IN THE SUPREME COURT OF NEW ZEALAND

SC 12/2005
[2005] NZSC 77

BASIL STEVEN MARSHALL MIST

v

THE QUEEN

Hearing: 9 August 2005

Court: Elias CJ, Gault, Keith, Blanchard and Tipping JJ

Counsel: R M Lithgow and N Levy for Appellant
B J Horsley and J Davidson for Crown

Judgment: 1 December 2005

JUDGMENT OF THE COURT

A. The appeal is allowed.

B. The sentence of preventive detention is quashed.

C. The sentence imposed in the High Court on count 2 is reinstated but without prejudice to the Solicitor-General's submission that, in total, the finite sentences are manifestly inadequate.

D. The question whether that is so is remitted to the Court of Appeal for determination by that Court as if the Solicitor-General were seeking leave to appeal on that issue.

REASONS

ELIAS CJ AND KEITH J

(Given by Keith J)

[1] An offender otherwise eligible could be sentenced to preventive detention under s 75 of the Criminal Justice Act 1985 only if he or she was "not less than 21 years of age". The present appeal turns on the meaning of s 75. Did it permit a sentence of preventive detention to be imposed on an offender who was less than 21 years of age at the time of the commission of the offence, although over the age of 21 at the dates of conviction and sentence? The time at which the age of the offender counts is not specified in s 75. In that respect it may be contrasted with the provision which replaces it in the Sentencing Act 2002, which established that the age of eligibility (18 years under the new legislation) is determined at the time of the commission of the offence.[1]

[2] Basil Steven Marshall Mist committed a number of sexual offences when under the age of 21 years. He was 21 years old when he was convicted and sentenced. At the time Mr Mist was sentenced, the Criminal Justice Act had been replaced by the Sentencing Act 2002. But s 153(1)(b) of the Sentencing Act provides that eligibility for preventive detention for offences committed before the commencement date of the Sentencing Act is to be determined under s 75 of the Criminal Justice Act:

> **153 Offender convicted of specified offence committed before commencement date**
>
> (1) This section applies if-

[1] Section 87(2) Sentencing Act 2002.

> (a) an offender is sentenced on or after the commencement date for an offence committed before that date that is a specified offence as defined in section 75(4) of the Criminal Justice Act 1985; and
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> (b) had the court been dealing with the offender immediately before the commencement date, the court would have sentenced the offender to preventive detention under section 75 of the Criminal Justice Act 1985 or committed the offender to the High Court in accordance with section 75(3) of that Act.
>
> (2) The court may deal with the offender under sections 87 to 90.

[3] In the High Court, Neazor J considered that s 75 of the Criminal Justice Act 1985 prevented him imposing a sentence of preventive detention on Mr Mist because he was under the age of 21 at the time of the offending.[2] Instead, Neazor J imposed sentences totalling 16 years' imprisonment with a minimum non-parole period of ten years, the maximum non-parole period available. The Solicitor-General appealed against the decision that the appellant was ineligible for preventive detention and also appealed against the adequacy of the finite sentences imposed. The Court of Appeal held that s 75 permitted a sentence of preventive detention to be imposed on an offender who had reached the age of 21 at the date of conviction.[3] It allowed the Solicitor-General's appeal and substituted a sentence of preventive detention for the finite term. Because of the view taken on the sentence of preventive detention, it was not necessary for the Court of Appeal to consider the alternative ground of appeal based on the adequacy of the finite terms of imprisonment. On further appeal, by leave, to this Court Mr Mist contends that the sentence of preventive detention was not open to the Court under s 75 because he was not 21 at the time of the offending.

[4] Section 153(1)(b) prevents any question of retrospective application of the new Sentencing Act to those convicted of offences committed before its commencement date. But the interpretation and application of s 75 raise the question whether the penalty applicable at the time the offence was committed changed to the detriment of Mr Mist before he was convicted and sentenced.

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2 HC PMN T2/054/838731, 21 September 2003, at [13].
3 [2005] 2 NZLR 791.

[5] We have had the advantage of reading in draft the reasons of Gault and Tipping JJ. We agree with their conclusion that s 4(2) of the Criminal Justice Act 1985 means that an offender must have been over the age of 21 years at the time of the offending to be eligible for the sentence of preventive detention under s 75. The same result is, we believe, required by s 4(1) of the Criminal Justice Act, s 6 of the Sentencing Act and s 25(g) of the New Zealand Bill of Rights Act 1990.

[6] Section 75, so far as is relevant, provided:

> **75 Sentence of preventive detention**
>
> (1) This section shall apply to any person who is not less than 21 years of age, and who either-
>
> > (a) Is convicted of an offence against section 128(1) of the Crimes Act 1961; or
> >
> > (b) Having been previously convicted on at least one occasion since that person attained the age of 17 years of a specified offence, is convicted of another specified offence, being an offence committed after that previous conviction.
>
> (2) Subject to the provisions of this section, the High Court, if it is satisfied that it is expedient for the protection of the public that an offender to whom this section applies should be detained in custody for a substantial period, may pass a sentence of preventive detention.

[7] As we have already indicated, the question whether the decisive date is the date of the offence or of the conviction (or sentence) is to be answered not simply in terms of the wording of s 75 of the 1985 Act, but also of s 4 – headed *Penal enactments not to have retrospective effect to disadvantage of offender* – and the wider context. That wider context includes the 1985 Act, the principle of non-retrospectivity of penal statutes, in particular as stated in s 25(g) of the Bill of Rights and s 6 of the Sentencing Act, and the relevant history with which we begin.

[8] The principle that criminal liability is not to be imposed retrospectively was established in New Zealand in a broad sense by the abolition of common law crimes by the Criminal Code in 1893. Consistently with that emphasis on what may now be seen as part of the principle of legality, Judges in New Zealand, as elsewhere, emphasised the presumption against retrospective application of legislation creating

criminal offences. For Williams J in 1913, the Crown's proposed retrospective construction of a criminal offence provision would mean that

> the statute violates the principles of jurisprudence recognized in every civilized country, and is contrary to natural justice.[4]

[9] But, by contrast, the law was not so sensitive to the proposition that heavier sentences were not to be retrospectively applicable. So the habitual criminal and habitual offender provisions in the Crimes Act 1908 and the reformative detention provisions of the 1910 Amendment Act applied in respect of offences committed before, as well as after, the powers were created, and the qualifying age provisions in the 1954 Criminal Justice Act for detention centres, borstals and corrective training all related to the date of sentence or conviction.[5] Consistently with that approach, Judges in the 1950s held that newly introduced increases in penalties for driving offences were to be applied to offences committed before the changes were made:

> At the time in respect of which the appellant was charged, the substantive offence was precisely the same as at the date of the conviction. No new offence has been created by the amending Act, and in this respect it has no retrospective effect. The only retrospective effect the amending Act may have is in regard to punishment.[6]

[10] That distinction between criminality and penalty was drawn despite the fact that the argument against retrospectivity had been made equally in relation to both for centuries, at least from the time of Thomas Hobbes.[7] The distinction was however to be removed when New Zealand ratified the International Covenant on Civil and Political Rights, article 15 of which provides:

> 1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offence was committed. If, subsequent to the commission of the offence, provision is made by law for the imposition of the lighter penalty, the offender shall benefit thereby.

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4 *Shanahan v Coulson* (1913) 32 NZLR 905, 909; see similarly the "fundamental rule of law" stated by Denniston J in *R v Harper* (1893) 12 NZLR 413, 416-417.

5 Section 43 of the 1954 Act accordingly regulated the validation of sentences where there are mistakes about the age of a person at sentencing, a matter dealt with by s 137 of the 1985 Act and s 143 of the 2002 Act (as amended in 2004), discussed later, at [47].

6 *Campbell v Robins* [1959] NZLR 474, 476; see similarly *O'Neill v Reid* [1959] NZLR 332.

7 *The Leviathan* (1651) chs 27 and 28; Lord Rodger refers to "traces of the doctrine" in 14th century writings of Bartolus de Saxoferrato, in *R (Uttley) v Home Secretary* [2004] 1 WLR 2278 at para 39.

> 2. Nothing in this article shall prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations.

[11] In 1980, in the light of that provision, Parliament took steps to incorporate its essence into the New Zealand statute book. The Minister of Justice, the Hon J K McLay, explained that:

> Article 15 also provides that an offender shall not be liable to a higher penalty than that which could be imposed at the time the offence was committed. Thus, if an offender commits an offence today that is punishable by a maximum fine of $200, but the maximum is increased to $500 before he comes up for sentence, article 15 requires that he should be liable only for a maximum of $200. Current New Zealand case law does not agree with this proposition. There is a long-standing authority to the effect that an increased penalty can be imposed validly in respect of an offence committed before the increased penalties come into force. The effect of subsection (2) of the proposed new section 43B is to overrule our current case law and bring it into line with article 15.[8]

[12] As the explanatory note to the Bill states, the "current case law" mentioned by the Minister included the driving cases mentioned earlier.[9] The new s 43B, included in the miscellaneous part of the Criminal Justice Act 1954, dealt with both criminality and penalty and included greater detail than article 15 and its equivalent in the European Convention on Human Rights (article 7). When the 1954 Act was "reformed" and "revised" by the Criminal Justice Act 1985, the subsection concerned with criminality was transferred to the Crimes Act 1961, and the remaining subsections, with only limited change, became the first provision (s 4) of Part I, headed *Sentencing Generally*:

> **4 Penal enactments not to have retrospective effect to disadvantage of offender**
>
> (1) Notwithstanding any other enactment or rule of law to the contrary, where the maximum term of imprisonment or the maximum fine that may be imposed under any enactment on an offender for a particular offence is altered between the time when the offender commits the offence and the time when sentence is to be passed, the maximum term of imprisonment or the maximum fine that may be imposed on the offender for the offence shall be either—

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8 427 NZPD 4153, 8 November 1979.

9 Criminal Justice Amendment Bill (No 2) No 135-1 [1979] iii which refers to *Shanahan* and *Campbell*, above n 4 and n 6.

> (a) The maximum term or the maximum fine that could have been imposed at the time of the offence, where that maximum has subsequently been increased; or
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> (b) The maximum term or the maximum fine that can be imposed on the day on which sentence is to be passed, where that maximum is less than that prescribed at the time of the offence.
>
> (2) Without limiting subsection (1) of this section, except as provided in sections 152(1) and 155(1) of this Act but notwithstanding any other enactment or rule of law to the contrary, no court shall have power, on the conviction of an offender of any offence, to impose any sentence or make any order in the nature of a penalty that it could not have imposed on or made against the offender at the time of the commission of the offence, except with the offender's consent.
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> (3) For the purposes of subsection (1) of this section, a sentence of life imprisonment shall be deemed to be the longest term of imprisonment that may be imposed.
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> (4) For the purposes of subsection (1) of this section, a sentence of corrective training, and a sentence of preventive detention, shall be deemed to be a sentence of imprisonment for a term equal to the maximum period for which the offender may be detained pursuant to the sentence.

