NOTE: PUBLICATION OF NAMES, ADDRESSES, OCCUPATIONS OR IDENTIFYING PARTICULARS, OF COMPLAINANTS PROHIBITED BY S 203 OF THE CRIMINAL PROCEDURE ACT 2011.

IN THE SUPREME COURT OF NEW ZEALAND

SC 10/2016
[2016] NZSC 127

BETWEEN	EDWARD THOMAS BOOTH Appellant
AND	THE QUEEN Respondent

SC 35/2016

BETWEEN	MICHAEL MARINO Appellant
AND	THE CHIEF EXECUTIVE OF THE DEPARTMENT OF CORRECTIONS Respondent

Hearing:	5 July 2016 for SC 10/2016 6 and 26 July 2016 for SC 35/2016
Court:	Elias CJ, William Young, Glazebrook, Arnold and O'Regan JJ
Counsel:	A J Bailey and K Paima for Appellant in SC 10/2016 D A Ewen and G K Edgeler for Appellant in SC 35/2016 B J Horsley and J E L Carruthers for Respondent in SC 10/2016 B J Horsley, D J Perkins and T P Westaway for Respondent in SC 35/2016
Judgment:	22 September 2016

JUDGMENT OF THE COURT

A **Mr Marino's appeal is allowed. Costs are reserved.**

B **Mr Booth's appeal is dismissed.**

REASONS

ELIAS CJ, GLAZEBROOK, ARNOLD AND O'REGAN JJ
(Given by Glazebrook J)

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Issue

[1] An offender is deemed, under s 90(1) of the Parole Act 2002, to have been serving a sentence of imprisonment during any period that he or she has spent in pre-sentence detention. These appeals relate to the manner in which pre-sentence detention is calculated.

Background[1]

Mr Marino

[2] Mr Marino was remanded in custody on 12 February 2015 on charges of family violence. On 18 March and 19 June 2015, charges of attempting to pervert the course of justice were laid as a result of telephone calls made by him from prison in February and March 2015.

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1 More detail on the background is in William Young J's judgment at [41]–[42], [54]–[58] and [64]–[66].

[3] On 6 July 2015 Mr Marino pleaded guilty to all charges. Judge Spear imposed concurrent sentences of 22 months imprisonment on both charges of attempting to pervert the course of justice and 12 months on the other charges.

[4] Mr Marino applied for a writ of habeas corpus, saying that he had served his sentence and should have been released on 12 January 2016. He was unsuccessful in both the High Court[2] and the Court of Appeal.[3]

[5] On the approach taken by the courts below, Mr Marino's pre-sentence detention is calculated on a charge by charge basis.[4] As the second charge of perverting the course of justice was laid on 19 June 2015, this would mean that his sentence expiry date was 18 May 2016 and that Mr Marino would receive no credit for the period spent in custody between 12 February and 19 June 2015.

Mr Booth

[6] Mr Booth was remanded in custody in July 2012 after being charged with offending against A.[5] In May 2013 he was charged with offending against B. After a trial on all charges, he was found guilty of a count of assault against A and two charges of sexual violation against B.

[7] Mr Booth was sentenced to concurrent sentences of 11 years nine months imprisonment on the first sexual violation charge, eight years on the other sexual violation count and six months on the assault count.[6] The sentence on the first sexual violation count was treated as the lead charge. The starting point of eight years for that offence was increased by three years and six months for the second sexual violation and three months for the assault charge, on the basis of the totality principle.[7]

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2 *Marino v Chief Executive of the Department of Corrections* [2016] NZHC 459 (Simon France J) [*Marino* (HC)].

3 *Marino v Chief Executive of the Department of Corrections* [2016] NZCA 117 (results judgment); and *Marino v Chief Executive of the Department of Corrections* [2016] NZCA 133 (reasons judgment) (Miller, Cooper and Kós JJ) [*Marino* (CA)].

4 *Marino* (HC), above n 2, at [13]–[15]; and *Marino* (CA), above n 3, at [16] and [22]–[23].

5 In the courts below this complainant was referred to as "F".

6 *R v Booth* [2015] NZDC 1586 (Judge MacAskill).

7 At [16]. See also William Young J's discussion of the totality principle in his judgment at [46].

[8] As noted by William Young J,[8] if the interpretation by the Court of Appeal in *Marino* applies, the 10 month period spent on remand from July 2012 (on the charges related to A) until his remand in May 2013 (on the charges related to B) will not count as pre-sentence detention. As a result, if Mr Booth is required to serve his full sentence, he will effectively have been in prison for 12 years and seven months rather than the 11 years and nine months actually imposed.

[9] Mr Booth appeals against sentence, seeking a restructuring of his sentence so that he would serve only the sentence imposed.[9] As William Young J notes,[10] this could have been achieved by imposing a three month cumulative sentence for the assault charge against A. If Mr Marino's appeal succeeds, Mr Booth would be required to serve only the sentence imposed and, if that occurs, he does not pursue his appeal.

The legislation

[10] Pre-sentence detention is defined by s 91(1) of the Parole Act 2002 (the Act):

> **91 Meaning of pre-sentence detention**
>
> (1) **Pre-sentence detention** is detention … that occurs at any stage during the proceedings leading to the conviction or pending sentence of the person, whether that period (or any part of it) relates to—
>
> (a) any charge on which the person was eventually convicted; or
>
> (b) any other charge on which the person was originally arrested; or
>
> (c) any charge that the person faced at any time between his or her arrest and before conviction.

[11] Section 90 deems pre-sentence detention to be time served:

> **90 Period spent in pre-sentence detention deemed to be time served**
>
> (1) For the purpose of calculating the key dates and non-parole period of a sentence of imprisonment (including a notional single sentence)

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8 Below at [65] of his judgment.

9 This was refused in the Court of Appeal: *Booth v R* [2015] NZCA 603 (Stevens, Fogarty and Mallon JJ). This was on the basis that it was not open to the Court to intervene as it could not be said that Judge MacAskill was in error to have adopted the structure he did, even if it was also open to him to have structured Mr Booth's sentence in the manner proposed: at [30].

10 Below at [66] of his judgment.

and an offender's statutory release date and parole eligibility date, an offender is deemed to have been serving the sentence during any period that the offender has spent in pre-sentence detention.

(2) When an offender is subject to 2 or more concurrent sentences,—

(a) the amount of pre-sentence detention applicable to each sentence must be determined; and

(b) the amount of pre-sentence detention that is deducted from each sentence must be the amount determined in relation to that sentence.

(3) When an offender is subject to 2 or more cumulative sentences that make a notional single sentence, any pre-sentence detention that relates to the cumulative sentences may be deducted only once from the single notional sentence.

[12] Section 92 deals with the determination of the length of pre-sentence detention and the review and appeal provisions. In relevant part it provides:

92 Procedure for recording length of pre-sentence detention

(1) The person who is in charge of a prison, social welfare residence, hospital, or secure facility referred to in section 91(2) (in this section referred to as a **detention place**) must keep a record of—

(a) the date on which a person is admitted to the detention place on detention as referred to in section 91(2); and

(b) the total period during which the person is subsequently detained before sentence in that detention place, whether on the original charge or any other charge.

(2) After sentencing, the person in charge of the detention place (other than a Police jail) must supply the offender with a copy of the record kept under subsection (1) and, if the offender disputes the accuracy of the record, he or she may apply to the person who made it to review it.

(3) A person in charge of a detention place (other than a Police jail) who receives an application under subsection (2) must immediately review the record and, having reviewed it, must notify the offender in writing of—

(a) whether the record is confirmed; or

(b) the manner in which the record is amended.

(4) If the offender is dissatisfied with the outcome of the review, he or she may appeal the review to the court that imposed the sentence, in which case subpart 4 of Part 6 of the Criminal Procedure Act 2011 applies so far as it is applicable and with any necessary modifications, to the appeal.

[13] Also relevant is s 75 which provides:

> **75 Cumulative sentences form notional single sentence**
>
> (1) If, after the commencement date, an offender is sentenced to a sentence of imprisonment (a **later sentence**) that is directed to be served cumulatively on another sentence (an **earlier sentence**), the later sentence and the earlier sentence form a notional single sentence for the purpose of determining—
>
> (a) whether the offender is subject to a long-term sentence or a short-term sentence; and
>
> (b) the non-parole period to apply when determining the offender's parole eligibility date; and
>
> (c) the release date to apply when determining the offender's statutory release date.
>
> (2) If the earlier sentence is part of a series of cumulative sentences, then all the sentences (including any pre-cd[11] sentences) in that series, along with the later sentence, form a notional single sentence for the purpose described in subsection (1).
>
> (3) Every sentence (including any pre-cd sentences) in a series of cumulative sentences links to the next one in the series at its sentence expiry date.
>
> (4) Every notional single sentence is deemed to be a sentence that is imposed on or after the commencement date, even if it contains a pre-cd sentence.

Interpretation

[14] Sections 90(1) and 91(1) apply to all sentences of imprisonment and establish the general approach to the treatment of pre-sentence detention. Section 90(1) provides that for the purposes of calculating the key dates[12] and non-parole period of a sentence of imprisonment (including a single notional sentence), an offender is deemed to have been serving the sentence during any period the offender has spent in pre-sentence detention.

