IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI

SC 115/2019
[2020] NZSC 141

BETWEEN	QUENTIN DYLAN WOODS Appellant
AND	NEW ZEALAND POLICE Respondent

Hearing:	21 May 2020
Court:	Winkelmann CJ, William Young, Glazebrook, O'Regan and Arnold JJ
Counsel:	M Starling and N R Wham for Appellant V McCall and S E Trounson for Respondent
Judgment:	10 December 2020

JUDGMENT OF THE COURT

The appeal is allowed.

REASONS
(Given by Winkelmann CJ and Arnold J)

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[1] The issues on this appeal concern the conditions that may lawfully be imposed under s 93 of the Sentencing Act 2002 on the release of an offender sentenced to imprisonment for a short term.

[2] On two occasions with which this appeal is concerned, the appellant was sentenced to a short term of imprisonment of 12 months or less.[1] The appellant contends that the special release conditions imposed to apply after their[2] release from prison subjected them to conditions amounting to residential restrictions and intensive monitoring, both of which were beyond the jurisdiction of the sentencing Courts to impose.

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1 Section 93 of the Sentencing Act 2002 provides that a judge imposing such a sentence may impose standard conditions and any special conditions on the offender to take effect when the offender is released from prison. Different conditions regimes apply to short-term sentences of 12 months or less than those that apply to short-term sentences of more than 12 months. See s 93(1) and (2) of the Sentencing Act.

2 The appellant's pronouns are they/them.

Factual background

[3] On 19 April 2018, the appellant was sentenced by Judge Rowe in the District Court on two charges of common assault, one of threatening behaviour and one of possession of an offensive weapon.[3] They were sentenced to eight months' imprisonment with standard[4] and special conditions on release to expire six months after the sentence expiry date. The special conditions imposed were that they:[5]

(a) attend a psychological assessment and complete any counselling or treatment as recommended;

(b) attend an alcohol and drug assessment and attend and complete any recommended treatment to the satisfaction of a probation officer and treatment provider;

(c) attend any counselling/programmes as directed to the satisfaction of a probation officer and provider;

(d) submit to electronic monitoring in the form of global positioning system (GPS) technology as directed by a probation officer in order to monitor compliance with any condition(s) relating to the appellant's whereabouts; and

(e) not enter Palmerston North city, as defined by the Council boundary map, without the prior written consent of a probation officer.

[4] These special conditions were imposed to respond to information available to the sentencing Judge in the form of a "Provision of Advice to Courts" report that described the appellant's lengthy history with Oranga Tamariki and mental health services. The report writer considered that the appellant required "very specialised help" to assist them in their rehabilitation and to reduce the likelihood of harm to their victims and other members of the public.

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3 *New Zealand Police v Woods* [2018] NZDC 7784 at [1].

4 Section 93(2B) of the Sentencing Act provides that the standard conditions are those set out in s 14(1) of the Parole Act 2002.

5 At [22].

[5] Whilst the appellant was in custody, they experienced psychotic episodes and were transferred to an At-Risk Unit within the prison. They would bang their head against walls and floors, requiring hospitalisation on several occasions before being returned to prison. As a result, the appellant was waitlisted for a bed in the secure mental health residential unit at Kenepuru Community Hospital in Porirua, but no bed became available prior to the appellant's release.

[6] As a result of these events, the Department of Corrections applied to vary the special conditions under s 94 of the Sentencing Act on the basis that the original conditions were insufficient to mitigate the appellant's risk to themselves and others. The Department asked the District Court to amend the order so that the appellant could be released to Toruatanga – supported accommodation located in Christchurch and managed by Christchurch Residential Care (CRC), a third-party contractor who provides services to the Department.

[7] In an affidavit in support of the variation application, a probation officer indicated that the Department considered the appellant required "appropriate accommodation and a high level of wrap-around support to manage [the] risk to [themselves] and others at this time" and that despite extensive efforts to source appropriate care and support, the Department had been unable to find any suitable mental health option for the appellant. The probation officer went on to say:

> … a house is available for a short-term period in [Toruatanga], Christchurch from [the appellant's] release date. Toruatanga is supported accommodation provided by the Department of Corrections and is located near Christchurch Men's Prison developed to facilitate offenders' integration into the community. Residents are supported by an external agency; to find permanent accommodation, engage in employment or further education, facilitate transport to and from appointments, and support residents in developing the life skills necessary [to] living independently in the future such as cooking, budgeting, safety planning, problem solving and managing high risk situations. External agency staff are available 24/7 to residents. Residents are expected to abide by the house rules which include abstinence from alcohol and drugs, having approved visitors only at the address, remaining at the address between 8.00pm and 8.00am daily, participating in reintegration activities and maintaining a tidy property. Residents are not permitted to leave the property by themselves. Supervised outings occur with staff to ensure the safety of residents and the local community. Prior to supervised outings safety plans are developed and approved by Corrections and the agency staff. Individual reintegration plans are generated with each resident, and they transition out of the supported accommodation at their own pace according to meeting the steps of their reintegration plan. To ensure consistency for

> residents of Toruatanga, to support them in their integration into the community and to ensure staff safety of both Department of Corrections and the external agency employees the additional special conditions are considered necessary.
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> … The house is managed by Christchurch Residential Care (CRC) who are contracted by the Department. CRC would provide two staff at all times to work with [the appellant], support [them], encourage [their] reintegration and keep [them] safe. Staff would develop a weekly plan with [the appellant] to support [their] reintegration and enhance [their] stability in the community. CRC staff are experienced in working with offenders with complex mental health needs and behavioural issues.
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> … it is expected that [the appellant] will be able to reside at the house for a minimum of six weeks and possibly up to several months. The Department and CRC, working with a community mental health team, would closely monitor and support [the appellant] during that time and reduce the hours of oversight if appropriate and safe. The Department will work with [the appellant], Oranga Tamariki and other providers during this time to source longer-term accommodation and support at the level [they require] at that time.