[13] Several features of this provision are significant.

- The first is its dogmatic character; the two rules apply notwithstanding legislation or rules of law to the contrary. That character is consistent with the absence of any limit (other than that in para 2) of article 15 and with the fact that it is not subject to derogation in time of war or declared public emergency (article 4(2)).

- The second is that the protections of article 15 have been divided, with subs (1) being limited to sentences of imprisonment and fine, and subs (2) not being so limited.

- The third (subject to the second) is the deliberate matching of the Covenant provisions : the offender is to get the advantage of the lower term of imprisonment or fine, old or new. Retrospectivity, if benign, is permitted, indeed required under subs (1). Both subs (1) and (2) regulate the penalties that may be imposed on “an offender” or “the offender”: they do not state abstract propositions.

- The fourth is that the provision makes it plain that sentences which may be indeterminate, including preventive detention, are to be treated as extending to their full possible term.[10]

- Finally, the exceptions in subs (2) tend to confirm that a primary concern of those responsible for including that subsection in 1980 and 1985 was to cover the case where a new type of penalty was being introduced as opposed to alterations in terms of imprisonment or fines. Under the exceptions an offender who could have been required instead to pay compensation under the law in force at the time of the offence could, after the coming into force of the new Act, be required instead to make reparation under the new provisions (s 152(1)) and similarly an offender who would have been liable to release on probation could now be sentenced to supervision, again under that new regime (s 155(1)). In the general case however a new type of sentence is to be imposed only if the offender agrees.

[14] Our concern here is of course not with a penalty which has been introduced or changed by law made since the date of the offence, but rather with a penalty which was not applicable to the offender at that date but which has arguably become available in respect of a particular offender by the time of conviction or sentence by effluxion of time. If article 15 applies to that case as well, Parliament's purpose of giving effect to that obligation would indicate that the 1980 and 1985 provisions should be available to protect such an offender.

[15] The legislative step next following that of 1985 was taken in 1990 with the enactment of s 25(g) of the New Zealand Bill of Rights Act 1990, a provision which is relevant to the interpretation and application of the 1985 Act:

> **25 Minimum standards of criminal procedure**
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> Everyone who is charged with an offence has, in relation to the determination of the charge, the following minimum rights.
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> …
>
> (g) The right, if convicted of an offence in respect of which the penalty has been varied between the commission of the offence and sentencing, to the benefit of the lesser penalty.

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[10] Subsection (4), see also subs (3).

[16] The provision in the draft Bill included in the White Paper, *A Bill of Rights for New Zealand* (1985), was to the same effect.[11] The commentary to the draft provision indicates that it was designed to give effect to article 15(1) of the Covenant. That purpose also appears from the initial New Zealand report to the Human Rights Committee[12] and more generally from the title to the Bill of Rights : "An Act … to affirm New Zealand's commitment to the … Covenant …".

[17] The briefer 1990 formula has been carried forward into s 6 of the Sentencing Act 2002. That provision had come into force by the time of sentencing; like s 4 of the 1985 Act it is in general and dogmatic terms; and accordingly it is directly applicable in this case:

> **4. Penal enactments not to have retrospective effect to disadvantage of offender**
>
> (1) An offender has the right, if convicted of an offence in respect of which the penalty has been varied between the commission of the offence and sentencing, to the benefit of the lesser penalty.
>
> (2) Subsection (1) applies despite any other enactment or rule of law.

[18] The 1990 and 2002 provisions plainly take a different form from those of 1980 and 1985. They do not distinguish between different types of penalty and no longer have a direct equivalent to s 4(2) of the 1985 Act. But do they have a different and, in particular, a more limited effect? We do not think so for reasons which we now give.

[19] A broad reason is that from 1980 the Parliamentary purpose has been to give effect in New Zealand law to article 15 of the Covenant. There is no reason to suppose that the different drafting adopted in 1990 and 2002 was designed to produce different results.

[20] On that basis, the 1990 and 2002 consolidation of the two provisions into one

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11 Para 10.122.

12 Report UN Doc CCPR/C/10/Add 6 (29 January 1982), published as *Human Rights in New Zealand* (Ministry of Foreign Affairs and Trade, Information Bulletin No 6) (1984) paras 203-205.

does not reduce the scope of the coverage. Subsection (1) of s 4 was limited to changes in imprisonment and fines, while subs (2) covered the imposition of sentences and penalties generally. The new provisions, taking a form which is closer to that of article 15, cover *all* penalties within a single general proposition which requires the lesser penalty to apply.

[21] Accordingly, if a different type of probation, supervision or community service was apparently applicable to a particular offender at the point of sentencing the court would have to determine whether one or the other was more onerous – unless, as in 1985, the legislature directly addressed the matter, in that case in respect of reparation and supervision. Consistently with our reading of s 4 (set out in para [23]) the new provisions also focus on the particular offender, excluding any argument that they apply only to the general state of the law.

[22] If the more generally worded subs (2) covers situations not covered by subs (1) does it also cover the whole of s 4(1)? We do not think so. Consider a reduction in the maximum term of imprisonment made after the date of the offence. The Court applying the law of that time "could … have imposed" a lower sentence within the new maximum with the result that subs (2) does not apply to provide protection, while subs (1) does. Further, the protection given under subs (1)(b) is by operation of law while, under subs (2), the offender is to consent.

[23] Our reading of the two subsections is as follows. Subsection (1) is concerned with the imposition on "the offender" of increased and decreased terms of imprisonment and fines for existing offences. Subsection (2), which is not to limit subs (1), concerns the application to "an offender" of a newly available type of sentence. Since the new availability of the penalty provides the occasion for the operation of the subsection, it would have been inappropriate for parliamentary counsel to speak in subs (2) of a penalty (including an existing penalty) being "altered". Each subsection, on the basis of the alteration in the one case and the availability in the other, then proceeds to regulate the penalty that would be imposed by protecting the particular offender from the heavier penalty. Both regulate the imposition of penalties on particular offenders not simply by their terms but also by

their very nature, in that a court does not have power to "impose" a penalty on "the offender" in some general sense. Subsection (1) is not to be characterised as "general", with the consequence of making irrelevant to its application apparently relevant circumstances of the particular offender.

[24] We now turn to the application of s 4 of the 1985 Act and s 6 of the 2002 Act to the facts of this case. Can it be said, on those facts, that the maximum term "is altered", in terms of s 4(1) or "varied" in terms of s 6, or that, in terms of s 4(2), the Court had power to impose preventive detention at the time of the offence? Whether the penalty "has been varied" to Mr Mist's disadvantage also arises under the Bill of Rights. That provision is relevant to the interpretation of ss 4 and 6 as is the presumption that so far as possible legislation should be interpreted consistently with New Zealand's international obligations and in particular article 15 of the Covenant.[13]

[25] What then does article 15 require? We begin with that question since, in addition to that general presumption, Parliament's specific purpose throughout has been to give effect to the requirements of article 15; as already stated, there is no basis for treating the more direct drafting of the 1990 and 2002 Acts and the exclusion of s 4(2) of the 1985 Act as indicating a departure from that purpose.

[26] Specifically, in terms of article 15(1), what was "the penalty that was applicable at the time when the criminal offence was committed"? It might be said that preventive detention was "applicable" in general in the sense that it was on the statute book at the time of the offending. Against that, the sentence was *not* "applicable" to the particular individual who was to be sentenced since Mr Mist at the time of the offence that time was not yet 21.

[27] In support of the broader, non-specific reading is the argument that the law was known, foreseeable and accessible at the time the offence was committed : see eg *Tolstoy Miloslavsky v United Kingdom*, a decision of the European Court of Human rights on the parallel provision of the European Convention on Human

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[13] See for example *Attorney-General v Zaoui* [2005] NZSC 38, 21 June 2005, at [90], *Sellers v Maritime Safety Inspector* [1999] 2 NZLR 44, 57, and the authorities they refer to.

Rights.[14] Those affected could order their affairs in accordance with known law, a principal rationale for the non-retrospectivity principle. The principle of legality was in that respect satisfied.[15]

[28] But consider one possible effect of such a non specific reading of article 15. Would it follow that someone brought within the scope of an existing offence provision by legislation enacted after the acts or omissions in issue could not invoke the protection of the first sentence of para 1? In one sense the law was known and accessible – it was on the statute book at the time of the offence. That interpretation may be unlikely.[16] More significant for us are considerations of fairness and due process.

[29] While a primary rationale of the principle of non-retrospectivity is accessibility and foreseeability with deterrence as a consequence, it has other rationales. One is simple fairness: that the state, through its institutions, should make determinations of criminal guilt and impose serious penalties only by reference to the law in force and "applicable" (to repeat the Convention's language) to the accused at the time of the crime. Consider too fairness in terms of equality between two young accused, one nearer than the other to the dates at which a heavier penalty (if fixed at conviction or sentence) will be available. And then too the claimed predictability of the relevant sentencing regime may be more apparent than real since it is dependent on such matters as the state of court lists, the availability of witnesses and counsel, pre-trial rulings and jury disagreement.[17]

[30] The second relevant matter appears from the wider context provided by the other protections accorded by the criminal justice system. Young persons facing the prospect of heavier penalties at their next birthday may decide not to exercise their rights to a fair trial affirmed by bills of rights and the Covenant. Allowing such a possibility may mean, in the words of the European Court of Human Rights, that

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14 13 July 1995 Series A no. 316-B, pages 71-72, para 37.

15 See for example Emmerson and Ashworth *Human Rights and Criminal Justice* (2001) ch 10.

16 But see for example the argument rejected in *Department of Labour v Latailakepa* [1982] 1 NZLR 632 (CA).

17 See for example Lord Salmon dissenting in *Baker v The Queen* [1975] AC 774, 790H-791H (PC), a decision discussed later in these reasons.

such young persons will no longer have an effective safeguard against arbitrary prosecution, conviction and punishment.[18]

[31] The more specific reading is also supported by a drafting point. The first and third sentences of article 15 both depend on changes being made in the law, while the second sentence (the one in issue here) does not : it focuses simply on the law "applicable" at the time of the offence and the penalty that could be "imposed" then.

[32] We have so far considered this matter without reference to relevant authority. The only possibly relevant cases to which we were referred were *Baker v The Queen*,[19] a 1975 decision of the Privy Council, and *Taylor v United Kingdom*,[20] a recent decision of a chamber of the European Court of Human Rights.[21] In the latter, the chamber held inadmissible the complaint of a young offender. It ruled that article 7 of the European Convention, the equivalent to article 15 of the Covenant, did not protect him where the relevant law was in force at the time of the offence and by the time of conviction he had moved into an age bracket where a more serious penalty was available.