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[11] Under s 4(1) of the Parole Act 2002 a pre-cd sentence is a sentence of imprisonment imposed before the commencement date of the Parole Act.

[12] Under s 4(1) of the Parole Act, the key date, in relation to a sentence of imprisonment, "means the start date, sentence expiry date, and release date of the sentence".

[15] Section 91(1) defines pre-sentence detention in terms of the period of the proceedings leading to conviction or pending sentence.[13] It relates, under para (a), to "any charge on which the person was eventually convicted" but it also, under para (b), includes "any other charges on which the person was originally arrested". Paragraph (c) widens the definition even further as it includes any charge faced at any time between arrest and conviction, as long as it was faced during the proceedings leading to conviction or pending sentence.

[16] It is therefore enough if the proceedings and the period of detention relate to any charge on which the person was convicted, any charge for which he or she was arrested "originally" or any charge he or she "faced" between arrest and before conviction.

[17] Pre-sentence detention is calculated in the aggregate. There is no warrant in the language of s 91(1) for it to be calculated on a charge by charge basis. Treating "the proceedings" in the first part of s 91(1) as referable to each charge is inherently inconsistent with the references to "any charge" and "any other charge" in the balance of the provision. Equally, the sentence referred to in ss 90(1) and 91(1) is not the sentence for each charge. We cannot read the term "sentence" in the first part of ss 90(1) and 91(1) as referring other than to the sentence imposed at the end of the proceeding or proceedings, starting with the first remand into custody and ending with the sentence of imprisonment.[14]

[18] The notion developed in the cases[15] of "related" offending is an unwarranted gloss on the statutory language. It leads to evaluative decisions, which will inevitably be uneven in application in an area that should be as certain and as simple to administer as possible. In terms of the statutory wording, all pre-sentence detention counts from the time of the first arrest and remand into custody until a

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[13] The reference to "pending sentence" is necessary to make it clear that pre-sentence detention may occur post-conviction and before sentence. The types of detention that qualify as "pre-sentence detention" are defined in s 91(2) of the Parole Act.

[14] Or sentences, as words in the singular are interpreted to include the plural: Interpretation Act 1999, s 33.

[15] Starting with *Taylor v Superintendent of Auckland Prison* [2003] 3 NZLR 752 (CA), which is discussed in more detail at [89]–[92] of William Young J's judgment. The relatedness inquiry had its origins in comments of the Court of Appeal in *Taylor* at [15]–[16].

person starts a sentence as a convicted prisoner, whether the offending is related or not.

[19] It is submitted on behalf of the respondents that section 90(2) and (3) require a different calculation for sentences that are cumulative and those that are imposed concurrently.[16] We do not accept that submission. As we have said, the operative general provisions applying to all sentences are set out in s 90(1) and 91(1). Section 90(2) and (3) are calculation sections that do not detract from those general provisions.

[20] Section 90(3) makes it clear that there is no double counting where sentences are imposed cumulatively. This provision is in fact belt and braces, given the treatment of cumulative sentences as a single notional sentence in terms of s 75 of the Act.

[21] Section 90(2) is a calculation section, necessary because, where sentences are imposed concurrently, there will be more than one sentence. They will not be treated as a single notional sentence, even though the sentence on the lead charge will usually be uplifted to reflect the totality of offending.[17] In terms of s 91(1), the pre-sentence detention on each charge will be the same (as long as the charges were ones faced during the proceedings leading to the conviction or pending sentence of the person). Other key dates, such as the release dates for each sentence, would differ, however, if the length of the sentences imposed differs.[18] Hence the need for and purpose of s 90(2).

[22] That the calculation required is of the whole period of detention from remand in custody until sentence is clear from the record keeping section, s 92. We note too that there is no separate record keeping requirement for cumulative or concurrent

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16 This was the result of the Court of Appeal's interpretation also: see *Marino* (CA), above n 3, at [22]–[23].

17 See William Young J's discussion of the totality principle at [46]. As he says, this principle means that the sentence should be the same whether a cumulative or concurrent sentence is imposed.

18 The statutory release date of an offender will depend on the sentence with the latest release date: Parole Act, s 17. The parole eligibility date of an offender is the date on which the offender has finished serving the non-parole period of every long-term sentence or passed the release date of every short-term sentence to which they are subject: Parole Act, s 20.

sentences, which would be necessary if the respondents' submission on the effect of s 90(2) were correct. Nor does s 92 does proceed on a charge by charge basis.

[23] Section 92(1)(a) provides that the person in charge of a place of detention must keep a record of the date the person is admitted to the place of detention. There is no requirement to keep a record of the date on which any subsequent charges are laid, which again would be necessary if the respondents' interpretation was correct. Section 92(1)(b) requires a calculation in aggregate of the total period the person is subsequently detained before sentence "whether on the original charge or any other charge". The language is wide and, like s 91(1), does not include any relatedness inquiry.

[24] In summary, the s 91(1) definition of pre-sentence detention relates to detention[19] during the whole of the court process or processes from the original remand in custody on any charge up to the imposition of a sentence (or sentences) of imprisonment. The entirety of that period is deducted from each sentence or sentences of imprisonment imposed in terms of s 90(1). This applies whether the sentence of imprisonment relates to a single charge or more than one, whether or not the sentence of imprisonment relates to the charge for which a person was originally arrested, whether or not sentences are imposed cumulatively or concurrently and whether or not the sentences are imposed at the same time or subsequently as long as any charges for which the sentence or sentences of imprisonment relate were faced after arrest and before conviction.[20]

Other factors

[25] The conclusion we have come to on the wording of the relevant provisions is confirmed by the policy behind the Act, its legislative history and the New Zealand Bill of Rights Act 1990 (Bill of Rights).

[26] The respondents did not put forward any policy reason for the difference between cumulative and concurrent sentences they submit s 90(2) requires. The fact

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19 Section 91(2) sets out the types of detention that are pre-sentence detention, including detention on remand pursuant to a court order in a prison or police station: s 91(2)(a). Pre-sentence detention does not include any time served as a sentenced prisoner.

20 Parole Act, s 91(1)(c).

that cumulative sentences are treated as a single notional sentence and all pre-sentence detention, whether referable to all charges or not, is a strong pointer to the policy of the Act being that all pre-sentence detention counts as long as the charges on which the person is sentenced were faced during the period of detention. It is also a strong pointer to there being no relatedness inquiry. By their very nature cumulative sentences would normally be imposed in relation to unrelated offending.[21]

[27] We have also already noted that the calculation of pre-sentence detention should be as simple and certain as possible (and this policy is clear from the record keeping section, s 92). The interpretation urged on us by the respondents would not be in accordance with this policy. We do not agree that any problems associated with any relatedness inquiry, had it in fact been necessary, would be tempered by the review and appeal mechanisms provided under s 92 of the Act.[22] This is because of the evaluative nature of any such decision, which, despite the review and appeal mechanism would still inevitably be uneven in application.[23]

[28] Further, despite being given the opportunity to do so,[24] the respondents have not put forward any convincing anomalies that arise with the interpretation of the provisions we have set out above and certainly none that would outweigh the anomalies, exemplified by the cases of the appellants, that would arise from the interpretation urged on us by the respondents.

[29] As to legislative history, as William Young J has noted,[25] if Messrs Marino and Booth had been sentenced when what he calls the third iteration of the Criminal Justice Act 1985 had been in force, the full extent of their pre-sentence detention would have counted as time served. If it had been intended to change the law and adopt different approaches to concurrent and cumulative sentences in the Parole Act, one would have thought that the language would have made this clear and that the

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21 See s 84(1) of the Sentencing Act 2002.

22 As suggested by William Young J: see below at [96] of his judgment.

23 See above at [18]. See also the examples given by William Young J at [96] of his judgment.

24 The hearing in this Court was adjourned to give the respondents an opportunity to make further submissions on this point.

25 Below at [75]–[76] of his judgment.

change would have been remarked on in the legislative process and any policy reasons for this change explained.

[30] In fact, changes made to what became s 90(2) before enactment by the Select Committee would suggest that there was no such intention. The Sentencing and Parole Reform Bill clause as introduced had read:[26]

> (2) When an offender is subject to 2 or more concurrent sentences, the pre-sentence detention (if any) that relates to each sentence must be deducted from that sentence only.

[31] The Bill as reported back from the Select Committee however had what became s 90(2) in its current form, without the reference to pre-sentence detention being deducted "from that sentence only".[27] That subsection with that phrase, considered in isolation, may have been interpreted more in line with the respondents' submissions. This was, however, not what was enacted.

[32] Finally the interpretation urged on us by the respondents leads to arbitrary results, contrary to s 22 of the Bill of Rights. As William Young J points out, on the respondents' interpretation, a great deal depends on chance.[28]

[33] If for example the judge in Mr Marino's case had imposed cumulative sentences (as he was in fact invited to do by the Crown), then all the time spent by Mr Marino in custody would have been time served for which he would have got credit. Further, if the charges on the second perversion of justice charge had been laid earlier, then Mr Marino would have received more credit.