[8] The Department sought the following additional special conditions to support the reintegration of the appellant back into the community:

(a) to reside at an address as approved by a probation officer and not to move address without prior written approval of a probation officer;

(b) to be placed in the care of an agency approved by the chief executive of the Department and, between the hours of 8 am and 8 pm daily and while in the care of that agency, to be accompanied and monitored by an agency staff member at all times unless with the prior written approval of a probation officer;

(c) to undertake, engage in and complete a reintegration programme administered by a programme provider between the hours of 8 am and 8 pm each day of the week, as approved by a probation officer, and abide by the rules of the programme to the satisfaction of a probation officer;

(d) not to stay overnight away from their residence without the prior written approval of a probation officer. This meant that they were

required to be present at their address between the hours of 8 pm and 8 am;

(e) not to possess, consume or use any alcohol or drugs not prescribed to them; and

(f) to comply with the requirements of electronic monitoring, and provide access to the approved residence to the probation officer and representatives of the monitoring company for the purpose of maintaining the electronic monitoring equipment as directed by the probation officer.

[9] The application for variation came before Judge Farish on 19 June 2018. The Judge declined to impose the condition listed at [8(b)] above. She accepted defence counsel's submission that she did not have jurisdiction to impose such a condition, although she observed that the condition was to a certain extent covered by the residential condition. The Judge imposed all other conditions sought.[6] In relation to the 8 pm to 8 am curfew, the Judge was satisfied that it was necessary and would assist the appellant, and that she had the power to impose it.

[10] The appellant was released from prison on 20 June 2018 but remained subject to the standard conditions and the special conditions just outlined. On the afternoon of 9 July 2018, the appellant violently offended against a supervisor at Toruatanga, threatening and assaulting him. The appellant was taken to hospital at about 7 pm to treat a self-inflicted cut, where they further offended against two more CRC employees who had accompanied them. The appellant was charged and remanded on bail.

[11] The summary of facts for that offending by the appellant refers to the appellant being monitored and supervised "24/7" at the Toruatanga property near the Christchurch Men's Prison.

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6 *New Zealand Police v Woods* DC Christchurch CRI-2018-054-288, 19 June 2018 [Judge Farish variation] at [9] and [11].

[12] Following these events, the appellant's appeal to the High Court against the June 2018 variation of special conditions was heard. The appellant argued that the special conditions as varied amounted to intensive monitoring and residential restriction conditions, and were not therefore permitted under the Sentencing Act. In a judgment dated 24 August 2018, Gendall J found the conditions lawfully imposed and dismissed the appeal.[7]

[13] The appellant offended further in September 2018. By this stage, the appellant was living at a flat in Mairehau, Christchurch, where they were subject to electronic monitoring and were under the supervision of two CRC staff members who lived nearby. The summary of facts for that offending narrates that just after 8 pm on 23 September 2018, a CRC staff member received a phone call from the electronic monitoring company advising that the appellant was not at the curfew address. CRC staff contacted the appellant, telling them to return home. On the appellant's return to the address at 8.30 pm, CRC staff were waiting. The appellant walked towards one of the personnel saying "You're controlling my life, you're a murderer, I'm going to kill you". The appellant then assaulted that person, punching him in the face, while continuing to say "I'm going to kill you". The appellant then also assaulted the other CRC staff member, striking him in the face and headbutting him in the forehead. The appellant was ultimately restrained.

[14] The appellant was arrested and remanded in custody until sentencing for the July and September offending on 28 November 2018. Shortly before sentencing, a consultant forensic psychiatrist prepared a lengthy report on the appellant, in which he concluded that the appellant did not meet the criteria for mental disorder (on a continuing basis). Rather, the psychiatrist considered that the appellant had a severe mixed personality disorder (with borderline and anti-social traits) and post-traumatic stress disorder. The appellant's complex psychological problems led to impulsive and unpredictable risk-taking behaviours. The appellant's anger management and other coping skills needed to be developed and they needed support to provide more structure in their life.

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7 *Woods v New Zealand Police* [2018] NZHC 2189 at [32]–[33].

[15] Judge David Saunders sentenced the appellant to 12 months' imprisonment with special conditions on release to run until 12 months after sentence expiry.[8] The special conditions included conditions to:

(a) submit to electronic monitoring in the form of GPS technology as directed by a probation officer in order to monitor compliance with any condition(s) relating to the appellant's whereabouts;

(b) comply with the requirements of electronic monitoring, and provide access to the approved residence to the probation officer and representatives of the monitoring company, for the purpose of maintaining the electronic monitoring equipment as directed by the probation officer;

(c) be at the address between the hours of 8 pm and 8 am unless there is prior written approval of a probation officer;

(d) reside at an address approved by a probation officer and not move to any new residential address without the prior written approval of a probation officer;

(e) not enter the Manawatu or Horowhenua Districts except with the prior written approval of a probation officer; and

(f) undertake, engage in and complete a reintegration programme administered by a programme provider between the hours of 8 am and 8 pm each day of the week, as approved by a probation officer, and abide by the rules of the programme to the satisfaction of a probation officer.

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8 *New Zealand Police v Woods* [2018] NZDC 24797 at [15].

[16] The appellant again appealed to the High Court on the basis that there was no jurisdiction to impose special conditions on release which amounted to intensive monitoring and residential restrictions. Again, Gendall J dismissed the appeal.[9]

[17] On 23 March 2019, the appellant was released from Christchurch Men's Prison into the care of CRC on the special release conditions imposed in November 2018.