[33] The chamber made the inadmissibility ruling by majority on the papers, without a hearing, in accordance with its usual practice. Its reasoning begins with the principle:

> that an offence must be clearly defined in law. This condition is satisfied where the individual can know from the wording of the relevant provision, if need be with the assistance of the domestic courts' interpretation of it, what acts and omissions will make him liable and, it would add for the purposes of the instant case, what penalties can be imposed (see the *Kokkinakis v Greece* judgment of 25 May 1993, Series A no 260-A, § 52; *Streletz, Kessler and Krenz v Germany* [GC], nos. 34044/96, 35532/97 and 44801/98, ECHR 2001-II, § 50).
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> It notes that the offences of which the applicant was convicted were clearly defined in statute and that statute also defined the sentencing powers of the domestic courts with respect to young offenders convicted of such offences as well as the age of the offender for the determination of the sentence.

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18 *Veeber v Estonia (No 2)* no. 45771/99 ECHR 2003-I, citing *SW v United Kingdom*, judgment of 22 November 1995, Series A no. 335-B, p 41, para 34 and *CR v United Kingdom*, judgment of 22 November 1995, Series A no. 335-C, p 68, para 32.

19 [1975] AC 774.

20 (2003) 36 EHRR CD104.

21 We agree with Tipping J that the three English cases to which we were referred are of no help (his para [101]).

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> The Court would add there was no guarantee that the proceedings against the applicant, at least as regards the question of his guilt or innocence, would be concluded before he turned fifteen. It is to be noted that the applicant contested the charges against him. He must be considered to have taken a risk that the proceedings would evolve in a way which was [not?] favourable to his interests, if eventually found guilty. It does not find that the applicant had any legitimate expectation that his trial would have been wound up before he attained the age of fifteen. This is to suppose, unreasonably and inaccurately as it transpired, that trial proceedings involving serious and contested accusations run smoothly to a timely conclusion; nor can any such legitimate expectation be based on the fact that the Crown Prosecution Service dropped the initial charge of robbery. This decision could not reasonably be construed as a guarantee that the risk of attracting a custodial penalty, in the event of a verdict of guilt, had passed, still less that the trial would be over before the applicant turned fifteen.
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> For the Court, and for the above reasons, the circumstances relied on do not disclose any appearance of a breach of Article 7. The imposition of a custodial penalty on the applicant was prescribed by law in sufficiently clear and accessible terms and was applied to the applicant without any element of retroactivity.[22]

The two cases the chamber cites are about the criminality limb of article 7 and the need for the law to be stated with some precision. The chamber did not expressly deal with the arguments set out in paras [28] to [31] above. And the decision appears not to have been referred to since. We accordingly do not consider it persuasive.

[34] The Privy Council decision concerned s 29 of the Jamaican Juveniles Law under which:

> (1) Sentence of death shall not be pronounced on or recorded against a person under the age of 18 years, but in place thereof the Court shall sentence him to be detained during Her Majesty's pleasure … .
>
> (2) [A person under 17] shall not be sentenced to penal servitude or to imprisonment … .

[35] The majority of the Privy Council, in an opinion given by Lord Diplock, held that the relevant date was the date of sentencing. The provisions read alone, they said, were not capable of bearing the meaning of the date of the offence. The plain meaning was supported by the other provisions of the relevant Part of the Law.

Earlier United Kingdom legislation – a source of the Jamaican law – and case law also operated on the date of sentencing. And the Jamaican legislature had not followed the change made in the United Kingdom in 1948 to refer to the date of the offence. The majority rejected the argument that their interpretation would be irrational and unjust for particular reasons which we set out at some length since they reduce the precedent value of the decision:

> Where the meaning of the actual words used in a provision of a Jamaican statute is clear and free from ambiguity, the case for reading into it words which are not there and which, if there, would alter the effect of the words actually used can only be based on some assumption as to the policy of the Jamaican legislature to which the statute was intended to give effect. If without the added words, the provision would be clearly inconsistent with other provisions of the statute it falls within the ordinary function of a court of construction to resolve the inconsistency and, if this be necessary, to construe the provision as including by implication the added words. But in the absence of such inconsistency it is a strong thing for a court to hold that the legislature cannot have really intended what it clearly said but must have intended something different. In doing this a court is passing out of the strict field of construction altogether and giving effect to concepts of what is right and what is wrong which it believes to be so generally accepted that the legislature too may be presumed not to have intended to act contrary to them. That is what this Board has been invited to do by counsel for the appellants.
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> The argument was not advanced in the Court of Appeal in the instant case, nor is there any trace of its ever having been raised in any Jamaican court in previous cases under the section. It is just the kind of argument that it is not their Lordships' practice to allow a party to raise for the first time here when the Board does not have the benefit of the opinions on it of any of the judges of the courts of Jamaica. Those judges are familiar with conditions in Jamaica, with the pattern of violent crime among young people and, perhaps most important, with the state of public opinion there on the controversial subject of capital punishment. This makes the judiciary in Jamaica much better qualified than any member of this Board to assess whether there is material, extraneous to the Juveniles Law itself, which could give rise to a presumption as to the policy of the Jamaican legislature sufficiently strong to justify the conclusion that it cannot have intended s 29(1) to mean what it so plainly says.[23]

[36] It was only when they had reached this clear view on the meaning of the Law that the majority considered the constitutional provisions. Section 20(7) of the Constitution closely tracked article 7 of the European Convention which had applied to Jamaica before it became independent:

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22 (2003) 36 EHRR CD104, CD110.

23 [1975] AC 779, 782E-783A.

> 20(7) No person shall be held to be guilty of a criminal offence on account of any act or omission which did not, at the time it took place, constitute such an offence, and no penalty shall be imposed for any criminal offence which is severer in degree or description than the maximum penalty which might have been imposed for that offence at the time when it was committed.

[37] Lord Diplock had no doubt about the effect of these provisions:

> So far as they relate to penalties for criminal offences, they are directed to invalidating laws *passed after an offence has been committed* which increase retrospectively the penalty that may be imposed for that offence. They are not directed to laws which have no retrospective effect but provide prospectively that different penalties for the same offence may be imposed on different categories of offenders.[24] (original emphasis)

He gave this reason:

> Different ways of treating [young offenders] with a view to their reformation are appropriate to different age groups, and for this purpose the segregation of offenders in the particular age *group* into which they fall at the time of undergoing the treatment, from offenders in other age groups, is a generally accepted principle of modern penology. This would not be possible if s 20(7) of the Constitution were construed so as to compel a young offender to be treated not in the manner most appropriate to his age at the time of the treatment in association with others of a similar age group, but to be treated in the manner appropriate to and in association with young persons of the age which he was when he committed the offence, notwithstanding that by the time that he is sentenced he is in a higher age group.[25]

Further, the majority had no doubt that s 29 of the Law was in any event protected by the savings provision included in the Constitution in respect of legislation predating the Constitution.[26]

[38] Lord Salmon dissented. Contrary to the certainties of the majority, he had no doubt that s 29(1) was capable of referring either to the date of the offence or the date of sentence. The interpretation supported by the majority, he declared, would produce results which were barbarous and absurd. The legislature would not have

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24 [1985] AC 774, 785A.

25 [1975] AC 774, 785D. As Lord Diplock's reasons and the provisions of the 1954 and earlier New Zealand statutes discussed earlier (para [9]) show, the matching of the type of sentence to the age of the person at sentencing has often been a feature of sentencing regimes. It would make little sense to suggest 25 years on from the offence that a 40 year old belatedly tried and convicted should be sentenced to a youth facility. But that is not our case: we are concerned not with an age related penalty but with imprisonment, as with a finite term, but with the limit removed.

26 [1975] AC 774, 785H.

been intended to introduce a law having such strange and palpably inhuman results.[27]

[39] We prefer the position taken by Lord Salmon. It is supported by the considerations of fairness, predictability and due process discussed earlier. Further, as indicated, the reasons given by the majority for rejecting the argument that their interpretation was irrational and unjust, relating as they do to the Judicial Committee's lack of familiarity with the Jamaican situation, provide a basis for distinguishing the decision. And judicial attitudes to the protection of human rights have undergone a change over the last thirty years in response to national legislative and constitutional changes and the development of international human rights law among other matters.[28]

[40] Apart from *Taylor* we have not found any decision of the European Court, any determination of the Human Rights Committee or any commentary bearing on the applicability of article 15 when it is the circumstances of the offender rather than the provisions of the law or its interpretation that alter.[29]

[41] We accordingly conclude that article 15 does protect an offender whose circumstances change after the date of the offence in a way which would otherwise make applicable a provision subjecting that offender to the possibility of a heavier penalty.

[42] We return to the words of s 4 of the 1985 Act and s 6 of the 2002 Act, read

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27 [1975] AC 774, 790-791.

28 For example Lords Bingham, Nicholls, Steyn and Walker (dissenting) in *Matthew v State of Trinidad and Tobago* [2005] 1 AC 433, 453G.

29 At the time of the preparation of these reasons, the European Court of Human Rights website includes only the *Taylor* case; the Human Rights Committee has not adopted a general comment on article 15 and its jurisprudence since 1 October 2003 (the cut off date for the Joseph, Schultz and Castan book, below) includes no relevant cases; and the following texts contain no relevant references or discussion: Lester and Pannick *Human Rights Law and Practice* (2d ed 2004) paras 4.7.5-6; Joseph, Schultz and Castan *The International Covenant on Civil and Political Rights* (2d ed 2004) paras 15.01-10; Harris and Joseph *The International Covenant on Civil and Political Rights and United Kingdom Law* (1995) 238-241; Nowak *UN Covenant on Civil and Political Rights : CCPR Commentary* (1993) 277-80; Optican in Rishworth and others *The New Zealand Bill of Rights* (2003) 706-713; and Hogg *Constitutional Law of Canada* (loose leaf edition 1997) vol II para 48.10.

with s 25(g) and article 15. Can it be said, in terms of subs (1) of s 4 and s 6, that the maximum term "is altered" or "has been varied" between the time of the offence and of the sentencing when what has altered is the offender's personal characteristics, or, in terms of subs (2) of s 4, that the Court had the power to impose preventive detention at the time of the offence?