[34] Similar arbitrary results are illustrated by the case of Mr Booth. In his case, the respondents' interpretation would mean that he would be imprisoned longer than the sentence actually imposed by the judge in accordance with the law.[29]

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[26] Sentencing and Parole Reform Bill 2001 (148–1), cl 247.

[27] Sentencing and Parole Reform Bill 2001 (148–2) (select committee report) at 200. The Select Committee report did not explain this change. We do note, as the appellant pointed out, that in its submission to the Select Committee, Ministry of Justice officials had recommended the change because "periods of pre-sentence detention may relate to and need to be deducted from more than one concurrent sentence". The officials were concerned that inclusion of the phrase "from that sentence only" could suggest that, "if a certain period of pre-sentence detention relates to (and is deducted from) one concurrent sentence, it should not also be deducted from another concurrent sentence that it relates to".

[28] Below at [63] of his judgment.

What this means for the appellants

[35] This means that, for both Mr Marino and Mr Booth, the whole period from first remand in custody until sentence, is pre-sentence detention applicable to all charges.

[36] For completeness we comment that, on our interpretation, this would have been the result for Mr Booth even had he been acquitted of all charges related to A. This is because, while the period of detention on the charges related to A would not relate to any charge on which he was eventually convicted under s 91(1)(a), it would have related to a charge on which he was originally arrested or to a charge that he faced at any time between arrest and conviction under s 91(1)(b) or (c).[30]

Result

[37] Mr Marino's appeal is allowed. He would have been entitled to an order for his release as sought but this is no longer applicable as, since the Court of Appeal judgment, he has been released from custody.

[38] Costs are reserved. Any submissions in support of an application by Mr Marino for costs should be filed by 24 September, with a response by 30 September.

[39] As Mr Marino's appeal has succeeded, this means that Mr Booth no longer pursues his appeal and it is dismissed accordingly.

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[29] See at [65] below of William Young J's judgment. This assumes (without deciding) that the Court of Appeal was correct to say that Mr Booth's sentence could not be restructured: see above at n 9.

[30] Let us assume, however, that Mr Booth had been arrested on charges related to A and the charges were withdrawn or he was acquitted and then released from prison. If in that case, after his release he had been arrested on charges related to B, the pre-sentence detention in relation to A would not have counted, given that the proceedings and the detention related to A had been completed before the charges relating to B had been laid. This results from the lines drawn by the Act in the definition of pre-sentence detention.

WILLIAM YOUNG J

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The appeals

[40] These two appeals raise difficult questions as to the way in which ss 90 and 91 of the Parole Act 2002 provide for pre-sentence detention to count as time served in respect of subsequently imposed prison sentences.

[41] Michael Marino, a serving prisoner when this case began, contended that the Department of Corrections had miscalculated, to his disadvantage, his release date by not treating all the time he had spent in custody on remand prior to sentence as time served. He claimed to be entitled to be released on 12 January 2016 but Corrections maintained that his release date was 18 May. Asserting that he was being unlawfully detained between those dates, he issued habeas corpus proceedings.

He was unsuccessful in the High Court and Court of Appeal.[31] He has, since the Court of Appeal judgment, been released. In this Court, he challenges Corrections' interpretation, so far upheld by the High Court and Court of Appeal, of ss 90 and 91 of the Parole Act.[32]

[42] Edward Booth is currently serving an effective sentence of 11 years and nine months imprisonment. His appeal against conviction and sentence was dismissed by the Court of Appeal and his appeal to this Court is confined to sentence.[33] Before conviction he spent a substantial period of time in prison on remand. On the approach adopted by Corrections, much of that time will not count as time served. If the argument advanced on behalf of Mr Marino is correct, Mr Booth is entitled to the benefit of the full period he spent on remand with the result that the basis of his appeal falls away. If Mr Marino's appeal fails, Mr Booth argues that his sentence should be restructured so that he receives the benefit of the full remand period.

The statutory scheme – a general overview

[43] The Parole Act and the Sentencing Act 2002 were enacted at the same time and were intended to provide for a coherent approach to sentencing and parole. They therefore must be read together.

[44] When an offender is sentenced to imprisonment for more than one offence, the sentences can be imposed either concurrently (so that they are served together) or cumulatively (so that they are served one after another). This is addressed in the Sentencing Act by ss 83–85.

[45] These sections apply in two situations. In the first, an offender is sentenced on one occasion (and thus by one judge) in respect of multiple offences. In the second, an offender already sentenced to, and serving, a prison sentence is sentenced on a separate occasion for other offending. Despite the clumsiness of the

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31 *Marino v Chief Executive of the Department of Corrections* [2016] NZHC 459 (Simon France J) [*Marino* (HC)]; and *Marino v Chief Executive of the Department of Corrections* [2016] NZCA 117 (results judgment) and *Marino v Chief Executive of the Department of Corrections* [2016] NZCA 133 (reasons judgment) (Miller, Cooper and Kós JJ) [*Marino* CA].

32 *Marino v The Chief Executive of the Department of Corrections* [2016] NZSC 52.

33 *Booth v R* [2015] NZCA 603 (Stevens, Fogarty and Mallon JJ); and *Booth v R* [2016] NZSC 43.

expressions, I will refer to the first situation as "single occasion sentencing" and the second as "separate occasion sentencing".

[46] In both situations – that is, single and separate occasion sentencing – the sentencing judge is required to have regard to the "totality" of the offending. The overall sentence imposed must reflect the seriousness of that totality and this is so irrespective of whether the sentences are structured as concurrent or cumulative.[34] So if concurrent sentences are imposed, the most serious offence receives the sentence appropriate for the totality of the offending.[35] For cumulative sentences, it is the length of the sentences, when added together, which reflect that totality.[36] Therefore, the practical effect of the totality principle is that the effective sentence of imprisonment will be the same irrespective of whether the sentences are structured cumulatively or concurrently.

[47] Where cumulative sentences are imposed on separate occasions, the total effective sentence is treated by s 75 of the Parole Act as a single notional sentence. As I will explain, the same must be so of cumulative sentences imposed on a single occasion. Where concurrent sentences are imposed, the total effective sentence is determined by the sentence which is last to expire, having regard to length and commencement dates.[37] This is illustrated by the facts of the two cases at hand which I am about to discuss.

[48] As I will explain, prior to the enactment of the Criminal Justice Act 1985, sentencing judges could allow for pre-sentence detention by reducing the sentence which would otherwise have been imposed. Between 1985 and 1987 and from 1993 to 2002, the Criminal Justice Act provided for pre-sentence detention to count as time served and thus form part of the calculations which determined parole eligibility and release dates.[38] The same is generally true of the regime established by ss 90 and 91 of the Parole Act. Under this regime pre-sentence detention is irrelevant to the length of a term of imprisonment to be imposed at sentencing and

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34 Sentencing Act 2002, s 85.
35 Section 85(4)(a).
36 Section 85(2).
37 That is to say, the key dates of each concurrent sentence are calculated independently and the furthest date into the future is the operative date.
38 For the 1987–1993 position, see below at [73]–[74].

should therefore be disregarded by sentencing judges. This is provided for by s 82 of the Sentencing Act and there were similar provisions in effect between 1985 and 1987 and 1993 and 2002.[39]

[49] Pre-sentence detention is defined by s 91(1) of the Parole Act:

> **91 Meaning of pre-sentence detention**
>
> (1) **Pre-sentence detention** is detention … that occurs at any stage during the proceedings leading to the conviction or pending sentence of the person, whether that period (or any part of it) relates to—
>
> (a) any charge on which the person was eventually convicted; or
>
> (b) any other charge on which the person was originally arrested; or
>
> (c) any charge that the person faced at any time between his or her arrest and before conviction.

[50] Section 90 of the Parole Act provides:

> **90 Period spent in pre-sentence detention deemed to be time served**
>
> (1) For the purpose of calculating the key dates and non-parole period of a sentence of imprisonment (including a notional single sentence) and an offender's statutory release date and parole eligibility date, an offender is deemed to have been serving the sentence during any period that the offender has spent in pre-sentence detention.
>
> *(2) When an offender is subject to 2 or more concurrent sentences,—*
>
> *(a) the amount of pre-sentence detention applicable to each sentence must be determined; and*
>
> *(b) the amount of pre-sentence detention that is deducted from each sentence must be the amount determined in relation to that sentence*.
>
> (3) When an offender is subject to 2 or more cumulative sentences that make a notional single sentence, any pre-sentence detention that relates to the cumulative sentences may be deducted only once from the single notional sentence.
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> (emphasis added)

[51] Relevantly to the operation of s 90(3), s 75 of the Parole Act provides for single notional sentences. It provides:

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[39] Criminal Justice Act 1985, s 81(2).