[18] The appellant was granted special leave to appeal both judgments of Gendall J and, on 20 September 2019, the Court of Appeal dismissed both appeals.[10]

[19] This Court granted leave to appeal, the approved question being whether the Court of Appeal was correct to dismiss the appellant's appeals.[11]

Legislative framework

[20] Under s 93(1) of the Sentencing Act, when a court sentences an offender to a short-term sentence of 12 months or less, the court may impose standard conditions and any special conditions to apply on the offender's release from prison. Section 93(3) provides that special conditions must not be imposed unless they are designed to:

> (a) reduce the risk of reoffending by the offender; or
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> (b) facilitate or promote the rehabilitation and reintegration of the offender; or
>
> (c) provide for the reasonable concerns of the victims of the offender.

[21] Section 15 of the Parole Act 2002 is also a critical provision on this appeal. Although its primary purpose is to prescribe release conditions the Parole Board may impose on offenders subject to long-term sentences of imprisonment, its provisions are also co-opted by the Sentencing Act to define the special conditions that can be imposed by the sentencing court when sentencing an offender to a short term of

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9 *Woods v New Zealand Police* [2019] NZHC 335.

10 *Woods v New Zealand Police* [2019] NZCA 446 (Simon France and Toogood JJ; Williams J dissenting in part) [CA judgment].

11 *Woods v New Zealand Police* [2020] NZSC 3.

imprisonment. This is because s 93(2B) of the Sentencing Act defines special conditions as including:

> … without limitation, conditions of a kind described in section 15(3) of the Parole Act 2002, other than a residential restriction condition referred to in section 15(3)(ab) of that Act

[22] Section 15 of the Parole Act provides in material part:

> **15 Special conditions**
>
> …
>
> (3) The kinds of conditions that may be imposed as special conditions include, without limitation,—
>
> (a) conditions relating to the offender's place of residence (which may include a condition that the offender reside at a particular place), or his or her finances or earnings:
>
> (ab) residential restrictions:
>
> (b) conditions requiring the offender to participate in a programme (as defined in section 16) to reduce the risk of further offending by the offender through the rehabilitation and reintegration of the offender:
>
> (ba) conditions prohibiting the offender from doing 1 or more of the following:
>
> (i) using (as defined in section 4(1)) a controlled drug:
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> (ii) using a psychoactive substance:
>
> (iii) consuming alcohol:
>
> (c) conditions that the offender not associate with any person, persons, or class of persons:
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> (d) conditions requiring the offender to take prescription medication:
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> (e) conditions prohibiting the offender from entering or remaining in specified places or areas, at specified times, or at all times:
>
> (f) conditions requiring the offender to submit to the electronic monitoring of compliance with any release conditions or conditions of an extended supervision order, imposed under paragraph (ab) or (e), that relate to the whereabouts of the offender:

(g) an intensive monitoring condition, which must, and may only, be imposed if a court orders (under section 107IAC) the imposition of an intensive monitoring condition.

(3A) If the Board imposes on an offender special conditions relating to residential restrictions (specified under subsection (3)(ab)),—

(a) the offender's probation officer must define the area of the residence specified under section 33(2)(a) within which the offender must remain and show that area to the offender and advise every relevant occupant (as defined in section 34(4)) of the residence of that area; and

(b) the offender must remain within that area.

…

[23] Section 4 of the Parole Act defines "residential restrictions" as meaning the special conditions described in s 33 of that Act. Unfortunately, s 33 does not define residential restrictions. Instead, s 33(1) empowers the Parole Board to impose residential restrictions and s 33(2) sets out the list of requirements of an offender subject to them as follows:

33 Residential restrictions

…

(2) An offender on whom residential restrictions are imposed is required—

(a) to stay at a specified residence:

(b) to be under the supervision of a probation officer and to co-operate with, and comply with any lawful direction given by, that probation officer:

(c) to be at the residence—

(i) at times specified by the Board; or

(ii) at all times:

(d) to submit, in accordance with the directions of a probation officer, to the electronic monitoring of compliance with his or her residential restrictions:

(e) to keep in his or her possession the licence issued under section 53(3) and, if requested to do so by a constable or a probation officer, must produce the licence for inspection.

Preliminary points

[24] Before we address the issues, we make four preliminary points. First, this case involves two sentence appeals, the first against the variation of the special conditions granted by Judge Farish and the second against the special conditions imposed by Judge Saunders (which built on the special conditions imposed earlier). A feature of both sets of special conditions is that they made no mention of any specific programme or place of residence; rather, they were framed more generally in terms of addresses and programmes approved by probation officers.

[25] In fact, the appellant was placed at Toruatanga for both residential and programme purposes pursuant to the special conditions following Judge Farish's decision granting the variation application. The effect was that the appellant was required to be at Toruatanga 24 hours per day, 7 days a week (subject to permission to leave). The Crown argued that, given the way the special conditions were framed, the appellant should have issued judicial review proceedings to challenge the *implementation* of the special conditions rather than bringing sentence appeals to challenge the imposition of those conditions. We address that argument at [49]–[53] below.

[26] Second, beyond what can be taken from the affidavit quoted at [7] above, this Court was provided with little information about exactly how Toruatanga operated, what programmes it provided, what precisely the obligations and rights of its residents were and what the nature of the appellant's programme was later when they lived in the flat in Mairehau, Christchurch. Given the nature of the issues on this appeal, we consider that further information should have been provided. In the circumstances, this could easily have been done by way of an agreed statement of facts.

[27] In relation to Toruatanga, we note that in *Coleman v Chief Executive of the Department of Corrections* the Court of Appeal said that it is located on Department

land adjacent to, but separate from, Christchurch Men's Prison and described its physical layout as follows:[12]

> [15] It comprises a community hub and three standalone houses. Mr Coleman occupies one of those houses which is a fenced property with a gate which is not locked and often is not closed. There is a fence around the entirety of the Tōruatanga property with a front gate which is normally open during the day but which, we understand, is locked at night.