[43] The main engine of alteration under s 4(1) or variation under s 6 would be intervening legislation. But, as European jurisprudence makes plain, judicial clarification and development may also be caught by the prohibition.[30] What about other arguably relevant "alterations"? The words "altered" in s 4(1) and "varied" in s 6 are to be related to "applicable" in the Covenant. And Mr Mist would assuredly see the maximum as "altered" or "varied" from that "applicable" at the date of the offence and from the maximum that could have been "imposed" (in both s 4(1) and article 15(1)) on him at the time of the offence. According to Lord Phillips, agreeing with Lord Rodger and Lord Carswell in the House of Lords in *R (Uttley) v Home Secretary*,[31] and with the "strong support" of a judgment of the European Court of Human Rights, article 7(1) of the European Convention (or article 15(1) in our case) is breached:

> if a sentence is imposed on a defendant which constitutes a heavier penalty than that which could have been imposed *on the defendant* under the law in force at the time that his offence was committed.[32]

[44] In *Morgan v Superintendent, Rimutaka Prison*,[33] Blanchard J, with whom Gault J agreed, referred to that passage and appears to have applied it. He also saw no possible distinction between the Convention provisions and s 25(g) based on the word "applicable" being in the Convention and not in s 25(g): both that provision and s 6 refer to the maximum penalty applicable.[34] Tipping J, referring to those

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30 See for example *Coëme v Belgium* ECHR 2000–VII p 75 para 145 discussed in *R (Uttley) v Home Secretary* [2004] 1 WLR 2278, at paras 20, 41, 45 and 59; compare also *R v Mako* [2000] 2 NZLR 170 at [21], and Optican, n 29 above, at 712-713.

31 [2004] 1 WLR 2278.

32 [2004] 1 WLR 2278 at para 21 (emphasis added, and removed from "could"); see also Lord Rodger at para 41 and Lord Carswell at paras 57 (summarising the Government's interpretation) and 61.

33 [2005] 3 NZLR 1 (SC).

34 [2005] 3 NZLR 1, 32 (at [65], [66]), 33 (at [69]), 35 (at [77]), 36 (at [79]) per Blanchard J, and 24 (at [28]) per Gault J.

authorities, similarly considered that, although the word "applicable" does not appear in our s 6(1) and s 25(g), "it is clearly implicit in them".[35] The sentence of preventive detention was simply not "applicable" to Mr Mist at the time he committed the offences. Equally, at that time, turning now to s 4(2), the Court did not then "have [the] power … to impose" preventive detention on Mr Mist; that sentence was not then "applicable".

[45] That interpretation of the two subsections also gives effect to the fairness and equality considerations mentioned earlier and protects the young person's rights to a fair trial. And it better conforms with the principle that courts give bills of rights "a generous interpretation avoiding what has been called 'the austerity of tabulated legalism', suitable to give to individuals the full measure of the fundamental rights and freedoms referred to",[36] and the more recent direction to ensure that the rights are "practical and effective".[37] We accordingly conclude that the facts of this case do fall within both subs (1) and subs (2) of s 4 of the 1985 Act and within s 6 of the 2002 Act.

[46] The appeal is of course concerned in the end with the interpretation of s 75 of the 1985 Act,[38] the provision which in this case is claimed to empower the Court to sentence Mr Mist to preventive detention. Subsection (1) applies "to any person who is not less than 21 years of age". That expression appears at first blush to relate to the day of sentencing, but the Crown's contention, accepted by the Court of Appeal, is that it relates to the date of conviction. The present tense also makes reference back to the date of the offence awkward, especially given the past tense in para (b) of subs (1). But the directions in s 4 of the 1985 Act and s 6 of the 2002 measure are given in dogmatic terms. "Notwithstanding" any other provision (including s 75), it is the date of offending that is decisive. Section 75 must be read in that way.

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35 [2005] 3 NZLR 1 at [91].

36 Lord Wilberforce in *Minister of Home Affairs v Fisher* [1980] AC 319, 328, quoting S A de Smith, *The New Commonwealth and its Constitutions* (1964) 194; see also Rishworth in Rishworth and others, n29 above, 43-45, and the authorities he mentions.

37 See for example the Chief Justice in *Morgan* at [25] and the cases she cites.

38 Set out at [6] above.

[47] Sections 4 and 6 also provide the answer to the argument based on s 137 about the validation of irregular sentences, a provision which expressly turns on the date of conviction. We would also note in respect of that miscellaneous ancillary provision that it was carried forward essentially unchanged from the 1954 Act when, as discussed earlier, the principle against retrospectivity was not seen as applying to sentencing, the emphasis being on the date of conviction or indeed of sentencing. The ancillary character of the provision is also evidenced by the initial failure, as recorded by Tipping J,[39] to align it with the new substantive provisions in the 2002 Act.[40]

[48] We accordingly read s 75 as referring to the date of the offence, by reference to s 4 and s 6 read with s 25(g) of the Bill of Rights. We consider that the appeal against the sentence of preventive detention must be allowed. The Crown's application for leave to appeal against the finite sentences must be referred back to the Court of Appeal.

GAULT J

[49] The appellant, at the time he committed the offences, was under the age of 21. He was 20 years old when the Sentencing Act 2002 came into force. He turned 21 prior to his conviction and sentence. The issue is whether, because of his age, he was ineligible for the sentence of preventive detention.

[50] He was to be sentenced under the Sentencing Act as provided in s 5(3) of that Act. But because the offending occurred before that Act came into force the transitional provisions apply. Section 153 reads:

> **153 Offender convicted of specified offence committed before commencement date**
>
> (1) This section applies if—

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39 At [100].

40 We also agree that s 8, concerning the imprisonment of persons under 16, could not have affected the meaning of s 4 which must have taken priority in its application to s 75.

> (a) an offender is sentenced on or after the commencement date for an offence committed before that date that is a specified offence as defined in section 75(4) of the Criminal Justice Act 1985; and
>
> (b) had the court been dealing with the offender immediately before the commencement date, the court would have sentenced the offender to preventive detention under section 75 of the Criminal Justice Act 1985 or committed the offender to the High Court in accordance with section 75(3) of that Act.
>
> (2) The court may deal with the offender under sections 87 to 90.

[51] Sections 87 to 90 provide for the sentence of preventive detention. In particular, under s 87 preventive detention may be imposed on persons 18 years or over at the time of committing the offence. Therefore, if the requirements in s 153(1)(a) and (b) are met, the appellant was eligible for preventive detention. It is common ground that para (a) is satisfied in this case.

[52] The issue for determination is whether para (b) is satisfied: had the court been dealing with the offender immediately before the commencement date of the Act (June 2002) would the court have sentenced the offender to preventive detention under s 75 of the Criminal Justice Act 1985? The sentencing Judge answered this in the negative. In his view, if the court had been dealing with the appellant in June 2002, it would not have sentenced him to preventive detention because he was then under 21, the age of eligibility for that sentence under s 75. The Court of Appeal took the opposite view by reference to the purpose of s 153 - to provide a seamless transition from the old to the new Act. That Court held that the notional sentencing postulated as occurring immediately before the Act's commencement date must be taken as applying the law as it stood under s 75 of the Criminal Justice Act but to the circumstances of the offender (including age) as he actually presents for sentencing. On that scenario, the appellant was to be sentenced as if s 75 were still in force but at his actual age.

[53] I agree with the Court of Appeal and Tipping J that s 153(1)(b) does not require the offender being dealt with to take on characteristics other than those presented at sentencing. Had the Criminal Justice Act continued in force (subject to the further issue of the application of s 4 to be dealt with) at the time of sentencing, the appellant was over 21 and therefore met the age condition in s 75 for the

imposition of the sentence of preventive detention. I am prepared to assume that the age condition applied at the date of sentencing. The interpretation of s 153(1)(b) I prefer does not strain the words of para (b). It simply requires "the offender" to be construed as the offender as he or she presents for sentencing.

[54] The view favoured by the sentencing Judge would mean that the circumstances of the offender (including whether or not having reached the age of eligibility for the sentence of preventive detention) would be fixed at the date of commencement of the Act. It is unlikely that the legislature would have intended sentencing to proceed by reference to the circumstances of offenders at an arbitrary date different from both the date of offending and the date of sentencing.

[55] There is the further issue, however, whether the age condition in s 75 is affected by s 4(2) of the Criminal Justice Act. Section 4 reads:

> **4 Penal enactments not to have retrospective effect to disadvantage of offender**
>
> (1) Notwithstanding any other enactment or rule of law to the contrary, where the maximum term of imprisonment or the maximum fine that may be imposed under any enactment on an offender for a particular offence is altered between the time when the offender commits the offence and the time when sentence is to be passed, the maximum term of imprisonment or the maximum fine that may be imposed on the offender for the offence shall be either—
>
> (a) The maximum term or the maximum fine that could have been imposed at the time of the offence, where that maximum has subsequently been increased; or
>
> (b) The maximum term or the maximum fine that can be imposed on the day on which sentence is to be passed, where that maximum is less than that prescribed at the time of the offence.
>
> (2) Without limiting subsection (1) of this section, except as provided in sections 152(1) and 155(1) of this Act but notwithstanding any other enactment or rule of law to the contrary, no court shall have power, on the conviction of an offender of any offence, to impose any sentence or make any order in the nature of a penalty that it could not have imposed on or made against the offender at the time of the commission of the offence, except with the offender's consent.
>
> (3) For the purposes of subsection (1) of this section, a sentence of life imprisonment shall be deemed to be the longest term of imprisonment that may be imposed.

> (4) For the purposes of subsection (1) of this section, a sentence of corrective training, and a sentence of preventive detention, shall be deemed to be a sentence of imprisonment for a term equal to the maximum period for which the offender may be detained pursuant to the sentence.

[56] Subsection (2) also postulates a comparison based on a notional sentencing. It requires a reference to the sentence or sentences that could have been imposed on the offender at the date of commission of the offence. This provision, like s 153(1)(b), does not specify whether the characteristics (age) of the offender are to be taken as he or she presents for sentence upon conviction or as he or she would have presented had sentencing taken place at the date of commission of the offence. This could be seen to raise essentially the same issue of interpretation as does s 153(1)(b).

[57] Section 4(2) is directed to the power of the court when sentencing on conviction and limits that to the power of the court ("could not have imposed") at the earlier date of offending. The words of the subsection do not expressly require the characteristics of the offender at the earlier time to be considered.

[58] The reference to "any sentence" is to be considered in the context of the Criminal Justice Act. That provided the criteria for the imposition of the full range of sentences from supervision to imprisonment to preventive detention. In some provisions it is directed to particular sentences on individual offenders, in others it is directed to kinds or forms of sentence. The express exceptions in s 4(2) for the kinds of sentence provided for in ss 152 and 155 suggest that in this provision it was referring to kinds of sentences. That is also how it is used in the references to; "a sentence of corrective training", "a sentence of preventive detention" etc in subss (3) and (4).