> **75 Cumulative sentences form notional single sentence**
>
> (1) If, after the commencement date, an offender is sentenced to a sentence of imprisonment (a ***later sentence***) that is directed to be served cumulatively on another sentence (an ***earlier sentence***), the later sentence and the earlier sentence form a notional single sentence for the purpose of determining—
>
> (a) whether the offender is subject to a long-term sentence or a short-term sentence; and
>
> (b) the non-parole period to apply when determining the offender's parole eligibility date; and
>
> (c) the release date to apply when determining the offender's statutory release date.
>
> (2) If the earlier sentence is part of a series of cumulative sentences, then all the sentences … in that series, along with the later sentence, form a notional single sentence for the purpose described in subsection (1).
>
> …

[52] The references to "later sentence" and "earlier sentence" strongly suggest that s 75 was drafted with sentences imposed on separate occasions in mind. Indeed, the terms "earlier" and "later" sentences do not have an obvious application when the cumulative sentences are imposed on a single occasion. This, however, must be just a quirk of the drafting because there is no reason to think that cumulative sentences imposed on a single sentencing occasion should be treated any differently.

[53] The procedure for determining the length of pre-sentence detention is provided by s 92. For present purposes, it is sufficient to say that the calculations are carried out in the first instance within the prison and the prisoners have a right of internal review in relation to the calculations and, if dissatisfied with the result of such review, a right of appeal to the Court which imposed the sentence.[40] Habeas corpus is, of course, also an available form of challenge, at least during a disputed period of custody.

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[40] Parole Act 2002, s 92(2)–(4).

The cases of Messrs Marino and Booth

Marino

[54] Mr Marino was arrested on 11 February 2015 for offences of family violence (and remanded in custody the next day). In February and March he made telephone calls from prison which resulted in him facing two charges of attempting to pervert the course of justice. These charges were laid on 18 March and 19 June. On 6 July 2015 at a hearing before Judge Spear, the appellant accepted a sentence indication of 22 months imprisonment with release conditions, and entered guilty pleas to all charges.

[55] When Mr Marino appeared for sentence, the Judge imposed concurrent sentences of 22 months imprisonment on both charges of attempting to pervert the course of justice and 12 months imprisonment on the ten other charges. As these were short term sentences (in that they were for less than two years),[41] Mr Marino was entitled to release after serving 11 months.[42] The Judge was of the view that the full period spent by Mr Marino in custody would count as time served as indicated by comments that Mr Marino's sentence expiry date was "fast approaching".[43] Given that the sentencing was in October 2015, this is consistent with an assumption by the Judge that Mr Marino would be released in January 2016.

[56] This was not the view taken by Corrections. Its approach, broadly, was that Judge Spear had imposed 12 sentences, one for each offence, so that the period of pre-sentence detention applicable to each of them ran from the date on which the relevant charge was laid. The second charge of perverting the course of justice was laid on 19 June 2015. On this basis, Mr Marino's sentence expiry date was 18 May 2016. The practical effect of this approach was that Mr Marino received no credit for the period of time which he spent in custody between 12 February and 19 June 2015.

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41 Parole Act, s 4.
42 Parole Act, s 86(1).
43 *R v Marino* [2015] NZDC 21348 at [8].

[57] Mr Marino issued proceedings for habeas corpus. In these proceedings, the High Court and Court of Appeal upheld the approach adopted by Corrections.[44] For present purposes it is sufficient to deal with the reasoning of the latter Court.

[58] The Court of Appeal explained the application of s 91(1) in this way:

> [16] The definition requires that "proceedings" exist, but nothing turns on that; a proceeding will always be in train between charge and sentence. The important point is that the definition addresses detention associated with a single charge leading to "the" conviction and pending sentence. The definition captures the charge on which the person was originally arrested and eventually convicted; and also any holding charge that was laid originally but not pursued; and also any charge laid subsequently by way of amendment to or substitution for the original charge; and also any other charge, whether related to the original charge or not, that the person faced between arrest on the original charge and before conviction on the original charge. …
>
> …
>
> [22] In this setting, we find the meaning of the parole legislation plain. Pre-sentence detention must be calculated for each separate concurrent sentence, and one of those calculations will establish the prisoner's release date. The definition of pre-sentence detention establishes a primary meaning, that of detention between arrest and sentence on the charge the subject of the calculation, but it also ensures that the prisoner gets credit for pre-sentence detention served on a holding charge or a charge laid by way of amendment or substitution for the original charge, and for detention on any other charges that the prisoner faced between arrest and sentence on the original charge.

[59] This approach is certainly consistent with s 90(2) of the Parole Act. It is, however, not so consistent with s 91(1). Mr Marino was sentenced on a single occasion in respect of a number of offences. The sentence imposed reflected the Judge's view of the totality of that offending. The word "conviction" in s 91(1) might be thought to denote "convictions".[45] The "proceedings leading to the conviction[s]" in respect of which Mr Marino was sentenced started with the laying of the family violence charges. All subsequent detention might be thought to have occurred "during [those] proceedings". This approach, however, does not sit easily with s 90(2), at least if it is assumed that this subsection applies to concurrent sentences imposed on a single sentencing occasion.

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44 *Marino* (HC), above n 31, at [13]–[21]; and *Marino* (CA), above n 31, at [22]–[29].

45 Interpretation Act 1999, s 33.

[60] On the approach adopted by the Court of Appeal, the position would have been different if the same effective sentence of 22 months had been arrived at with cumulative sentences.[46] Because such sentences would have constituted a single notional sentence and all pre-sentence detention would have counted as time served in respect of that sentence.

[61] On the Court of Appeal's approach, the time to be served by Mr Marino was thus determined by the decision of the Judge to impose concurrent and not cumulative sentences and to do so in respect of both perversion of justice charges. As noted, the Corrections view, which was upheld by the Court, was that the 22 month sentence in respect of the second of the perversion of justice charges ran from 19 June – that is the day on which this charge was laid. Corrections and the Court of Appeal were thus prepared to credit Mr Marino with the period between 19 June and 6 July on the basis that his detention during that period related to the second perversion of justice charge.

[62] If the Judge had treated only the first of the perversion of justice charges as the lead charge and imposed a sentence of 22 months on that charge and shorter concurrent sentences on the other charges, the Court of Appeal's approach would have resulted in his time in custody from 18 March (when that charge was laid) counting as time served.[47]

[63] In all of this, a great deal depends on chance. It would have been perfectly open to the Judge to impose cumulative sentences. Indeed he was invited to do so by the prosecutor. Had he done so, all time spent by Mr Marino in custody would have counted as time served. As it turned out, the extent of his credit turned on when the police chose to lay the second of the perversion of justice charges. If they had laid it earlier, he would have received more credit. If they had done so later, he would have received less.

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46 *Marino* (CA), above n 31, at [23].

47 This assumes that the sentence imposed on the second perversion of justice charge was shorter than 22 months by a sufficient margin to render irrelevant the shorter period of pre-sentence detention to be credited to it, that is from 19 June as compared to 18 March.

Booth

[64] Mr Booth was arrested and charged in relation to offending relating to A in July 2012 and was remanded in custody.[48] In May 2013 he was charged with offending against B. Following a jury trial he was found guilty on two counts of sexual violation against B, and one count of assault against A. He was acquitted on other serious counts in relation to A. When sentencing Mr Booth, the Judge took the first offence of sexual violation in respect of B as the lead offence. He adopted a starting point for that offence of eight years imprisonment which he increased by three years and six months for the second sexual violation. He added three months for the charge of assaulting A.[49] He therefore sentenced Mr Booth to concurrent sentences of 11 years nine months imprisonment on the first sexual violation count, eight years on the other sexual violation count and six months on the assault count.[50]

[65] On the approach to the application of ss 90 and 91 of the Parole Act adopted in *Marino*, Mr Booth's statutory release date and parole eligibility period will be calculated from his remand on the charges in respect of B (May 2013). This means that the 10 month period spent on remand from July 2012 (on the charges in relation to A) will not count as pre-sentence detention for the purposes of calculating his parole eligibility or his statutory release date. If he is not granted parole, he will wind up having served a total sentence of 12 years and seven months in prison (counting the entirety of the pre-sentence detention), rather than 11 years and nine months, the sentence actually imposed by the Judge in accordance with the law.

[66] Mr Booth's appeal against sentence to the Court of Appeal was on the basis that the interpretation adopted by the Court of Appeal in *Marino* is correct.[51] What he was seeking was a restructuring of the sentences imposed so as to ensure that he received credit for the 10 months served between July 2012 and May 2013 against the effective sentence which was imposed. This could have been achieved by imposing cumulative sentences of three months on the assault charge and 11 years six months on the other charges. Given the premise of the appeal, the Court of

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48 In the Courts below this complainant was referred to as "F", for my purposes I will refer to that complainant as "A".

49 *R v Booth* [2015] NZDC 1586 (Judge MacAskill) at [16].

50 At [18].

51 *Booth* (CA), above n 33, at [3].

Appeal assumed – and did not seriously engage with the correctness of – the *Marino* approach. For this reason the Court dealt briefly, and only in a footnote, with the issues which I am now grappling with:[52]

> Section 91 of the Parole Act defines pre-sentence detention and confirms it is referable to detention pending sentence on a charge for which a person is eventually convicted and [sentenced]. Subsections 90(2) and (3) set out how the pre-sentence detention must be deducted, namely only against the sentence for the offence for which the offender was held in remand.