[28] Third, as will be apparent from the description of the legislative framework given above, the statutory drafting technique employed in s 93(2B) of the Sentencing Act of co-opting for sentencing purposes provisions in the Parole Act creates complexity. This is because the co-opted provisions – ss 15 and 33 of the Parole Act – are directed at conditions the Parole Board may impose and, for that reason, use language and describe procedures relevant to the Parole Board. They require some modification in a sentencing context.

[29] Finally, the statutory drafting leaves some uncertainty about the powers of a sentencing judge in setting special conditions under s 93 of the Sentencing Act. Because of the difficulty with applying Parole Act provisions in a sentencing context, and because of the nature of the argument we heard, we have limited our findings to the particular facts of this case. We have not, for example, addressed whether a different combination of conditions would amount to a residential restriction condition for the purposes of s 93(2B). We have also not addressed what the prohibition on the imposition of residential restrictions means for the power to require attendance at a rehabilitative/reintegrative programme, given that both the Sentencing Act[13] and the Parole Act[14] provide for the possibility of residential programmes as well as non-residential ones. Desirably, there should be greater legislative clarity.

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12 *Coleman v Chief Executive of the Department of Corrections* [2020] NZCA 210.
13 See, for example, ss 50, 51 and 54H of the Sentencing Act.
14 See ss 16 and 61(e) of the Parole Act.

Were special conditions restricting the appellant to the Toruatanga residence lawfully imposed?

The Court of Appeal judgment

[30] By a majority, the Court of Appeal rejected the appellant's arguments that the combination of special conditions imposed on the appellant in June and November 2018 amounted to "residential restrictions" as defined in the Parole Act, and that on each occasion the Court had no jurisdiction to impose those conditions. The majority said that the definition of special conditions in s 93(2B) of the Sentencing Act makes clear that the sentencing court has a broad discretion as to the nature of special conditions it may impose: this because the use of the phrase "includes without limitation" in the definition of "special conditions". The reference to "conditions of a kind" described in s 15(3) of the Parole Act is made only to indicate that the court may have regard to the kinds of special conditions made by the Parole Board under the Parole Act.[15]

[31] The majority noted that the Parole Board's own condition-making power was similarly broadly expressed – s 15(3) describes the "*kinds of conditions* that may be imposed as special conditions". The phrase "includes without limitation" "emphasises", said the majority, that the kinds of conditions that may be imposed are not limited to those set out in paras (a)–(g) of s 15(3).[16]

[32] The majority concluded therefore that it is the purposes set out in s 93(3), and not the s 93(2B) definition, which limit the sentencing court's discretion.[17] It recognised that in interpreting the subs (2B) definition in this way, it is necessary to give some effect to the words "other than a residential restriction condition referred to in s 15(3)(ab) of [the Parole] Act".[18] It adopted as its starting premise that the point of release conditions is to address the consequences of a sentence coming to an end in circumstances where the unrestricted release of the offender into the community would

15 CA judgment, above n 10, at [48]–[50].
16 At [50].
17 At [51].
18 At [55].

result in an unacceptable risk to the community and to victims in particular through the prospect of reoffending.[19] In those circumstances it said the question is:[20]

> … why should a court be prevented from imposing conditions, in compliance with s 93(3), that are no more restrictive than the terms of EM bail that a court can impose on someone merely charged with an offence, when the Parole Board may impose such conditions on a prisoner who happens to have served a longer sentence? And why would the power to impose post-release conditions be expressed in very broad terms (to "include, without limitation, conditions of a kind …") if the courts were to be limited in their ability to impose residence-related conditions?

[33] It answered this question as follows:

(a) It may be that Parliament did not intend to limit the courts to imposing only some of the restrictions available under s 15(3)(ab), wanting rather to allow the courts more flexibility than that available to the Parole Board in deciding what residential restrictions to impose.[21]

(b) It may also be that Parliament did not want the courts to be required to adopt the comprehensive procedure (set out in ss 33–35 of the Parole Act) involved for the imposition of a residential restriction condition that the Parole Board must follow, given the Parole Board may impose these conditions for longer and on a greater number of released offenders.[22]

(c) The s 33 regime is structured, through its associated procedures, to accommodate the release and reintegration into the community of offenders who have served lengthy terms of imprisonment by placing them in controlled environments outside prison – a "half-way house".[23] These conditions include that the offender "has been made aware of and understands the residential restrictions, and [the person] agrees to comply with them".[24] They are conditions that do not sit comfortably

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19 At [56].
20 At [57].
21 At [58].
22 At [58].
23 At [59].
24 Parole Act, s 35(c).

> with considerations that a court may take into account in determining what conditions should be imposed on an offender, without consent, following release from a short term of imprisonment.[25]

[34] The majority concluded that the limitation on the court's discretion to impose special conditions means only that the court may not have recourse to the Parole Board's powers under s 33 of the Parole Act and is not obliged to follow the highly prescriptive procedure for their use. It said:[26]

> What the court may do, however, is impose release conditions which are of a similar kind to residential restrictions under s 33.

[35] It followed, the majority said, that a court may impose residential conditions of a kind referred to in ss 15(3) and 33(2) of the Parole Act, such as:[27]

> (a) requiring the offender to stay at a specified residence,[28]
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> (b) to be at the residence at specified times[29] or at all times,[30] and/or
>
> (c) to submit to electronic monitoring,[31]
>
> that have a similar effect to that of a residential restriction under s 33 of the [Parole Act] but do not incorporate the full set of requirements under the section.