[59] The argument for the Crown is that the purpose of s 4(2) is to limit a court on sentencing to the kinds of sentence provided for at the time the relevant offence was committed. That would conform with s 4(1) which limits sentencing courts to maxima of fines or terms of imprisonment provided for at the time of the relevant offending. This interpretation of s 4(2) is said to avoid the inconsistencies with other provisions of the Criminal Justice Act which otherwise must be resolved by recourse to the over-ride provision in s 4(2). It is at least unusual for the same Act to contain

clear contradictions requiring resolution in this way. Sections 8, 75 and 137 clearly contemplate sentencing at the date of conviction. This interpretation also is consistent with that adopted by the Privy Council in *Baker v The Queen*[41] and by the European Court of Human Rights in *Taylor v United Kingdom*.[42]

[60] Reliance was also placed on the heading to s 4. The Court of Appeal found this indicative of the correct interpretation of s 4(2). It seems somewhat question-begging to draw assistance from the reference in the section heading precluding retrospective effect when either of the competing interpretations of subs (2) may be said to do that depending upon the meaning attributed to retrospective effect. For my part, I do not understand that expression normally to be used in relation to provisions that continue to apply to matters occurring after they came into force. Further, so far as s 4(2) excludes from its prohibition sentences of reparation (s 152) and supervision (s 155), it is expressly retrospective in effect.

[61] On the other hand, the words of s 4(2) can be read as preventing a court from imposing a particular sentence on an individual offender that it could not have imposed had that offender presented for sentencing at the time of the commission of the offence. That interpretation is not easily reconciled with the interpretation of s 153(1)(b) I have preferred. It is justified, however, by reference to the history of s 4(2) as reviewed in the judgment of Keith J. It was introduced to give effect to Art 15 of the International Covenant on Civil and Political Rights the relevant part of which reads:

> Nor shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offence was committed.

[62] That plainly is capable of being read as relating to a particular sentence as well as to applicable maximum sentences for specific criminal offences. There is no indication that it should not be construed generously. The sentences applicable to Mr Mist at the date of commission of the offence did not (because of his age) include preventive detention. Section 4(2) can be construed broadly in conformity. In terms of s 4(2), the sentencing court did not have the power to impose upon him the

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41 [1975] AC 774.
42 (2003) 36 EHRR CD104.

sentence of preventive detention because that could not have been imposed upon him at the time of the offending and must be seen as heavier than any sentence that could have been imposed. This construction must apply notwithstanding any contrary indication in s 75.

[63] I agree that the appeal must be allowed and remitted to the Court of Appeal.

[64] Not having had the benefit of argument on two points, I express no view on the relevance to the circumstances of this case of s 4(1) of the Criminal Justice Act nor on the scope of s 6 of the Sentencing Act 2002.

BLANCHARD AND TIPPING JJ

(Given by Tipping J)

Introduction

[65] We are required in this appeal to identify the date at which the age criterion which applied to the sentence of preventive detention under s 75 of the Criminal Justice Act 1985 had to be fulfilled. Was it necessary for the offender to have reached the age of 21 years at the date when the qualifying offence was committed, or was it sufficient for that age to have been attained by the date of conviction (or sentencing)? The Court of Appeal held that it was sufficient if the offender was aged 21 or more at the date of conviction.[43] It did not matter that he was under 21 at the date when the offending took place. We find ourselves unable to agree with that conclusion. We are of the view that the relevant legislation, when properly construed, required the offender to be no less than 21 years of age at the time of the offending.

[66] The appellant, Mr Mist, committed a series of serious sexual offences while he was under the age of 21 years. He was born in October 1981 and hence attained the age of 21 years in October 2002. The offending took place between 2 October 1998 and 27 January 2002. Mr Mist was convicted of the offending on 5 September

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[43] [2005] 2 NZLR 791.

2003 and came before Neazor J for sentence in the High Court on 21 November 2003.[44] By that time he had of course reached the age of 21. The Crown sought a sentence of preventive detention but Neazor J held that Mr Mist was not liable to a sentence of that kind because of the combined effect of s 153 of the Sentencing Act 2002 (which had come into force on 30 June 2002) and s 75 of the Criminal Justice Act 1985.

[67] The Judge therefore imposed finite sentences totalling 16 years' imprisonment with a minimum non-parole period of 10 years (the maximum). The Solicitor-General sought and obtained leave to appeal to the Court of Appeal, which allowed the appeal and substituted a sentence of preventive detention on the most serious count.[45] The Court did so on the premise that Neazor J had been wrong in his conclusion that this sentence could not be passed on Mr Mist. The Court was of the view that a sentence of preventive detention could and should be imposed. Mr Mist has appealed to this Court contending that the Court of Appeal was wrong in its conclusion that he was liable for the sentence of preventive detention. We are concerned in this appeal only with whether that sentence was within the power of the sentencing Judge.

[68] The legislation in force at the time Mr Mist committed the offences was the Criminal Justice Act 1985. By the time of his conviction and sentencing that Act had been repealed and replaced by the Sentencing Act 2002. Section 153 of the latter Act governed Mr Mist's case. It provides:

> **153 Offender convicted of specified offence committed before commencement date**
>
> (1) This section applies if—
>
> (a) an offender is sentenced on or after the commencement date for an offence committed before that date that is a specified offence as defined in section 75(4) of the Criminal Justice Act 1985; and
>
> (b) had the court been dealing with the offender immediately before the commencement date, the court would have sentenced the offender to preventive detention under section 75 of the Criminal Justice Act 1985 or committed the offender to the High Court in accordance with section 75(3) of that Act.

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44 HC PMN T2/054/838731, 21 September 2003.

45 Sexual violation of a 12 year old girl (count 2).

(2) The court may deal with the offender under sections 87 to 90.

[69] There was an issue in the Court of Appeal as to how s 153(1)(b) should be applied. Mr Mist argued that it required the sentencing Judge to regard the sentencing exercise as taking place in all respects on 29 June 2002 (the day before the commencement date of the Sentencing Act). We agree with the Court of Appeal's conclusion that s 153(1)(b) does not require the sentencing court to deem itself for all purposes to be sitting "immediately before the commencement date". What the subsection is saying is that the sentencing court must be satisfied that it both could and would have sentenced the offender to preventive detention under the law which applied immediately before the commencement date. The sentencing process must be viewed as taking place on its actual date but the law to be applied is the previous law. Section 153(1)(b) is effectively a savings provision. It saves the previous law for offences committed while it was in force. The purpose of the section as a whole is to make sure that a person who offended under the old law, but is to be sentenced under the new law, qualifies for preventive detention under both regimes.

[70] Section 153(1)(b) is designed to achieve the same result as that prescribed by s 19 of the Interpretation Act 1999:

> **19 Effect of repeal on prior offences and breaches of enactments**
>
> (1) The repeal of an enactment does not affect a liability to a penalty for an offence or for a breach of an enactment committed before the repeal.
>
> (2) A repealed enactment continues to have effect as if it had not been repealed for the purpose of—
>
> (a) Investigating the offence or breach:
>
> (b) Commencing or completing proceedings for the offence or breach:
>
> (c) Imposing a penalty for the offence or breach.

[71] Section 19 applies unless the enactment being construed provides otherwise or its context requires a different interpretation.[46] It cannot fairly be said that either the terms of s 153(1)(b) or its general context dictate a result different from that

[46] Section 4 of the Interpretation Act 1999.

prescribed by s 19. It is to be noted that the Sentencing Act uses the phrase "immediately before the commencement date" in a number of different places under the heading "Transitional and Savings Provisions".[47] It is apparent from a perusal of the individual instances that the same phrase is used in two different senses. In some situations the phrase is used simply to signify that the previous law is to apply.[48] In this usage it is not the date which is important, simply what law is to apply. In other instances the phrase is designed to make relevant an individual offender's particular circumstances on the date immediately before the commencement date.[49]

[72] The constructional difficulty arises because the same phrase serves different purposes. Nevertheless we think it is tolerably plain that in s 153(1)(b) the phrase must have been intended to serve the former purpose, that is the purpose of making the previous law applicable to a present day sentencing exercise. The Court must sentence today on the basis of the law which previously applied. The issue in the present case is therefore whether Mr Mist was eligible for the sentence of preventive detention under the previous law, namely s 75 of the Criminal Justice Act 1985. That section provided:

> **75 Sentence of preventive detention**
>
> (1) This section shall apply to any person who is not less than 21 years of age, and who either—
>
> > (a) Is convicted of an offence against section 128(1)] of the Crimes Act 1961; or
> >
> > (b) Having been previously convicted on at least one occasion since that person attained the age of 17 years of a specified offence, is convicted of another specified offence, being an offence committed after that previous conviction.
>
> (2) Subject to the provisions of this section, the High Court, if it is satisfied that it is expedient for the protection of the public that an offender to whom this section applies should be detained in custody for a substantial period, may pass a sentence of preventive detention.
>
> (3) Where any person is convicted by a District Court of any specified offence, and the court has reason to believe, from a report of a probation officer or otherwise, that the offender is liable to preventive detention, section 44 of the Summary Proceedings Act 1957 or (as the case may require) section 28G of the District Courts Act 1947 shall apply and the

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47 Comprising ss 148-160.
48 For example ss 149 and 158.
49 For example ss 150, 151, 156 and 160.

court shall endorse on the relevant information a statement to the effect that the court has declined jurisdiction upon the ground that it has reason to believe that the offender is liable to preventive detention.

(3A) A court shall not impose a sentence of preventive detention on an offender to whom subsection (1)(a) of this section applies unless the court—

(a) Has first obtained a psychiatric report on the offender; and

(b) Having regard to that report and any other relevant report,—

is satisfied that there is a substantial risk that the offender will commit a specified offence upon release.

(3B) Notwithstanding anything in section 121(1) of this Act, the Court may, for the purposes of obtaining the psychiatric report referred to in subsection (3A)(a) of this section, exercise all or any of the powers conferred by section 121(2) of this Act, and subsections (2A) to (13) of section 121 and sections 122 and 123 of this Act shall apply, so far as they are applicable and with any necessary modifications, to the offender and any psychiatric report so obtained.

(4) For the purposes of this section the expression specified offence means,—

(a) If committed against a child under the age of 16 years at the time of the commission of the offence,—

(i) Any offence against any of sections 130 to 134 and 140 to 142 of the Crimes Act 1961; or

(ii) An attempt to commit an offence against section 142 of that Act:

(b) If committed against any person, whether or not a child under the age of 16 years at the time of the commission of the offence,—

(i) Any offence against any of sections 128, 129, 142A, 173, 188, 189(1), 191, and 199 of that Act; or

(ii) An attempt to commit an offence against section 142A or section 188(1) of that Act.

