re-interpretation of the Parole Act provisions, and a tweaking of sentencing practice, but not, in my submission, in respect of the latter so much as to make section 84 and 85 absolutely hard and fast rules of concrete application. Sentencing by its nature needs to be a fluid exercise to take into account the very, very varied situations that can come before a Court in sentencing. They are guidelines and they're operated as guidelines. They operate, in my submission, entirely in harmony with the Parole Act, if the Parole Act is interpreted in a manner that takes account of totality in sentencing.

My friend at paragraph 37 raised the issue about what the situation would be in respect of appeals, if in respect of charges A, B and C, there was a remand credit and then there was D, E and F subsequently laid, and the Court on appeal – sorry, I'm just going to go to the correct page. Paragraph 7, "Initial remanded in custody on A, B and C, then charges D, E and F are laid six months later. Z is convicted and sentenced in respect of all six offences.

If the Court of Appeal overturns the convictions on A, B and C, does the subsequent sentence adjustment incorporate the time spend in custody on those charges?"

Well again in my submission that's not really a Parole Act problem. For a start in that situation there needed to be a concurrent appeal against sentence in all probability because if a totality concurrent sentence was imposed then the charges on D, E and F were inflated to take into account A, B and C anyway. But again this fits squarely, in my submission, within the paradigm of proceedings leading to the conviction and pending sentence. So, yes, the remand credit on more, one, is the remand credit on all.

The issue about escaping punishment raised by my friend's submission just does not stand analysis. In that situation there would be an increase in the prison sentence imposed under section 85 anyway. There is no escaping of punishment. That's the 12 months and 12 months argument that my friend made in his oral submissions, and it just doesn't hold in my submission.

Loss of incentive to plead. At paragraphs 41 and 42 my friends suggest that my interpretation will lead to a loss of incentive for people to plead guilty early. I would say as a starting point it is difficult to see how loss of incentive to plead guilty can in any way affect the interpretation of a statute, but in any event it is not the loss of an incentive to plead guilty, as per the first point I dealt with Justice Young, it's an incentive to plead guilty early but to defer sentencing until all charges outstanding have been resolved so that there will be as few sentencing hearings as possible, and once the big picture is known. Now I accept there may be situations in cases where there's been severance of trials, where different Judges are going to have to sentence because there will have been different trials with different presiding Judges, and that is going to be, it's not going to be anomalous, it's going to be irritating and take a bit of scheduling, but again the approach I suggested earlier that the succeeding Judges, if they have a copy of the sentencing notes that were passed of the previous sentencing, the totality assessment can be made with a subsequent

sentencing, as was obviously the case in *Taylor*. Again the disparity issue raised by my friend just does not arise.

I'm not entirely sure why the Crown has provided the statistics about what it says will be the outcome of an adverse ruling, or whether that's for the Court's information, or whether it is the Chicken Little submission that the sky will fall. In my submission it is not a situation where there will be catastrophic results about, imminently following the decision of this Court, if the Court allowed the appeal. The simple reason for that is, in my submission, Corrections has clearly identified the people involved by reference to numbers about who are going to be affected by this. That being the case, there are fewer than 50 cases that need to be referred to the Parole Board to set conditions at sentence expiry date under section 18 of the Parole Act. Because if someone serves their full sentence, and without release on parole at any stage, it's an automatic statutory incident that they are subject to six months standard conditions of release, and the Parole Board has the discretion to impose special conditions for up to six months, and that's from sentence expiry date. So it's whatever the sentence is, plus six months. The last occasion where I encountered a case like that, the Parole Board actually set the sentence expiry conditions four months prior to his release anyway, so that process may well be in train, but if it's not in train, it certainly should have been since the last hearing when Corrections should have been on reasonable notice that there was a live issue for them to consider. But in my submission, given that the numbers appear to be comparatively small, there is nothing that should trouble this Court when it come to construing the statute by reference to the consequences.

If I can just have a moment with my friend. Unless I can assist the Court with any particular questions, those are my submissions.

ELIAS CJ:

Thank you. Was there anything arising out of that Mr Horsley that you wanted to be heard on?

MR HORSLEY:

I'm not sure that I have a right of reply on that actually Your Honour.

ELIAS CJ:

Well we would be assisted if you had anything to reply on.

MR HORSLEY:

No, Your Honours, I think we've probably done this to death.

ELIAS CJ:

Probably exhausted. Yes, well it's tricky, and I should thank counsel for your help in the case because it is a very nasty point of statutory interpretation, and we will reserve our decision in the matter.

COURT ADJOURNS: 12.48 PM