The first sentence does not accurately reflect s 91(1) but presumably what the Court had in mind was a construction of s 91(1)(b) similar to that adopted by the Court of Appeal in *Marino*.

[67] It is common ground that if cumulative rather than concurrent sentences had been imposed, Mr Booth's detention between July 2012 and May 2013 was relevant pre-sentence detention for the purposes of s 91(1) and would thus have been "counted".

The history of allowances for pre-sentence detention

Before the Criminal Justice Act 1985

[68] Prior to the enactment of the Criminal Justice Act 1985, an allowance for time spent on remand in custody could be made by reducing what would otherwise have been the appropriate sentence.[53] Practice as to the allowance of such deductions was uneven[54] and where allowances were made, there was not much, if any, engagement with parole considerations with the result that time spent in custody pending trial was not necessarily fully accounted for on sentence. For instance, an offender who had been on bail prior to sentence and was sentenced to two years imprisonment would serve less time than an equally culpable prisoner whose

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52 At n 13.

53 For examples see *R v Irvine* [1976] 1 NZLR 96 (CA) at 101; *R v Puru* [1984] 1 NZLR 248 (CA) at 255; *R v Shewan* [1984] 2 NZLR 362 (CA) at 367–368; and *R v Downey* CA117/84, 10 August 1984 at 3.

54 See Ministry of Justice *Attitudinal Assessment of New Zealand Judiciary about Sentencing and Penal Policy: Part 1 Analytical Summary* (1982) at 93–94: Seventy-four judges were surveyed and to the question "Where defendants have spent time in custody on remand prior to conviction, do you take that into consideration when sentencing?" Forty-three per cent replied yes always, 31 per cent replied yes frequently, 22 per cent replied yes sometimes, one per cent replied no never and three per cent either did not know or did not respond to the question.

12 months on remand was deducted from an otherwise appropriate sentence of two years and was thus sentenced to 12 months. Assuming a release after half the sentence was served, the first offender would spend 12 months in prison and the second 18 months in prison (12 on remand and six as a sentenced prisoner).

[69] Against this background, it is not surprising that the legislature provided for a more prescriptive approach.

Section 81 of the Criminal Justice Act (first iteration)

[70] From 1 October 1985 to 1 August 1987,[55] s 81 of the Criminal Justice Act was in these terms:

> **81 Period on remand to be taken as time served**
>
> (1) On imposing a sentence of imprisonment or of preventive detention on an offender, a court shall determine, as nearly as practicable on the information available to it, the total period (if any) during which the offender was held on remand in penal custody *at any stage of the proceedings leading to the offender's conviction or pending sentence, whether that period or any part of it related to any charge on which the offender was originally arrested or that the offender faced at any time subsequent to his or her arrest and prior to his or her conviction.*
>
> (2) In determining the length of the sentence to be imposed, the court shall not take into account any part of the period so determined under subsection (1) of this section, but shall specify that period on the warrant of commitment.
>
> (3) In any case to which subsection (1) of this section applies, the offender shall, for the purposes of determining the date on which he or she will become eligible for parole and the date on which he or she will become eligible for remission of sentence, be deemed to have been serving the sentence during the whole of the period spent on remand in penal custody, as specified by the court on the warrant of commitment in accordance with subsection (2) of this section.
>
> …
>
> (5) For the purposes of subsection (3) of this section, terms of imprisonment under cumulative sentences shall be treated as one term.
>
> …
>
> (emphasis added)

[55] When s 8 of the Criminal Justice Amendment Act (No 3) 1987 came into force.

[71] The words I have italicised in s 81 are virtually identical to those which appear in s 91(1) of the Parole Act. Under this provision, the sentencing judge was required to determine the extent of any pre-sentence detention (to use the current phrase) and to specify that period on the warrant of commitment. Where a number of sentences were imposed on a single sentencing occasion, there would usually be a single warrant of commitment.[56] The Criminal Justice Act contained no provision equivalent to s 90(2).[57] If Messrs Marino and Booth had been sentenced under this regime, the most obvious reading of the section is that all the time they had spent in custody on remand would have been specified on the warrant of commitment and credited to the sentences imposed.

[72] Section 81 was trenchantly criticised by Holland J in *R v Jarvis*,[58] a judgment which I discuss shortly, and it was substantially recast in 1987.[59]

Section 81 of the Criminal Justice Act (second iteration)

[73] From 1 August 1987 to 1 September 1993,[60] s 81 provided:

> **81 Period on remand to be taken as time served**
>
> (1) On imposing a sentence of imprisonment for a term, the court shall, in determining the term, take into account in accordance with subsection (2) of this section the total period (if any) during which the offender was held on remand in penal *custody at any stage of the proceedings leading to the offender's conviction, or pending sentence, whether that period or any part of it related to any charge on which the offender was eventually convicted or any other charge on which the offender was originally arrested or that the offender*

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56 As provided for by s 143(5) of the Criminal Justice Act.

57 As I will explain later, the expression "2 or more concurrent sentences" did appear in s 89 of the Criminal Justice Act in relation to parole eligibility but the context was different (between 1 October 1985 and 31 August 1993 and then in the equivalent provision s 92 between 1 September 1993 and 29 June 2002).

58 *R v Jarvis* HC Christchurch BF S47A, 6 March 1987 noted in [1987] BCL 599.

59 The explanation for the change given by the Minister of Justice to Parliament was in these terms: "I shall foreshadow an amendment that I will be moving by supplementary order paper at the Committee stage. It concerns s 81 of the Criminal Justice Act, which requires the amount of time that an inmate has spent on remand to be accurately calculated and noted by the judge on the warrant for imprisonment. It is to be taken as time served under the sentence. The calculation of time spent on remand has given rise to considerable administrative and practical difficulty. Furthermore, the provision appears to have had the effect that some defendants are refusing bail with a view to have the time spent on remand counted as credit against any custodial sentence. It has been decided that that ought to be changed." See (8 July 1987) 482 NZPD 10318.

60 When s 40 of the Criminal Justice Amendment Act 1993 came into force.

faced at any time subsequent to his or her arrest and prior to his or her conviction.

(2) For the purposes of subsection (1) of this section, a court shall take into account the period spent on remand in penal custody by reducing the term of imprisonment that would otherwise be appropriate by so much of that period as is reasonably practicable in all the circumstances.

…

(emphasis added)

[74] Although the scheme of s 81 in its second iteration was the opposite of the earlier iteration, the language which I have italicised remained the same.

The Criminal Justice Act from 1 September 1993 (third iteration)

[75] With effect from 1 September 1993 s 81 was amended yet again. The scheme of the first iteration was reinstated with the ascertainment and recording function removed from the sentencing judge and transferred to the prisons. The section provided:

81 Period on remand to be taken as time served

(1) The **Superintendent** of any penal institution … shall for the purposes of this section cause a record to be kept of—

(a) The date on which any person is admitted to the institution on remand; and

(b) The total period during which any person is detained in the institution on remand—

at any stage of the proceedings leading to the person's conviction or pending sentence, whether that period or any part of it relates to any charge on which the person was eventually convicted or any other charge on which the person was originally arrested or that the person faced at any time subsequent to his or her arrest and prior to conviction.

…

(3) On receiving a warrant of commitment for any sentenced offender, the Superintendent shall cause any period during which the offender was detained in a penal institution on remand (as so recorded) to be determined and entered on the warrant of commitment.

…

> (7) For the purposes of determining the dates on which an offender to whom subsection (1) of this section applies will become eligible for parole or final release, as the case may be, the offender shall be deemed to have been serving the sentence during the period specified on the warrant of commitment in accordance with subsection (3) of this section … .
>
> …
>
> (9) For the purposes of subsection (7) of this section, terms of imprisonment under cumulative sentences shall be treated as one term determined in the manner provided in section 92 of this Act.
>
> …
>
> (emphasis added)

[76] If Messrs Marino and Booth had been sentenced when this version of s 81 was in effect, the full extent of their pre-sentence detention would have counted as time served; this is for the reasons already explained in respect of the first iteration.

Subsequent amendments to the Criminal Justice Act

[77] Although there were subsequent amendments to s 81, these are not material.

The case law on pre-sentence detention under the Criminal Justice Act

[78] In *R v Noble*,[61] Williamson J expressed a narrow approach to the application of s 81.[62] The offender had been on bail or at large on charges of theft and driving while disqualified. He was then arrested on 23 January 1986 and charged with a serious assault. From that time on he was remanded in custody. While awaiting trial on the serious assault charge, he pleaded guilty to the theft and driving while disqualified charges and was sentenced on 21 April 1986 to a term of three months imprisonment. The serious assault charge was unrelated to the theft and driving while disqualified charges. In the opinion of Williamson J, it followed that the detention between 23 January and 21 April had not occurred during "any stage of the proceedings" in relation to those charges even though it post-dated the laying of those charges and preceded Noble's sentencing in respect of them. There was also

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61 *R v Noble* HC Christchurch T9/86, 9 June 1986 noted in [1986] BCL 1065.