[73] Section 75 had to be read in conjunction with s 4 which provided:

4 Penal enactments not to have retrospective effect to disadvantage of offender

(1) Notwithstanding any other enactment or rule of law to the contrary, where the maximum term of imprisonment or the maximum fine that may be imposed under any enactment on an offender for a particular offence is altered between the time when the offender commits the offence and the time when sentence is to be passed, the maximum term of imprisonment or

> the maximum fine that may be imposed on the offender for the offence shall be either—
>
> > (a) The maximum term or the maximum fine that could have been imposed at the time of the offence, where that maximum has subsequently been increased; or
> >
> > (b) The maximum term or the maximum fine that can be imposed on the day on which sentence is to be passed, where that maximum is less than that prescribed at the time of the offence.
>
> (2) Without limiting subsection (1) of this section, except as provided in sections 152(1) and 155(1) of this Act but notwithstanding any other enactment or rule of law to the contrary, no court shall have power, on the conviction of an offender of any offence, to impose any sentence or make any order in the nature of a penalty that it could not have imposed on or made against the offender at the time of the commission of the offence, except with the offender's consent.
>
> (3) For the purposes of subsection (1) of this section, a sentence of life imprisonment shall be deemed to be the longest term of imprisonment that may be imposed.
>
> (4) For the purposes of subsection (1) of this section, a sentence of corrective training, and a sentence of preventive detention, shall be deemed to be a sentence of imprisonment for a term equal to the maximum period for which the offender may be detained pursuant to the sentence.

[74] As noted in para [65], the essential issue can be further narrowed to whether, for the purposes of s 75(1), the offender must have reached the age of 21 years at the time of the qualifying offending or whether it was sufficient for the offender to have reached that age prior to conviction or prior to being sentenced. The distinction between conviction and sentence is not material in the present case. If it was necessary for Mr Mist to have attained the age of 21 years at the time of the offending, it is common ground that he was ineligible for preventive detention.

Court of Appeal's reasoning

[75] The reasons for the Court of Appeal's conclusion that s 75 was concerned with the offender's age at the date of conviction are best recorded in the Court's own words:

> [41] We accept that, taken alone, s 75(1) provided that a Court had power to impose preventive detention if an offender was 21 at the date of conviction, even if the offender were less than 21 years of age at the time the offence occurred. It seems to us that this is the only sensible reading that can

> be given to the terms of s 75(1): the jurisdiction to impose preventive detention arises only when a conviction occurs, and in the absence of any other specified date (such as the date of the offence or the date of sentencing), it seems to us that the sensible reading of s 75(1) is that it applies as at the date of conviction. The wording of s 75(1)(b) ("convicted on at least one occasion since that person attained the age of 17 years of a specified offence...".) illustrates the focus of the section on age at the time of conviction.
>
> [42] We agree with Mr Horsley that s 137 of the Criminal Justice Act supports that interpretation.
>
> [43] We accept there is some force in Mr Lithgow's argument that, when read in isolation, s 4(2) appears to have general application, and to apply notwithstanding the specific terms of s 75 (or, for that matter s 8). However, we have come to the conclusion that it is the narrow interpretation of s 4(2) which should be applied. It seems to us to be clear that ss 4(1) and 4(2) must be read together, since they are complementary in addressing different situations which may apply to the disadvantage of an offender as a result of changes to different aspects of sentencing law. Section 4(1) deals with increases in maximum terms of imprisonment or maximum fines, while s 4(2) deals with the introduction of a penalty of a different nature than that which was available at the time of the commission of the offence. We believe that this becomes clear when the terms of s 4 are considered in the light of the heading to the section, which is very clear as to its intent. Section 5 of the Interpretation Act provides that indications such as the heading to the sections should be taken into account in determining the meaning of a section. In that respect we respectfully agree with the observation by the learned author of Hall's Sentencing.
>
> [44] We accept that s 4(2) is worded broadly, and that if it is considered in isolation from its context, it is open to the broad interpretation suggested by Mr Lithgow. That raises the issue as to whether that broad interpretation should be adopted, because s 4(2) is part of a penal statute and should be construed in the way most favourable to the offender. In our view, once s 4(2) is considered in the context of s 4 as a whole, and taking into account the clear indication from the heading of s 4, it becomes clear that the narrow interpretation is correct. We do not accept that the fact that s 4(2) appears in a penal statute requires us to adopt the broad interpretation.
>
> [45] We accept Mr Lithgow's submission that this interpretation of s 4(2) could have led to anomalies where the trial of a young offender was delayed until after his or her 21st birthday. However, we are not persuaded that this should lead us to adopt an interpretation of the provision which is at odds with what we believe was Parliament's purpose.

Section 75

[76] We now develop our reasons for reaching the opposite conclusion. We will incorporate counsel’s submissions in this Court to the extent necessary in the discussion which follows. We will also, for convenience, express our reasons as if

s 75 and other relevant provisions of the Criminal Justice Act 1985 were still in force.

[77] Section 75(1) does not state expressly when the offender must have reached the age of 21 years. We do not agree with the Crown's submission and the Court of Appeal's conclusion that the only sensible reading of s 75(1) is that the relevant date is the date of conviction. That argument and conclusion were based, at least in significant part, on the reference to the date of conviction in paragraph (b) of s 75(1). That paragraph states one of two alternative pre-conditions which must be fulfilled before the sentence of preventive detention can be imposed. The relevant one is that the offender must have previously been convicted of a specified offence on at least one occasion since attaining the age of 17 and before being convicted of the instant specified offence. The fact that for the purpose of this pre-condition the focus is on age at date of conviction does not mandate a similar approach to the age criterion for the offending in respect of which the person concerned is now appearing for sentence.

[78] It is quite possible, and would not be in any way inconsistent, for Parliament to have specified the offender's age at date of conviction for the purpose of the pre-condition without meaning to adopt that same date for the instant offending, in respect of which different considerations and principles apply. In our view Parliament has not made it clear in s 75, either expressly or by necessary implication, at what time the age of 21 must have been reached in order to qualify the offender for preventive detention in relation to the instant offending. It is therefore appropriate to look elsewhere in the Criminal Justice Act to see what assistance can be derived on this point from other relevant provisions.

Section 4

[79] Mr Lithgow's argument was based essentially on s 4(2), which can be summarised as providing that, notwithstanding any other enactment, no Court may sentence an offender, except with the offender's consent, to a sentence which it could not have imposed when the offending took place. The argument for Mr Mist can be reduced to a short and simple proposition. As he could not, for age reasons,

have been sentenced to preventive detention at the time he offended, he was not liable to be sentenced to preventive detention under s 75. He contends either that s 4(2) overrides s 75, or that s 75 must be interpreted so as not to conflict with s 4(2). On either basis the fact that he was less than 21 years of age at the date of the offending rendered him ineligible for preventive detention.

[80] The Court of Appeal's answer to this argument was essentially two-fold. First, the Court relied on the heading[50] to s 4 to support the view that the meaning of s 4(2) should be narrowed from its ostensibly broad terms. Second, the Court held that the meaning of s 4(2) advanced by Mr Lithgow was "at odds with" what the Court considered to be Parliament's purpose.[51] The Court acknowledged the force of the submission that, read in isolation, s 4(2) was broadly worded, but considered that the heading to the section, the statutory context and Parliament's purpose required it to be given a narrow reading.

[81] In support of that narrow reading, Mr Horsley argued both in this Court and below that s 4, viewed as a whole, was designed to deal only with changes in sentencing law which had come into force between the date an offence was committed and the date the offender was convicted and sentenced. It was not designed, so counsel argued, to deal with a legislative environment which had remained unchanged throughout, and which made provision for a sentencing option which was not available on the date the offending took place but was available on conviction and sentence because the offender had now reached the requisite age.

[82] There are three features of s 4(2) which immediately stand out. The first is that the subsection constitutes an express limit on the Court's sentencing powers. The second is that whatever may be the true effect of its provisions, they apply notwithstanding any other enactment or rule of law to the contrary. Section 4(2) thus prevails over any contrary provision within the Criminal Justice Act itself.[52] The third feature is that s 4(2) is clearly focused on the particular offender rather than on offending of the kind which the offender has committed. It is therefore concerned

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50 "Penal enactments not to have retrospective effect to disadvantage of offender".

51 At [45].

52 See s 29 of the Interpretation Act 1999: "Enactment" means the whole or a portion of an Act or regulations.

with individual cases and their individual circumstances rather than with the generality of offending.

[83] Bearing in mind the dominant effect which s 4(2) is clearly intended to have, it must be viewed as prevailing over all contrary indications appearing in other sections. Nevertheless other sections may be relevant to the true meaning of s 4(2). That meaning is central to the resolution of this case. In order to determine what that meaning is, it is appropriate first to examine s 4(2) in the context of s 4 as a whole. We will then examine s 4(2) in the context of other relevant sections in the Act.

[84] We start with the heading to s 4 upon which the Court of Appeal placed significant weight, albeit Mr Horsley informed us that it had not featured much in his argument. We do not consider the heading carries the weight which the Court of Appeal ascribed to it. The proposition which the heading incorporates is that a penal enactment, such as s 75, must not have retrospective effect to the disadvantage of an offender. The key concept is of an offender being disadvantaged by the imposition of a sentence having retrospective effect. Such an effect occurs when a sentence is imposed which could not have been imposed at the time the offence was committed. The reasons why the prohibited sentence could not then have been imposed are not limited in any way by the general proposition captured by the heading. The sentence might have been beyond the maximum earlier available. It might have been of a type which was not earlier available. It might have been unavailable earlier because of some circumstance affecting the particular case or the particular offender. The heading is apt to cover all these situations. It does not suggest that retrospective effect is confined to legislative change. With respect to the Court of Appeal's contrary view, we consider that, if anything, the heading to s 4 supports Mr Mist's argument.

[85] We move next to consider the relationship between s 4(2) and s 4(1). As already noted, s 4(2) has a sharp focus on the particular offender. The subsection is designed to prevent the Court from imposing a sentence on an offender which it could not have imposed on that offender at the time of the commission of the offence. Mr Horsley argued that words should be read into s 4(2) making it clear that its reference to "any sentence or …. any order in the nature of a penalty" meant

"any new type of sentence or … order …". It was necessary to do this, in Mr Horsley's submission, because s 4 should be viewed as confined to legislative changes brought into force between commission date and conviction date. In the same way as s 4(1) deals only with legislative changes to sentencing maxima, so s 4(2) should be construed as being concerned only with legislative changes introducing new types of sentence. For the following reasons we find ourselves unable to read into s 4(2) the limiting words proposed by Mr Horsley or indeed any such limiting concept.