[36] The majority concluded a fact-specific inquiry is required to assess whether the court-imposed conditions offend against the limitation in s 93(2B). The Court was satisfied that the residence-related conditions imposed in this case were similar to, but did not amount to, the imposition of a residential restriction condition referred to in s 15(3)(ab).[32]

[37] Williams J, dissenting, noted the extensive procedural safeguards associated with the imposition of residential restrictions by the Parole Board.[33] He said that the

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25 CA judgment, above n 10, at [63].
26 At [64].
27 At [65].
28 Sections 15(3)(a) and 33(2)(a).
29 Section 33(2)(c)(i).
30 Section 33(2)(c)(ii).
31 Sections 15(3)(f) and 33(2)(d).
32 CA judgment, above n 10, at [66].
33 At [105]–[106].

obvious purpose of the explicit exclusion in s 93(2B) is to prevent courts from effectively exercising without safeguards the same power that the Parole Board can only exercise with safeguards.[34] In his view, the conditions imposed on the appellant amounted in substance to a residential restriction condition as defined in the Parole Act.[35] Therefore, he said, the Court had no jurisdiction to impose these conditions.

Submissions

[38] The appellant argues that the conditions imposed by Judge Farish (and by Judge Saunders) were, in combination, residential restrictions, the imposition of which is precluded by the terms of s 93 of the Sentencing Act.

[39] The appellant notes that, prior to June 2018, GPS monitoring was imposed only to ensure compliance with a "whereabouts condition" – that the appellant stay out of Palmerston North city.[36] When the special conditions were varied in June 2018, conditions were added requiring the appellant to participate in a programme at Toruatanga between 8 am and 8 pm each day, and abide by the rules of the programme there. The conditions also included that the appellant be at a stipulated residence for the other 12 hours of the day. On the appellant's argument, the GPS monitoring imposed was extended beyond monitoring the whereabouts condition to include monitoring of the appellant's presence at the approved address – the Toruatanga residence.

[40] The appellant says that the same point can be made in respect of the special conditions imposed in November 2018 by Judge Saunders.

[41] The Crown adopts the analysis of the majority of the Court of Appeal. It argues the majority was correct to say that while a sentencing court may not impose a residential restriction condition as described in s 33(2) of the Parole Act, it has a broad

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34 At [107].
35 See [119]–[122].
36 A "whereabouts condition" is a condition "that prohibits an offender from entering or remaining in specified places or areas at specified times or at all times": Sentencing Act, ss 26(2)(i)(i) and 54IA(7).

discretion to impose release conditions of a "similar kind" to residential restrictions, including stipulating where the offender is required to reside.[37]

[42] The Crown accepts that whether a set of conditions imposed by the court amounts to residential restrictions is to be determined by looking at the substance and not the form of the conditions. It says that the special conditions relating to the appellant's residence were imposed for lawful purposes and independently, or in combination, do not amount to a residential restriction condition under s 33(2). While it accepts that the appellant was, broadly speaking, under the supervision of a probation officer,[38] and that the appellant was required to stay at a specified address, it submits the other requirements of s 33(2) are not met in form or in substance:

(a) The appellant was not subject to electronic monitoring for the purpose of ensuring compliance with their residential restrictions, only for monitoring of their whereabouts.

(b) The appellant was not required to stay at the residence at all times, or at times specified by the court. It argues there must be some level of restriction that does not amount to a residential restriction for the purposes of s 33(2).

(c) The appellant was not required to carry a licence issued under s 53(1) of the Parole Act.

[43] As to [42(b)] above, although the Crown accepts that s 33(2) refers both to "at all times" and to "at times specified by the Board", it argues that it would render the wording of the provision redundant if it required a person to remain at their residence for some period much less than "at all times". The Crown gives the following example: "if a residence condition required a person to remain at a residence for only three hours per day, it does not seem to fall within the intention of s 33". It follows, says the Crown, that since the conditions imposed did not require the appellant to be

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37 See CA judgment, above n 10, at [64].

38 While supervision is not defined in the Parole Act, the Corrections Act 2004 defines "person under control or supervision" as including "a person who is subject to conditions under … [s] 93 of the Sentencing Act 2002": s 3(1) definition of "person under control or supervision", para (e).

at the residence for all or nearly all of the time, it could not amount to a residential restriction.

[44] As to this argument, we understand the Crown's point to be that the expression "at times specified by the Board" is coloured by the expression "at all times" so that for something to amount to a residential restriction condition it must require the person to remain at the specified address for most of the day.

Nature of the conditions

[45] The parties are at odds as to the nature of the special conditions imposed by the District Court in June and November 2018 and so that is the place to begin this analysis.

[46] The special conditions in question contained a straightforward curfew condition, requiring that the appellant stay at the stipulated residence for 12 of every 24 hours. When imposing that curfew, Judge Farish said that she was satisfied that she had the power to do so: "I am satisfied that s 15(3) subs (a)(b) [ie, s 15(3)(ab)] allows me to impose residential restrictions".[39] This is noteworthy for three reasons. First, as we have said, s 93(2B) of the Sentencing Act prohibited the Judge from imposing a residential restriction condition referred to in s 15(3)(ab) of the Parole Act. Second, the Judge obviously thought that a residence requirement supported by a curfew was such a residential restriction condition. Third, as we discuss further below, it supports the view that the Judge intended that the electronic monitoring condition apply to monitoring the appellant's compliance with the curfew.

[47] The special conditions also contained a condition that the appellant undertake, engage in and complete a reintegration programme administered by a programme provider between the hours of 8 am and 8 pm each day of the week, as approved by a probation officer, and abide by the rules of the programme to the satisfaction of a probation officer.

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[39] Judge Farish variation, above n 6, at [9].