62 His remarks were very much by way of observation because the issue did not arise for determination in the case in front of him.

the separate consideration that Noble had never been remanded in custody on the theft and driving while disqualified charges.

[79] A few days later, a very similar issue arose before Holland J in *R v Pirimona.*[63] The offender had been arrested on 8 January 1986 on a charge of aggravated robbery. While in custody on that charge, he committed an assault for which he received a sentence of six months imprisonment on 29 April. He was sentenced to three years imprisonment for the aggravated robbery on 15 May 1986 (127 days after his original arrest), a sentence which the Judge said was to be served "concurrently" with the six month sentence.[64] The 29 April warrant of commitment was endorsed with 111 days pre-sentence detention. This had the effect of bringing Pirimona's six month sentence to an end on 7 May 1986.

[80] Holland J accepted that the time in custody on the robbery charge could be taken into account in relation to the assault albeit only in relation to the period after those proceedings were commenced;[65] this despite the charges being unrelated. To this extent he expressed disagreement with the approach taken by Williamson J in *Noble*. Holland J allowed a full credit of 119 days (being the 127 days since arrest less the period between 29 April and 7 May, which was spent serving the assault sentence and thus excluded by s 81(4)).

[81] 111 days in custody were attributed to both the assault and aggravated robbery. In a literal and simplistic sense, this might be thought to involve double counting but, if so, the practical effect was very limited. If no pre-sentence detention had been credited to the six months assault sentence, the practical effect of that sentence would have been a 16 day deferral of the start date of the three year sentence. After allowing a full credit for the presentence detention, the practical effect of the assault sentence was an eight day deferral of the start date of the next sentence. So if it is right to see what happened as double counting, it made very

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63 *R v Pirimona* HC Christchurch T7/86, 19 June 1986 noted in [1986] BCL 1064.

64 Because Pirimona was no longer being held in custody on the six month sentence by the time he came to be sentenced on the aggravated robbery charge, the sentences were not concurrent.

65 It is not clear from the judgment when the assault occurred. Holland J was of the view that the 111 days represented an over-allowance.

little difference to the time which Pirimona would have been required to spend in prison.

[82] In *R v Jarvis*, the offender had been charged on 20 March 1986 with driving while disqualified.[66] On 31 July 1986 he was arrested on charges of drug dealing and arson and was remanded in custody on those charges on 14 August. He was sentenced to three months imprisonment on the driving while disqualified charge on 9 September 1986. The sentencing judge certified 40 days pre-sentence detention – that is from 31 July – despite the offender never having been remanded in custody on the driving while disqualified charge. This meant that the three month sentence expired on 30 September. Jarvis was then sentenced to nine years imprisonment imposed on the drug dealing and arson charges on 4 November 1986. Because the three month sentence had expired by the time that Jarvis was sentenced on 4 November 1986, the sentences were not concurrent.

[83] When Holland J came to consider pre-sentence detention on the drug dealing and arson charges, he expressed the view that the 40 day allowance ought not to have been provided in relation to the driving while disqualified charge. This is because Jarvis had not been in custody on that charge prior to sentence. He nonetheless accepted the 30 September termination date as a fait accompli and certified for 75 days pre-sentence detention[67] on the nine year sentence for drug dealing and arson. This enabled the offender to receive a double allowance similar to the 111 days in *Pirimona,* in this case 61 days (between 31 July and 30 September).

[84] There may be scope for argument whether the double counting which occurred in *Pirimona* and *Jarvis* is problematical. This may depend on the state of mind of the sentencing Judge. In *Pirimona,* Holland J obviously thought that the earlier sentence was still current at the time he imposed sentence and he would have regarded the sentence he imposed as superseding that sentence. Conceivably he fixed the sentence he imposed by reference to the totality of the offending (which is what would happen now). On this basis, a full allowance of 127 days was arguably

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66 *Jarvis,* above n 58.

67 Being the 40 days between 31 July and 9 September 1986 prior to the imposition of the three months sentence for driving while disqualified and the 35 between the expiry of that sentence on 30 September and the second sentencing on 4 November 1986.

appropriate if assessed against the intended practical effect of the sentence. If so, Pirimona may have considered himself short-charged with the eventual allowance of 119 days.

[85] In *R v Coward and Hall* the appellants had been arrested on 17 February 1986 on charges alleging the manufacture of heroin.[68] After spending 10 days in custody (18 February to 28 February), Coward was granted bail but was then arrested again (on 9 July) and sentenced (on 19 August) in respect of other unrelated charges to 18 months imprisonment. The sentencing Judge certified for 41 days pre-sentence detention (that is for the period from 9 July). He was sentenced on 19 December to two years and six months imprisonment to be served concurrently with the manufacturing heroin charge. The sentencing judge allowed a remand credit on that charge of only 10 days. The Court of Appeal disagreed, noting:[69]

> This section has been the cause of some difference of judicial opinion and we were favoured with copies of judgments by Williamson J and Holland J about its application in other cases. In our view the intention was to ensure that all appropriate time spent in remand custody was taken into account in determining the date of eligibility for parole or remission. This differs from the situation under the present s.81; now the Court must give credit for remand custody in fixing the length of any prison sentence it imposes. In both the former and the current version of s.81(1) time spent in custody on remand in respect of any charge the offender faced during the period between arrest on the charge under consideration and conviction or sentence thereon is to be taken into account. The logic is readily understandable. Where concurrent sentences are passed, eligibility for remission or parole cannot be given any effect until the appropriate date in the longest one has arrived. This means that the benefit of separate remand periods imposed over the stipulated time may be lost if they are applied only to their relevant shorter sentences. With cumulative terms the benefit is preserved by subsection (5), in treating them as one term.

The Court also noted:[70]

> Applicants' counsel submitted that all the periods should have been aggregated for the 2½ years' sentence imposed on 19 December 1986, as the remands occurred between that date and their arrest on 17 February 1986 on the heroin charges, and related to the latter or to other charges they faced over that time. Applying s.81(1) literally, the Judge should have determined the total period of remand for Coward as 51 days and for Hall as 107 days. Mr Young conceded this was the correct approach and we are satisfied from our reading of the section that it must be so.

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68 *R v Coward and Hall* CA182/87, 18 December 1987.
69 At 4.
70 At 6.

[86] Because the first of the concurrent sentences (the 18 months imposed on 19 August) had not expired by the time the 19 December sentence was imposed, there was no double counting.

[87] In *R v Harris* the appellant had been arrested on charges of assault on 26 November 1987 and remanded on bail.[71] He was arrested on 17 March 1988 on a charge of arson. He appears to have spent approximately a year in custody on the arson charge and was eventually acquitted in August 1989. On 1 September 1989 he was sentenced to 9 months imprisonment on the charge of assault. Under the iteration of s 81 then in force, the Judge took into account only the 10 days he spent in custody between his acquittal on the arson charge and his sentencing on the assault charge.

[88] The Court observed:[72]

> We are satisfied that the provisions of s 81 applied in these circumstances and did require the Judge to take into account the period spent in remand custody on the intervening arson charge on which he was eventually acquitted. It provides for a reduction in the term of imprisonment that would otherwise be appropriate by so much of that period as was reasonably practicable in all the circumstances. Mr Mander for the Crown submitted that the wording of this section should be read restrictively, to refer to periods on remand in connection with only the actual proceedings before the Court at the time of the sentence. The provisions of this section were discussed by this Court in *R v Coward and Hall* unreported, 18 December 1987, CA182, 183/87, and although the case dealt with the former s 81 we made these observations in respect of the present section:
>
> > "In both the former and the current version of s 81(1) time spent in custody on remand in respect of any charge the offender faced during the period between arrest on the charge under consideration and conviction or sentence thereon is to be taken into account."
>
> The words of s 81 are quite explicit and we can see no reason for reading them down in the way Mr Mander suggested. Nor can we properly adopt, in the circumstances of the case, his alternative submission that in the event of our taking into account the remand period, the 9 months sentence of imprisonment is still appropriate because of the applicant's prior convictions and the seriousness of the assault. Those were matters fully taken into account by the sentencing Judge and we would not be justified in reviewing his sentence in a way that includes the remand period and still results in the applicant having to serve a further term of imprisonment. He may well consider himself fortunate in this outcome, but the fact is that he spent

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71 *R v Harris* (1989) 5 CRNZ 403 (CA).

72 At 404.

> 12 months in prison waiting for trial on a charge on which he was eventually acquitted.

[89] The last of the cases is *Taylor v Superintendant of Auckland Prison*.[73] It involved sentences for unrelated offending handed down on 16 July 1993, 19 July 1994, 28 March 1995 and 4 August 1998. All sentences were imposed cumulatively and totalled 15 years. For this reason the dispute which related solely to the first two sentences did not assume practical significance until the early years of the current century. The first charge related to what was called the "Te Kauwhata robbery". Between his arrest and sentence on that charge, Taylor had served 361 days in custody. When sentenced on 16 July 1993, he received a credit for that time off the sentence the Judge would otherwise have imposed (under the second iteration of s 81) in that he was sentenced to nine years imprisonment rather than the 10 years which would otherwise have been appropriate.[74] Under the transitional provisions associated with the introduction of the third iteration of s 81 this 361 days also counted as time served against the already reduced nine year sentence.[75] While awaiting trial for the Te Kauwhata robbery, Taylor was charged with a second robbery, the "Antheas robbery". This was on 2 June 1993, that is six weeks before his sentence on the Te Kauwhata robbery. For the Antheas robbery he was sentenced on 19 July 1994 to two years imprisonment, to be served cumulatively. Taylor sought to treat the 361 days as time served in respect of the Antheas robbery sentence as well as the Te Kauwhata robbery sentence. In effect, the appeal involved an attempt to receive a third credit for the same period.