[86] Section 4 of the Criminal Justice Act 1985 was first introduced to the statute book by s 22 of the Criminal Justice Amendment Act 1980. It became s 43B of the Criminal Justice Act 1954. On the enactment of the Criminal Justice Act 1985, s 43B was carried forward into the 1985 Act as s 4. The introduction of this provision was designed to reflect New Zealand's acceptance of certain international instruments. In particular, what became s 4 was designed to adopt Article 15 of the International Covenant on Civil and Political Rights.[53] Article 7 of the European Convention on Human Rights is in similar terms. We reproduce Article 15(1):

> **Article 15**
>
> 1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offence was committed. If, subsequent to the commission of the offence, provision is made by law for the imposition of the lighter penalty, the offender shall benefit thereby.

[87] We agree with Mr Horsley that s 4(2) is apt to cover statutory additions to the available range of sentences introduced between commission date and conviction date. We are, however, unable to agree that its scope goes no further. Section 4(2) is designed to supplement s 4(1) and is expressed more broadly than s 4(1). Parliament must have wanted s 4(2) to catch all cases which might not come within the terms of s 4(1), but which nevertheless came within the same general principle as s 4(1) and indeed the heading to the section are designed to reflect.

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[53] See *Department of Labour v Latailakepa* [1982] 1 NZLR 632; 635-636 per Richardson J; and *Morgan v Superintendent of Rimutaka Prison* [2005] 3 NZLR 1, 29 (at [53]ff) per Blanchard J.

[88] The essence of s 4(1) is that offenders are not liable to any "altered", ie increased, maximum which comes into force between commission date and conviction date. Only Parliament can effect such an alteration. Section 4(2) is not, however, limited to the concept of Parliamentary alteration. Its wider focus must have been deliberate. There is certainly no basis for saying that the concept of Parliamentary alteration should be read into s 4(2) as a limiting factor, thereby narrowing the scope evidenced by its plain words. That would be to read down s 4(2) from the meaning conveyed by its simple and uncomplicated terms. There is no justification for doing that. Once it is established that s 4(2), with its focus on the specific offender, covers a wider field than Parliamentary alterations to the sentencing regime coming into force between commission date and conviction date, it must follow that the subsection cannot be read in the narrow way favoured by the Court of Appeal, nor in the way for which Mr Horsley contended in this Court. In short, s 4(2) covers any change in the law or in any other circumstance (such as an offender's age) which occurs between commission date and conviction date and which would otherwise render the offender liable at the conviction date to a sentence to which he or she was not liable at the commission date.

[89] There is one further point concerning the relationship between s 4(2) and s 4(1) which should be mentioned. It did not feature in the Court of Appeal's discussion nor was it much developed in the Crown's argument in this Court. The point is that if the broad meaning we favour is given to s 4(2), the scope of that meaning might reasonably be thought to make s 4(1) largely redundant. A legislative increase in a maximum term or fine, which is the principal alteration contemplated by s 4(1), would be covered by s 4(2) broadly construed. A legislative increase in maximum penalty between commission date and conviction date would be a change in the law between those dates, rendering the offender liable to a sentence to which he or she was not liable when the offence was committed.

[90] This is a point of some force because normally legislation is enacted on the basis that all its provisions have some work to do. But a degree of overlap does

sometimes occur,[54] particularly when the drafting technique is to cover specific instances and then to have a residual catch-all provision. We think this is what has happened here. The fact that s 4(2), when read according to its clear terms, makes the specific provisions of s 4(1) largely unnecessary, does not lead us by clear and necessary implication to adopt a narrower meaning for s 4(2). We consider that the generality and breadth of s 4(2) enshrine the true purpose and intent of the measure and any doubling up is an incidental consequence.

[91] We are satisfied that there is no mutual inconsistency in the meanings we have given to s 4(2) and s 153(1)(b). The two provisions are designed to serve different purposes. Section 4(2) embodies a general sentencing principle. Section 153(1)(b) is a savings provision designed to continue in force a repealed section for the purpose of dealing with events which occurred before the repeal. The purpose of s 4(2) is to preserve the applicability of a circumstance which would have limited the powers of the sentencing court at the time the offending took place. It is premised on the basis that the offender is notionally treated as having been convicted and sentenced on the same day as the offence was committed.

[92] We have already noted that s 153(1)(b) does not go that far. There is no notional sentencing on the day before the Sentencing Act came into force. The sentencing takes place on its actual date. The only retrospective element is that the law to be applied is the law as it stood on the day before the commencement date. In short, for the purposes of s 4(2), all steps (offending, conviction and sentence) are to be treated as taking place on the same day. For the purposes of s 153(1)(b) all these steps are treated as happening on their actual dates. The only change is that instead of applying the law which is in force on the sentencing date, the Court is directed by a savings provision to apply the law which previously applied.

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[54] See *Craies on Legislation* (8ed 2004) at 601, para 20.1.23.

Section 8

[93] We turn now to the broader statutory context against which s 4(2) must be construed. In coming to our conclusion we have considered what effect ss 8 and 137 of the Criminal Justice Act might have on the meaning of s 4(2). The Crown relied on these sections in support of the conclusion reached by the Court of Appeal in relation to the meaning of s 75. But it is the construction of s 4(2) as the dominant provision, with its consequential effect on s 75, which is crucial, rather than any influence ss 8 and 137 may be said to have on s 75 directly.

[94] Section 8 provides that, except for a purely indictable offence, no Court shall impose a sentence of imprisonment on a person who, at the time of conviction, is under the age of 16 years.[55] This constitutes a limit on the Court's sentencing powers in the same way as s 4(2) also constitutes a limit on those powers. In the case of s 8, the age criterion is related to the date of conviction. Read in isolation, s 8 suggests that persons who are aged 15 at the time of offending can be sentenced to imprisonment if they have attained the age of 16 by the time they are convicted. What does this indicate about the true meaning of s 4(2)? The Crown's submission is that the drafting of s 8 shows that s 4(2) should be read narrowly to avoid setting up a conflict with s 8. We are not, however, persuaded that this argument is of sufficient strength to lead, by clear and necessary implication, to a reading down of the plain terms of s 4(2).

[95] When enacting s 8, Parliament was concerned with the minimum age at which offenders could be imprisoned, except in the case of purely indictable offences. The age selected was 16 at date of conviction. The fact that date of conviction was chosen for this purpose does not give sufficient support for an implication that the plain terms of s 4(2) should be read down. When enacting s 8 Parliament's mind was no doubt focused primarily, if not entirely, on what the

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[55] The equivalent provision in the Sentencing Act is s 18. The age is now 17 and the relevant date is the date of the commission of the offence.

minimum age should be rather than on the date of assessment. There is nothing to suggest that any consideration was given to the impact which an age at date of conviction focus might have on the interpretation of s 4(2). The purpose of s 4(2) is materially different. It prohibits the imposition of sentences which could not be imposed at the time of the offending. Indeed the limits on the Court's sentencing powers which ss 4(2) and 8 each enact, are not of themselves inconsistent. The s 4(2) limit places an additional restriction on the Court's sentencing powers beyond that created by s 8. Parliament clearly did not recognise that the date of conviction focus of s 8 had the capacity to create an inconsistency with s 4(2). While some inconsistency results if s 4(2) is given its plain meaning, s 8 does not, in our view, justify a departure from that meaning which on its own terms must prevail. Specifically we cannot agree that s 8 requires the words suggested by Mr Horsley to be read into s 4(2), thus limiting it to legislative changes coming into force between commission date and conviction date.

Section 137

[96] We turn to s 137. That section provides:

> **137 Sentence not invalidated by mistake in age of offender**
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> (1) Where in respect of an offence a court sentences to periodic detention, corrective training, imprisonment, or preventive detention an offender appearing to the court to have been at the time of conviction of an age at which the offender would have been liable to that sentence for that offence, the sentence shall not be invalid by reason only of the fact that, because of the offender's age at the time of conviction, the offender was not liable to that sentence.
>
> (2) Where it appears that, because of the offender's age at the time of conviction, the offender was not liable to the sentence, the offender or the prosecutor or any counsel on behalf of the Crown may at any time apply in accordance with this section for the substitution of some other sentence.
>
> (3) Notwithstanding anything in subsection (2) of this section, where it comes to the notice of the Superintendent of a corrective training institution or to the notice of the Secretary that an offender who has been sentenced to corrective training was under 16 years of age at the time of conviction, the Superintendent or Secretary, as the case may be, may apply in accordance with this section for the substitution of some other sentence.

(4) Without limiting subsection (3) of this section, where it comes to the notice of the Superintendent of a corrective training institution that an offender who has been sentenced to corrective training was of or over the age of 20 years at the time of conviction, the Superintendent shall report the fact forthwith to the Secretary.

(5) Where it comes to the notice of the Secretary that an offender who has been sentenced to corrective training was of or over the age of 20 years at the time of conviction, the Secretary shall direct that the offender be transferred to a prison to serve the remainder of the sentence, which shall thereafter be deemed for the purposes of this Act and the Penal Institutions Act 1954 to be a sentence of imprisonment for a term of 3 months that commenced on the date on which the sentence of corrective training commenced.

(6) Every application under this section shall be made—

(a) To the High Court, if the sentence was passed—

(i) By the Court of Appeal on appeal from the High Court; or

(ii) By the High Court otherwise than on appeal from a District Court; or

(b) To a District Court presided over by a trial Judge, if the sentence was passed—

(i) By the Court of Appeal on appeal from such a District Court; or

(ii) By a District Court Judge upon conviction on indictment; or

(c) To a District Court presided over by any Judge, in any other case.

(7) The Judge to whom the application is made, after inquiry into the circumstances of the case, may pass in substitution for the original sentence any sentence that could have been passed on the offender at the time of conviction.

(8) For the purposes of any appeal or application for leave to appeal against the substituted sentence, that sentence shall be deemed to be a sentence passed on the conviction of the offender, but the time allowed for giving notice of the appeal or application shall run from the date on which the substituted sentence was in fact passed.