[48] To understand the effect of this condition, it is necessary to go back to the variation application and accompanying affidavit. The application for variation was a pro forma document referring to no more than that a variation to the conditions was sought because the existing conditions were insufficient to mitigate the appellant's risk to themselves and others. The detail behind the orders sought was set out in the probation officer's affidavit, especially the extract quoted at [7] above. That affidavit made clear that the programme referred to was to be offered at Toruatanga where the appellant would be living subject to curfew. It outlined the nature of the programme and "house rules" with which the appellant would be required to comply while at Toruatanga. As is plain from the affidavit, the "rules of the programme" included a rule that the appellant could not leave Toruatanga unsupervised between the hours of 8 am and 8 pm. They also included rules that whilst supervised outings were allowed, the appellant would be subject to "safety plans" which had to be approved by Department and agency staff. These rules were plainly safety-focused.

[49] The Crown submits that these rules were not part of the orders made by the Court, and to the extent the Department administered the conditions beyond what could be lawfully imposed in terms of the order, that is an issue for a judicial review or civil proceedings, but could not be raised on this sentence appeal.

[50] The difficulty with that argument is that the application for variation was made on the basis that the variation would enable the appellant to be placed at Toruatanga for both residential and programme purposes and would be subject to the programme's rules. The orders were made in response to this application and imposed not only the curfew in relation to the appellant's place of residence (which meant the appellant was required to be there from 8 pm until 8 am, absent approval otherwise) but also a requirement that the appellant abide by the rules of a reintegration programme as approved by a probation officer (which included a requirement that the appellant be in the programme from 8 am until 8 pm daily, subject to any approved outings). The affidavit detailed the regime to which the appellant would be subject if the Judge ordered the variation. The orders are therefore fairly read as approving what is proposed in the accompanying affidavit.

[51] It is true that the Judge declined to impose the condition which would have required the appellant to:

> … be placed in the care of an agency approved by the Chief Executive of the Department of Corrections, and between the hours of 8.00 am and 8.00 pm daily and while in the care of that agency, to be accompanied and monitored by an agency staff member at all times unless [the appellant had] prior written approval of a probation officer.

The Judge considered she could not impose such a condition.[40] In this she was correct. As we come to shortly, that condition would have amounted to intensive monitoring as it required that the appellant be accompanied and monitored by an agency staff member – that is, it required person-to-person monitoring. But it was the other condition, referred to above, that mandated compliance with the programme's rules – rules which required that the appellant participate in the programme at Toruatanga between 8 am and 8 pm daily.

[52] It would be artificial to proceed on the basis that the effect of the court orders was not to approve the programme with its associated house rules. We are therefore satisfied that the conditions also required that the appellant remain at Toruatanga between the hours of 8 am and 8 pm, unless supervised and subject to a safety plan approved by Department and agency staff.

[53] In summary, then, the effect of what was put before Judge Farish was that the appellant would be required to be within the Toruatanga property 24 hours per day, 7 days a week (other than for approved absences). The ultimate result was something akin to home detention.

[54] Further, we consider that the requirements imposed on the appellant as to the curfew were supported by electronic monitoring. The Crown submitted that the appellant was not subject to electronic monitoring for the purpose of ensuring

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[40] Judge Farish variation, above n 6, at [9].

compliance with the residence requirement and its associated curfew. It referred to the following condition:

> To submit to electronic monitoring in the form of Global Positioning System (GPS) technology as directed by a Probation Officer in order to monitor your compliance with any condition(s) relating to your whereabouts.

The Crown submitted that such a condition could be imposed as a "kind of" condition under s 15(3)(f) of the Parole Act.

[55] It is true that the monitoring requirement the Crown referred to was included in the original April 2018 orders to monitor the whereabouts condition that the appellant not enter Palmerston North city, and such a condition was retained in the June 2018 variation and the November 2018 sentencing.[41] But the Crown failed to address that in the June 2018 variation and November 2018 sentencing an additional condition was added to monitor the appellant's compliance with the curfew. This new condition required the appellant to comply with the requirements of electronic monitoring and allow access to their residence for the maintenance of the monitoring equipment. This condition was *in addition* to the whereabouts monitoring condition. It is naturally read, in this context, as imposing monitoring of the appellant's presence at the residence. As we have said, this interpretation is consistent with Judge Farish's view that she had the power to impose residential restrictions. There is evidence to support this interpretation – the incident in September 2018 occurred when a CRC staff member received a phone call from the electronic monitoring company advising that the appellant was not at the curfew address at around 8.15 pm.

[56] It is clear then that the GPS monitoring was put in place and used to monitor the curfew, and we think it a fair reading of that order that it authorised that monitoring. It is less clear that the order authorised monitoring of the appellant's attendance at Toruatanga during the day, from 8 am to 8 pm. The evidence as to whether there was such monitoring is inconclusive, but if it occurred, we have no doubt that would have been on the basis that the Department understood the monitoring to be authorised by the order.

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[41] The whereabouts condition to not enter "Palmerston North city" was subsequently changed to not enter the "Manawatu or Horowhenua Districts" in the November 2018 sentencing.

Did the Courts have jurisdiction to impose these conditions?

[57] The effect of the special conditions as varied by Judge Farish and continued by Judge Saunders was that the appellant was required to:

(a) reside at an address approved by a probation officer;

(b) be present at the approved residential address between 8 pm and 8 am each day, unless a probation officer approved otherwise;

(c) be under the general supervision of a probation officer (as a result of the approvals required);

(d) submit to electronic monitoring to ensure compliance with the curfew.