[90] The Court identified the issue it had to address in this way:

> [7] The dispute was described by Crown counsel in the following outline of a simpler hypothetical case:
>
> | | |
> |---|---|
> | "1 January | Custodial remand on Count A |
> | 1 July | Charged and custodial remand on Count B, which is unrelated to Count A |
> | 31 December | Sentenced on Count B." |

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73 *Taylor v Superintendant of Auckland Prison* [2003] 3 NZLR 752 (CA).
74 At [2].
75 At [4].

> [8] The appellant says that the period of remand time to be credited to the sentence on count B is one year. The decision of Priestley J, supported by the Crown, is that the credit is limited to six months. It is to be emphasised that the offending on count B is unrelated to that on count A. It is undisputed that if count A changed in nature – as from assault to manslaughter – the remand credit for the sentence on count A, in whatever form the charge or charges finally take, starts from 1 January.

[91] The Court continued:

> [9] It is the appellant's submission that:
>
> > "… the total period during which any person is detained in the institution on remand … at any stage of the proceedings leading to the person's conviction or pending sentence …"
>
> includes prior unrelated proceedings: here, in the case of the cumulative sentences, those concerning the Te Kauwhata robbery.

In the course of rejecting this submission, the Court of Appeal commented on s 81 in this way:

> [15] The options following the clause "at any stage of the proceedings leading to the person's conviction or pending sentence" are designed to cover the eventualities that arise in relation to an initial charge:
>
> > (1) any charge on which the person was eventually convicted (the case of a conviction upon the original charge); and
> >
> > (2) any other charge that the person faced at any time subsequent to arrest and prior to conviction. That embraces any other remand time served whether on an intermediate charge not originally brought and not subject of sentence resulting from the same series of events; and also … remand on unrelated charges.
>
> [16] The essential point is that the remand credit is for time served between the time of original charge and the time of sentence on the same or a related charge. The alternative would be that a prisoner earned remand credit in relation to an offence not only unrelated to the reason for the prisoner being in jail, but one of which the prisoner has not been charged; of which the commission might not be known to the authorities; or indeed the commission of which might not even have occurred.

[92] Despite the conclusion of the Court of Appeal, Taylor did, to a limited extent, receive a third credit in relation to a portion of his 361 days in custody on the Te Kauwhata robbery; this in respect of the six week period between 2 June 1993 (when he was arrested on the Antheas robbery) and 16 July 1993, when he became a serving prisoner after being sentenced on the Te Kauwhata robbery. That six week

period was treated as time served in respect of both sentences and was counted by the sentencing judge in reducing the 10 year sentence to nine years.

[93] There is one additional point to come out of *Taylor* which I should mention. As noted, Williamson J in *Noble* and Holland J in *Jarvis* were of the view that time spent in custody only counted as pre-sentence detention in respect of a charge if the offender had been remanded in custody on that charge. This approach was not adopted in *Taylor*.[76] Instead the judgment proceeds on the basis that the offender's time in custody was in the course of the proceedings in respect of any charge current at the time the offender was in custody.

The legislative history of ss 90 and 91 of the Parole Act

[94] We were taken to the legislative history of these sections, including the form in which they were proposed in the relevant Bill and the explanation given by officials for subsequent changes. This is referred to at [30] and [31] of the reasons prepared by Glazebrook J. I see this history as too cryptic to be of much assistance.

The jurisprudence as to the current Parole Act provisions

[95] The cases decided under the Parole Act have, in the main, involved situations similar to the present cases; that is concurrent sentences imposed on a single sentencing occasion where the effective sentence was determined by that imposed on a charge which was laid sometime after the offender had been first remanded in custody. For the purposes of this discussion I will refer to this later charge as the "lead charge". The cases all proceed on the basis that unless the lead charge was "related" to the charge or charges on which the offender was earlier remanded in custody, there is no allowance for the pre-sentence detention which preceded the laying of the lead charge.[77]

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[76] At [20] and [21].

[77] *Maile v Manager, Mt Eden Correction Facility* [2012] NZAR 39 (HC) at [3]; *Kopara v Manager, Mt Eden Corrections Facility* [2012] NZAR 982 (HC) at [12]; *Jolly v Manager, Christchurch Men's Prison* [2014] NZHC 1398 at [13]; *Gray v Manager, Waikeria Prison* [2014] NZHC 1745, [2014] NZAR 864 at [12]; and *Brandon v Chief Executive of the Department of Corrections* [2015] NZHC 1586, [2015] NZAR 1257 at [53].

[96] The jurisprudence as to when the lead charge is relevantly related to the earlier charge is not entirely consistent.

(a) In *Maile v Manager, Mt Eden Correction Facility*, Courtney J thought it was enough if the charges arose out of the same sequence of events.[78] In that case the first charge was one of robbery and the later charge (which was the lead charge for sentence purposes) was money-laundering in respect of the proceeds of the robbery. She therefore concluded that the time spent in custody on the robbery charge was pre-sentence detention for the purposes of the money laundering charge.

(b) In *Jolly v Manager of Christchurch Men's Prison*, a different approach was favoured. There the offender had been sentenced for breaches of the conditions of an extended supervision order. This was breached in two respects, possession of an internet capable device (the later charge) and using that device (the earlier charge). Ronald Young J held that they were not relevantly related.[79] This second approach was also adopted by Brewer J in *Gray v Manager, Waikeria Prison*.[80]

(c) In *Brandon v Chief Executive of Department of Corrections* Collins J took a third approach. In that case, the offender had initially been arrested on charges of conspiring to supply methamphetamine (between 16 March and 1 April 2012) and possession of methamphetamine for supply (on 29 March 2012). These charges were later withdrawn. In the end he pleaded guilty to seven charges, two of these (a charge of conspiracy to supply between 15 March and 4 April 2012 and a charge of possession for supply on 29 March 2012) were either the same or very similar to the original charges. Of the other five charges, two alleged offending (offering to supply methamphetamine and supplying methamphetamine) which occurred between the originally alleged dates and the other three charges

78 *Maile*, above n 77, at [9].
79 *Jolly*, above n 77, at [25].
80 *Gray*, above n 77, at [20].

alleged offending which preceded 15 March 2012.[81] Following extremely extensive analysis of the facts, Collins J concluded that the original charges should be treated as "holding charges" with the result that all subsequent charges were related to them.[82] Similar exercises could have been, but were not, carried out in *Jolly* and *Gray* .

As these cases illustrate, the principles of "relatedness" that the cases apply are not susceptible to simple and mechanical application and for this reason, not well suited to administrative application by Corrections officers. The problems associated with this are, however, tempered by the review and appeal mechanisms provided for by s 92 of the Parole Act.

[97] There are two cases involving different fact patterns.

(a) In *R v Filo,* the offender had been arrested on charges of violence against a young child.[83] While on bail in respect of that offending, he was arrested and held in custody for nine months on an entirely unrelated charge of rape. That charge did not proceed (as the complainant died in a car accident). His trial, conviction and sentence on the violence charges occurred after his discharge on the rape charge. It was common ground that the nine months counted against the three year sentence for violence.[84] The fact pattern and outcome were thus the same as in *Harris*.[85]

(b) In *Kahui v R,* the offender had spent five months in custody on charges of assault before being granted bail.[86] He pleaded guilty to one of the charges of assault and to a number of charges associated with subsequent offending which had occurred at a time when he was on home detention. He was dealt with on all charges at the same time. He was convicted and discharged by the Judge on the assault charge,

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81 See *Brandon* , above n 77, at [20]–[22].
82 At [79].
83 *R v Filo* [2007] NZCA 20.
84 At [24]–[25].
85 *Harris*, above n 71.
86 *Kahui v R* [2013] NZCA 124.

this given the amount of time he had spent in custody in relation to it; but he was sentenced to four months imprisonment on the other charges. The effect was to disentitle him to a credit for the five months he spent in custody on the assault charge.

My approach to ss 90 and 91

Sections 22 and 6 of the New Zealand Bill of Rights Act 1990

[98] Section 22 of the New Zealand Bill of Rights Act 1990 provides:

> **22 Liberty of the person**
>
> Everyone has the right not to be arbitrarily arrested or detained.

As will be apparent, I am of the view that the interpretation currently applied by the courts to ss 90 and 91 results in deductions for pre-sentence detention depending on accidents of chance. To my way of thinking this results in detention which is fairly regarded as arbitrary, a view that brings into play the s 6 direction:

> **6 Interpretation consistent with Bill of Rights to be preferred**
>
> Wherever an enactment can be given a meaning that is consistent with the rights and freedoms contained in this Bill of Rights, that meaning shall be preferred to any other meaning.