[97] The principal point in s 137, upon which the Crown relied, derives from the reference in subs (1) to an offender appearing to have been, at the time of conviction, of an age at which the offender would have been liable to preventive detention. There is a similar reference to age at the date of conviction in subs (2). It must be

acknowledged that s 137 seems to have been drafted on the basis that it is age at date of conviction, rather than age at date of commission, which is to count for the purpose of eligibility for preventive detention and the other sentences referred to. The principal purpose of the section is to provide a mechanism for correcting sentences wrongly imposed by reason of a mistake in the offender's age. Such sentences are not invalid but are susceptible of correction in terms of the procedures laid down. The section assumes, rather than states, that the time at which the age criterion must be satisfied is the time of conviction. As with s 8, s 137 does not mandate the Crown's suggested meaning of s 4(2). That provision should not be read down against the offender's interests unless the case for doing so is compelling.[56]

[98] Our conclusion that the circumstances are not sufficiently compelling is also supported by the fact that s 137 was brought forward into the Criminal Justice Act 1985 from earlier legislation and can ultimately be traced back to s 43 of the Criminal Justice Act 1954. Its terminology pre-dates 1980 when the predecessor to s 4 was introduced into the 1954 Act as s 43B. Had s 75 stood alone, the presence of s 137 could well be said to point to a conviction date construction of s 75, as the Court of Appeal suggested. But s 75 does not stand alone. It must be construed so as to accommodate the true effect of s 4(2). Once this is recognised, it is apparent that the references to date of conviction in s 137 represent a failure by the legislature to harmonise s 137 with s 4. Whatever may have been the position before 1980, after the enactment in that year of the predecessor to s 4, the assumption upon which s 137 was drafted no longer reflected a correct understanding of the law.

[99] There is in any case no direct clash between s 137 and s 75, when that section is read in the light of s 4(2). Section 137 is not empowering in any relevant sense. It does not empower the imposition of any sentence, let alone preventive detention. Even if it were possible to read it as implicitly empowering the sentence of preventive detention, and this would be extremely difficult, that implicit power would necessarily be have to yield to the express and overriding limit on the Court's sentencing powers enacted by s 4(2).

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[56] *Timoti v The Queen* [2005] NZSC 37 at [14].

[100] Before leaving this point, we note that the successor to s 137 in the Sentencing Act is s 143. When first enacted, that section, like s 137, was drafted on the premise that the age criterion for the sentence of preventive detention was determined at the date of conviction. That set up a direct conflict with the express terms of s 87(2)(b) which provides for that determination to be made at the date of the offending. This shows how easy it is for a drafting slip of this kind to occur when a section is simply carried forward from earlier legislation without recognition of the need for amendment to reflect a change made elsewhere in the legislation. The same sort of difficulty appears to have arisen when s 4 was introduced in 1980. The failure to spot the inconsistency with s 137 (and indeed with s 8) was more understandable in those circumstances because the effect of s 4 on ss 8 and 137 was less obvious than the effect of s 87(2)(b) on s 143, which had to be amended two years later to reflect s 87(2)(b).[57]

English cases

[101] The English cases[58] cited by Mr Horsley are all clearly distinguishable. None of them concerned anything comparable to s 4(2). In *Fallows* the Court of Criminal Appeal was concerned with a provision similar to s 75 and nothing else. The same situation applied in *Danga*. In *Ghafoor* the point was the subject of concession. That case is therefore of no particular assistance.

[102] The position in the Privy Council case of *Baker*[59] was statutorily a little more complicated. There was an overriding constitutional provision analogous to s 4(1) but nothing equivalent to s 4(2). Section 20(7) of the Constitution of Jamaica provided that no penalty could be imposed which was severer in degree or description than the maximum penalty which might have been imposed for the offence when it was committed. When the appellants committed the murder for which they had been sentenced to death, they were under the age (18) at which the

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57 See s 18 of the Sentencing Amendment Act 2004.

58 *R v Fallows* [1954] 1 All ER 623; *R v Danga* [1992] QB 476; and *R v Ghafoor* [2002] EWCA Crim 1857.

59 *R v Baker & Anor* [1975] AC 774.

death penalty could be imposed on them. By the time they had been convicted they had attained the qualifying age. A majority of their Lordships, in advice delivered by Lord Diplock recommending the appeal be dismissed, departed from an earlier decision of the Board[60] and focused on the maximum penalty generally applicable for murder. At all times this was death. It did not matter that this penalty could not be imposed on the particular offenders at the time of the crime because of their age.

[103] Lord Salmon delivered a powerfully reasoned dissenting opinion. He held that as the appellants could not have been sentenced to death at the time they committed the crime they were not liable for the death penalty, even though they qualified for it at the time they were convicted. We consider that the decision of the majority was a product of its time and that Lord Salmon's contrary view is much more persuasive today. It better represents both justice and principle. Furthermore, as we have earlier emphasised, the focus of s 4(2) is very much on the position of the particular offender rather than on the generally applicable maximum, that being the focus of s 4(1). *Baker*'s case is also distinguishable on the basis that it was decided in terms of a statutory provision equivalent to s 4(1), without there being anything equivalent to s 4(2).

The European Court of Human Rights

[104] Much the same can be said of the decision of the European Court of Human Rights in *Taylor v The United Kingdom*[61] upon which Mr Horsley also relied. That case concerned Article 7 of the European Convention, the relevant words of which are:

> Nor shall a heavier penalty be imposed than one that was applicable at the time the criminal offence was committed.

[105] *Taylor*'s case is therefore distinguishable on the same basis as *Baker*. Furthermore, the reasoning in *Taylor* does seem to be a rather narrow approach to the underlying principle which Article 7 is designed to reflect. The penalty imposed

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60 *Maloney Gordon v The Queen* (1969) 15 WIR 359.
61 (2003) 36 EHRR CD104.

on *Taylor* was not available at the time he committed the offence because of his age. When he came to be sentenced he had reached the qualifying age. The penalty imposed was "applicable" to the offence at the time it was committed, but it was not applicable to the offender. The European Court held that general applicability sufficed.

[106] In this context it may be helpful to point out again that s 87(2)(b) of the Sentencing Act now expressly relates the qualifying age for preventive detention to the date of commission. Our legislature has therefore decided that this is the appropriate way to apply the general principle. It may have been because of this express recognition that s 6 of the Sentencing Act is expressed in rather more limited terms than the old s 4, there being nothing comparable to the precise terms of s 4(2). It is not unreasonable therefore to conclude that s 4(2) was thought to have had the effect now expressly specified in s 87(2)(b).

[107] We have covered the issues in some detail in these reasons in deference to the contrary view of the Court of Appeal and the careful and detailed submissions made by the Crown in this Court. In the end, however, we regard the matter as comparatively simple. Section 153 of the Sentencing Act makes s 75 of the Criminal Justice Act applicable to Mr Mist's case. Section 75 does not clearly state at what date the age criterion it prescribes must be fulfilled. When the section is interpreted in the light of s 4(2), it becomes clear that the age criterion must be fulfilled at the date of the offending. As Mr Mist was less than 21 years of age at the date of his offending, he did not qualify for preventive detention.

Applicability of s 4(1)

[108] After these reasons were prepared we have had the opportunity of reading in draft the reasons of Keith J. We note that he considers that not only s 4(2) but also s 4(1) of the Criminal Justice Act applies so as to influence the meaning of s 75(1). We do not consider it appropriate to express a concluded view on this issue. The clear applicability of s 4(2) makes it unnecessary to do so and the point was not the subject of full argument. In any event, it is not self evident that s 4(1) can be read as applying to the circumstances of this case. There was no change between the date of

commission and the date of sentencing to the maximum penalty for sexual violation by rape, or for any of the other crimes committed by Mr Mist.

[109] On the other hand there were, at the date of commission, effectively two maximum terms for sexual violation. The one (20 years imprisonment) applied to persons under the age of 21 and the other (preventive detention – life imprisonment in terms of s 4(4)) applied to persons 21 years of age and over. While neither of these maxima was the subject of alteration between commission date and sentencing, there was an alteration in the offender's age, rendering him liable (on the Crown's argument) to the greater of the two maxima. We do not, in this case, have to decide whether the alteration of which s 4(1) speaks is confined to a legislative change to a maximum term of imprisonment, or can extend to an alteration to what may be described as the applicable maximum by dint of some other change in circumstance.

[110] Section 6(1) of the Sentencing Act 2002, which is the current statutory equivalent of s 4, refers to offenders who are convicted of "an offence in respect of which the penalty has been varied" between the date of commission and sentencing. The concept of a penalty having been "varied" is similar to the concept of a maximum having been "altered". Furthermore, as this Court held in *Morgan v Superintendent of Rimutaka Prison*,[62] the concept of penalty for the purposes of s 6 relates to the maximum penalty available for the kind of offence with which the Court is concerned. In that respect s 6 mirrors s 4(1). Section 4(2), with its sharper focus on the particular offender as opposed to the type of offence, was not reproduced as part of s 6 of the Sentencing Act or elsewhere.

[111] What effect, if any, that may have on the current state of the law should, in our view, be left for a case in which the issue necessarily arises and is the subject of full argument on both sides. We can understand Keith J's concern to give s 4(1) an extensive meaning so as to avoid any argument that its present equivalent, s 6(1), does not achieve the full reach of ss 4(1) and (2) combined. We recognise the force of the case for giving s 6(1) a meaning which incorporates the width of s 4(2), and

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62 [2005] 3 NZLR 1.

the principle behind Article 15. Furthermore, on the two maxima thesis, that meaning would not be inconsistent with *Morgan*. The essential issue in *Morgan* was the meaning and effect of the word "penalty" in s 6(1) of the Sentencing Act. The essential issue in relation to s 4(1) of the Criminal Justice Act is the meaning and compass of the concept of alteration in maximum term of imprisonment or fine.

[112] But, for the reasons already given, we are not prepared to commit ourselves either way on the s 4(1) point. Indeed, as noted earlier,[63] the precise issue which arises in this case could not arise again in the light of the legislature's express adoption of the date of offending in s 87(2)(b) of the Sentencing Act.

Result and consequential matters

[113] It follows that the appeal must be allowed. The consequences of that conclusion must now be examined. The Solicitor-General's application for leave to appeal to the Court of Appeal had an alternative ground. He submitted that if the Court did not accept his primary contention that Mr Mist could and should be sentenced to preventive detention, the Court should increase the total finite term to which Mr Mist had been sentenced in the High Court, on the basis that 16 years' imprisonment was manifestly inadequate. Having accepted that preventive detention could and should have been imposed, the Court of Appeal was not required to address the Solicitor-General's alternative submission. Mr Horsley contended that if we were of the view that Mr Mist was ineligible for preventive detention, we should remit the case to the Court of Appeal, pursuant to the powers given to this Court by s 26 of the Supreme Court Act 2003. The purpose of the remission would be for the Court of Appeal to consider the Solicitor-General's alternative submission.

[114] Mr Lithgow informed us he had not anticipated this request. He asked for, and was granted, time to make written submissions on the matter. We have considered them and have come, without difficulty, to the conclusion that we both can and should do as the Solicitor-General requests. Section 26 clearly gives this

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63 Para [100].

Court the power to do so and we can see no basis for declining to exercise it. That would result in our simply reinstating the sentence imposed in the High Court without the Solicitor-General's alternative argument having been considered in the Court of Appeal, which is the appropriate Court to do so. For these reasons we would make the formal orders noted above.

Solicitors:
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