[58] It will be recalled that the obligations of a parolee on whom residential restrictions have been imposed under s 15(3)(ab) of the Parole Act are set out in s 33 of that Act (quoted at [23] above). Under s 33(2), the parolee concerned must: stay at a specified residence; be under the supervision of a probation officer; be at the residence at times specified; submit to electronic monitoring; and carry a residential restrictions licence. The licence requirement has no relevance in a sentencing context and so may be ignored for present purposes. In the remaining respects, the features of the special conditions imposed on the appellant equate to the elements of "residential restrictions" in s 33(2). In substance, then, the relevant special conditions imposed "residential restrictions". This is not surprising given that the Judge saw herself as imposing residential restrictions in terms of s 15(3)(ab). On the face of it, therefore, the relevant special conditions fall within the prohibition in s 93(2B) of the Sentencing Act and the Court was not entitled to impose them.

[59] The Crown sought to persuade us that this straightforward analysis was incorrect. While accepting that a sentencing judge did not have the power to impose "residential restrictions" (or conditions that were in substance residential restrictions), the Crown argued that a sentencing judge had a broad discretion under s 93 of the Sentencing Act to impose release conditions "of a similar kind to residential restrictions under s 33". The Crown accepted that this broad discretion was

constrained, in the sense that it had to be exercised consistently with the purposes in s 93(3) – there had to be a rational nexus between the special conditions and the purposes identified and, overall, the special conditions had to be "reasonably necessary and proportionate". The Crown also argued conditions could only be imposed if they complied with the broader purposes and principles of the Sentencing Act. In this case, however, the Crown argued the combination of conditions imposed on the appellant did not amount to a "residential restrictions" condition.

[60] We do not accept this submission.

[61] Under s 15(3)(a) of the Parole Act, the Judge was entitled to require the appellant to live at an approved address. What is problematic is the fact that this residence requirement was supported by a 12-hour curfew, which was enforced through electronic monitoring. This combination of requirements imposed a significant constraint upon the appellant's liberty. It was a constraint certainly sufficient to amount to a detention for the purposes of s 3 of the Habeas Corpus Act 2001,[42] and ss 22 and 23 of the New Zealand Bill of Rights Act 1990.[43] Accordingly, the Crown must point to clear lawful authority for imposing the special conditions as to curfew and electronic monitoring to support the residence requirement.[44]

[62] Section 93 of the Sentencing Act falls to be interpreted in light of its text and purpose.[45] It is also to be interpreted in light of the provisions of the New Zealand Bill of Rights Act and in particular s 6, which provides that "[w]herever an enactment can be given a meaning that is consistent with the rights and freedoms" contained in

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42 See also *Coleman*, above n 12, at [29]. And see *Secretary of State for the Home Department v JJ* [2007] UKHL 45, [2008] 1 AC 385 at [59] per Baroness Hale; and *R (Jalloh) v Secretary of State for the Home Department* [2020] UKSC 4, [2020] 2 WLR 418 at [27].

43 See, for example, *Police v Smith* [1994] 2 NZLR 306 (CA) at 309 per Cooke P, 316 per Richardson J, 321 per Casey J and 327 per Hardie-Boys J.

44 Clear lawful authority is required for detention. See, for example, *O'Connor v Chief Executive of the Ministry of Vulnerable Children, Oranga Tamariki* [2017] NZCA 617, [2018] NZAR 94 at [43]; and *Chief Executive of Department of Labour v Yadegary* [2008] NZCA 295, [2009] 2 NZLR 495 at [38] and [107] per Baragwanath J.

45 Interpretation Act 1999, s 5(1).

that Act, that meaning is to "be preferred to any other meaning".[46] Given that the special conditions in question required the appellant to be at one place, the appellant's residence, for 12 hours out of every day, the relevant rights and freedoms are the right to freedom of movement (s 18) and the right to be free from arbitrary detention (s 22).

[63] The definition of special conditions in s 93(2B) of the Sentencing Act is expressed in very permissive terms – it "includes, without limitation, conditions of a kind described in section 15(3) of the Parole Act". It confers a broad discretion upon the courts, but that discretion is not without constraint. As this Court said in *Dotcom v Attorney-General*:[47]

> [100] The Bill of Rights Act plays an important role in the interpretation of the scope of powers affecting protected rights that are expressed in broad or general terms. Legislative provisions conferring discretions and powers are, like all statutory provisions, to be read in accordance with s 6 of the Bill of Rights Act[.]

[64] Relevant also to the task of statutory interpretation is the principle of legality – the principle that fundamental rights cannot be overridden by general or ambiguous language. The matter was put in the following way by Lord Hoffmann in the case of *R v Secretary of State for the Home Department, ex parte Simms*:[48]

> … the principle of legality means that Parliament must squarely confront what it is doing and accept the political cost. Fundamental rights cannot be overridden by general or ambiguous words. This is because there is too great a risk that the full implications of their unqualified meaning may have passed unnoticed in the democratic process. In the absence of express language or necessary implication to the contrary, the courts therefore presume that even the most general words were intended to be subject to the basic rights of the individual.

[65] In determining whether the broad discretion conferred by s 93(2B) is sufficient to authorise the restrictions imposed on the appellant, we start with the text.

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46 Furthermore, the principle that statutes should be interpreted "in favorem libertatis" (in favour of liberty) has been part of the common law for centuries: see *Crowley's Case* (1818) 2 Swans 1 at 67–68, 36 ER 514 (Ch) at 533 per Lord Eldon LC; *Tan Te Lam v Superintendent of Tai A Chau Detention Centre* [1997] AC 97 (PC) at 111; *Refugee Council of New Zealand Inc v Attorney-General (No 1)* [2002] NZAR 717 (HC) at [32]; and see *Attorney-General v Refugee Council of New Zealand Inc* [2003] 2 NZLR 577 (CA) at [57] per McGrath J and [256] per Glazebrook J.

47 *Dotcom v Attorney-General* [2014] NZSC 199, [2015] 1 NZLR 745 per McGrath, William Young, Glazebrook and Arnold JJ.