The current interpretation of s 91(1)

[99] The current interpretation of Corrections and the courts proceeds on the basis that s 91(1) provides for what is primarily a charge-by-charge calculation. Where an offender is sentenced in respect of more than one offence the pre-sentence detention that relates to each charge must be calculated. This is qualified by reason of s 91(1)(b) interpreted so as to include only pre-sentence detention on a charge which is *related* to the charge on which the offender was convicted. It is further qualified by s 91(1)(c) to allow for pre-sentence detention in relation to a charge faced by the offender after arrest on the charge on which sentence was imposed but before

conviction on that charge (which was the situation in *Coward and Hall*[87] and *Harris*[88]).

The Taylor *interpretation of s 91(1)(b)*

[100] Despite the repetition, it is helpful to set out s 91(1) again:

> **Pre-sentence detention** is detention … that occurs at any stage during the proceedings leading to the conviction or pending sentence of the person, whether that period (or any part of it) relates to—
>
> *(a) any charge on which the person was eventually convicted; or*
>
> *(b) any other charge on which the person was originally arrested; or*
>
> *(c) any charge that the person faced at any time between his or her arrest and before conviction.*
>
> (emphasis added)

[101] In *Taylor*, the Court construed the second part of the subsection – the portion I have italicised – as being subordinate to the first and therefore as encompassing only detention which occurred during the currency of the charges which resulted in the conviction of the offender. For this reason, the Court concluded that Taylor's time on remand on the charges associated with the Te Kauwhata robbery prior to the commencement of the prosecution in respect of the Antheas robbery did not occur "during the proceedings" for the purposes of the latter robbery. The *Taylor* approach requires s 91(1)(b) to be confined to holding charges or charges which evolved by amendment or withdrawal and substitution into the charges on which the offender was convicted and sentenced.

[102] The language of s 91(1)(b) is susceptible to a different interpretation. Under this interpretation, the second part of the subsection – the portion I have italicised – is not subordinate to the first but rather expands the meaning that would otherwise be given to the words "during the proceedings leading to the conviction". On this basis, providing there is a temporal overlap between the currency of the proceedings in respect of two charges, pre-sentence detention in respect of one will count as

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87 *Coward and Hall*, above n 68.
88 *Harris*, above n 71.

pre-sentence detention in respect of the other. This is the interpretation favoured by the majority.

[103] The argument advanced by the appellant in *Taylor* would have had unattractive consequences in terms of double-counting, consequences which were material to the dismissal of the argument. Such an argument could not now succeed given the combined effect of ss 75 and 90(3) under which cumulative sentences of the kind imposed are treated as a single notional sentence from which there is a deduction for all pre-sentence detention referable to the charges but without any doubling up.

[104] Despite the consideration just referred to and the reasons advanced by the majority, I would prefer to follow the approach adopted in Taylor. That approach was, and remains, available on the statutory language. On the alternative interpretation, pre-sentence detention on charges on which an offender is not imprisoned might be, in effect, banked against offending which occurs after the offender was released, as *Kahui* illustrates. It is open to question whether this is appropriate. And most importantly, the *Taylor* interpretation must have been adopted in the calculation of a very large number of parole eligibility and sentence expiry date calculations. I see it as potentially destabilising to abrogate it retrospectively.

The interpretation of s 91(1)(a)

[105] On the interpretation set out in [102] and adopted by the majority, it follows, a fortiori, that the periods of detention in the present cases counted in respect of all sentences imposed. This is because there could be no rational basis for construing "any charges" in s 91(1)(a) more narrowly than the same expression in s 91(1)(b). In contradistinction, however, a rejection of that interpretation is not inconsistent with the argument advanced on behalf of Mr Marino.

[106] On the basis of *Taylor*, I accept that time in custody is pre-sentence detention in respect of a sentence of imprisonment only if it occurs during (and therefore after the commencement of) the proceedings leading to conviction and sentence. This, however, is not inconsistent with a conclusion that pre-sentence detention relating to

any of the charges in respect of which an offender is convicted and sentenced on a single sentencing occasion relates to all other charges for which the offender is sentenced on that occasion and thus to all the sentences imposed.

[107] To put this in more concrete terms, it was perfectly plausible to conclude that Taylor's time in custody before the laying of the Antheas charges did not occur "during the proceedings" which led to him being convicted for, and sentenced on, those charges. On the other hand, the proceedings leading to Mr Marino's convictions can be seen to have been commenced when he was arrested on the family violence charges. In this respect the use of the word "any" in conjunction with "charge" seems to be significant.

[108] This natural reading is also consistent with the legislative history of s 91(1). As I have noted, under the warrant of commitment mechanisms which underpinned the operation of the corresponding provisions of the Criminal Justice Act, the interpretation I favour was plainly that envisaged by the legislature. I am aware of no cases under the Criminal Justice Act provisions in which it was suggested that any other approach should be taken to concurrent sentences imposed on a single sentencing occasion. It is inconceivable that the legislature envisaged that, in this respect, s 91(1) should be interpreted any differently from its almost identically expressed precursors. I will develop this point in a little more detail in my discussion of s 90(2), in respect of which it perhaps assumes more significance.

Application of s 90(1) and (2)

[109] Taking the approach to s 91(1) which I have just outlined works well enough with s 90(1) albeit that, where concurrent sentences have been imposed, it requires the expression "sentence of imprisonment" to be read as encompassing the total effective sentence. Rather more difficulty, however, arises with s 90(2).

[110] Despite the repetition, I set out s 90(2) again.

> When an offender is subject to 2 or more concurrent sentences,—
>
> (a) the amount of pre-sentence detention applicable to *each* sentence must be determined; and

(b) the amount of pre-sentence detention that is deducted from *each* sentence must be the amount determined in relation to *that* sentence.

(emphasis added)

[111] The words "each" and "that" which I have emphasised are not easily consistent with the total effective sentence approach just explained in [109]. On the other hand, a literal interpretation of s 90(2) results in a disconnect between it and s 91(1) as I interpret it in that it would result in pre-sentence detention within the meaning of s 91(1) being ignored.

[112] For reasons which will already be apparent, I think that a literal approach to s 90(2) produces absurdities which cannot have been within the legislative purpose. As these absurdities involve arbitrary detention, s 6 of the New Zealand Bill of Rights Act is very much in play. Applying s 6, I consider that there is an available non-literal interpretation of s 90(2) which avoids (or at least limits) the scope for arbitrary detention and which I should prefer.

[113] Under the interpretation I favour all pre-sentence detention which is referable to any of the convictions for which an offender was sentenced to imprisonment is, for the purposes of s 90(2) applicable to each of the sentences imposed for those convictions and is thus to be deducted from such sentences.

[114] This approach is available, if perhaps only just, on the language of s 90(1) and (2) and is supported by a number of other considerations which support it.

(a) As noted, it is consistent with the language of s 91(1).

(b) It is also consistent with the legislative history. As explained, the warrant of commitment basis for the calculation makes it clear that all pre-sentence detention served would have been applied in favour of Messrs Marino and Booth if their cases had fallen for consideration prior to 2002. There is no sensible reason why the legislature in 2002 would have wished to change the law in this regard. Indeed the close similarity in the language of s 91(1) of the current Act and s 81 of the Criminal Justice Act very much suggests the contrary. Further, one

would expect some legislative materials to indicate such a change were it contemplated: there are none.

(c) The present cases are concerned with concurrent sentences imposed on a single sentencing occasion. In such circumstances the offender will be able to satisfy s 91(1) as I interpret it. Where concurrent sentences are imposed on separate sentencing occasions, s 91(1) may well not be satisfied. So my interpretation does not deprive s 90(2) of effect. Rather it leaves it applicable to concurrent sentences imposed on separate sentencing occasions.

[115] More generally, the drafting of s 90(2) raises some issues. The occasion for concurrent sentences arises only where there is more than one offence. So if the current interpretation were correct, the references to "2 or more" in s 90(2) is tautologous, or, to put it another way, the subsection would have the same meaning if "2 or more" did not appear. Such tautology would be avoided if s 90(2) is construed as applying only to concurrent sentences imposed on separate sentencing occasions. In a slightly round-about way, some support for this approach is provided by ss 75 and 90(3) because, as I have noted, s 75 seems to have been drafted by reference to cumulative sentences imposed on different sentencing occasions.

[116] I therefore conclude:

(a) The periods of time spent in custody by Mr Marino on the family violence charges and Mr Booth on the assault charge involving A were relevantly within s 91(1)(a) and more generally occurred during the proceedings leading to the convictions on which each was sentenced.

(b) The time each spent in pre-sentence detention counts as time served in relation to the lead sentences of imprisonment.

A concluding comment

[117] I do not regard my approach as eliminating all anomalies from the operation of the pre-sentence detention regime which I consider warrants legislative reconsideration.

Disposition

[118] I would determine the appeals in the manner proposed by the majority save that I would also grant a declaration that Mr Marino was entitled to be released on 12 January 2016 but I accept that this is the practical effect of the majority judgment.

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