48 *R v Secretary of State for the Home Department, ex parte Simms* [2000] 2 AC 115 (HL) at 131.

[66] The Court of Appeal, by a majority, considered that the carve out of residential restrictions in the s 93(2B) definition only precluded recourse to the Parole Board's powers under s 33 and meant the court is not obliged to follow the highly prescriptive processes associated with those powers. It saw the carve out as operating to confer what was, in effect, a permission, which allowed a sentencing court to impose residential restrictions of a kind referred to in ss 15(3) and 33(2) of the Parole Act without any of the checks and balances associated with the exercise of those powers by the Parole Board.

[67] We consider the carve out from the general discretion is to be read as excluding conditions which in substance amount to s 15(3)(ab) residential restrictions. First, it is an explicit statement that the sentencing court does not have jurisdiction under s 93 to impose residential restrictions of the same kind as a residential restriction condition. The language employed – "*other than* a residential restriction condition" – is the language of limitation.

[68] Secondly, reading the text of s 93(2B) as precluding the imposition of special conditions that have the effect of detaining an offender in their residence for 12 hours a day is the most rights-consistent reading of the provision. If an unrestricted power to order such detention were intended, then it could be expected that Parliament would have spoken directly to confer that power. But there is no express power to detain set out in s 93 of the Sentencing Act or s 15 of the Parole Act, other than the power to impose a residential restriction condition contained in s 15(3)(ab), which is excluded from the types of conditions which a sentencing judge may impose.

[69] Thirdly, the absence of any statutory power to impose electronic monitoring to enable enforcement of conditions that require an offender to be in their residence for fixed periods of time per day tells against reading s 93(2B) as authorising residential restriction conditions free of the checks present for the Parole Board when imposing s 15(3)(ab) conditions. Section 15(3)(f) authorises electronic monitoring of compliance with, first, conditions imposed under s 15(3)(e) prohibiting a person from entering or remaining in particular areas or places (ie, whereabouts conditions) and, second, residential restriction conditions imposed under s 15(3)(ab). But there is no power under either the Sentencing Act or the Parole Act to impose electronic

monitoring of conditions which confine an offender to their residence when released from a short term of imprisonment for fixed periods of time other than when the conditions are imposed under s 15(3)(ab).

[70] It is significant that s 93(3A) of the Sentencing Act prohibits the court from imposing electronic monitoring for a whereabouts condition unless it has had regard to the opinion of the chief executive of the Department in a pre-sentence report. There is no similar requirement in relation to electronic monitoring to support a residence condition under s 15(3)(a) of the Parole Act, which would be odd if electronic monitoring were available in that context.

[71] A consideration of the broader scheme of the Sentencing and Parole Acts supports a reading that a sentencing judge's discretion under s 93(2B) does not include the power to impose special conditions which require an offender to reside at a particular place subject to a curfew supported by electronic monitoring.

[72] In the Sentencing Act, any power to make orders detaining an offender outside of imprisonment are expressly conferred and carefully circumscribed – for example the provisions relating to community and home detention. Three features of those provisions are particularly relevant:

(a) The first is that when considering either of these sentences, the court must direct a probation officer to prepare a s 26A pre-sentence report, which must provide certain information as to the suitability of the proposed address and confirmation that the offender consents to the conditions of the proposed sentence.[49] In preparing this report, the probation officer is required to take a number of steps, such as consulting others at the proposed address.[50]

(b) The second is that before either sentence may be imposed, the sentencing judge must ensure that the proposed address is suitable, the occupants understand the terms of the sentence and agree to the

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[49] Sentencing Act, s 26A.
[50] Section 26A(3).

offender being at the address, and the offender understands the conditions imposed and agrees to comply with them.[51]

(c) The third is that in respect of each sentence, there is a provision stating what the purpose of electronic monitoring is and the use to which information about the offender obtained from it may be put.[52]

[73] The position is similar under the Parole Act:

(a) When considering the imposition of residential restrictions, the Parole Board must obtain a report from the chief executive of the Department on matters relating to, among other things, the offender's rehabilitation and reintegration prospects, the likelihood that residential restrictions will prevent further offending, the suitability of the proposed residence, and whether the occupants of the proposed residence consent.[53]

(b) Before it may impose residential restrictions, the Parole Board must be satisfied on reasonable grounds, among other things, that the proposed residence is suitable, the occupants understand the residential restrictions and consent to the offender residing in the residence under those conditions, and the offender understands and agrees to comply with the residential restrictions.[54] It is a ground for recall that an offender no longer wishes to be subject to residential restrictions.[55]

(c) Section 15A sets out the purpose of an electronic monitoring condition imposed under s 15(3)(f) and the uses to which information about an offender obtained by electronic monitoring may be put.

[74] Like the provisions in the Sentencing Act in relation to community and home detention, the provisions in the Parole Act dealing with residential restrictions reflect

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51 In relation to community detention, see s 69C(2); and in relation to home detention, see s 80A(2)(a).
52 In relation to community detention, see s 69F; and in relation to home detention, see s 80E.
53 Parole Act, s 34.
54 Section 35.
55 Section 61(d)(iii).

a careful balancing of the purposes of such restrictions and the rights and freedoms preserved under the New Zealand Bill of Rights Act. Such an approach – ensuring that the intrusion upon rights is no more than is justifiable in a free and democratic society – is apparent throughout both the Sentencing and Parole Acts. Were a sentencing court to be free to impose conditions that were "of a similar kind to" residential restrictions, there would be no comparable statutory framework of safeguards, for example, as to the consent of the offender. The broader statutory scheme therefore tells against the interpretation for which the Crown contends.

[75] A further significant feature common to home detention, community detention and residential restrictions is that there must be a relevant scheme, operated by the chief executive of the Department of Corrections, in place in the proposed location. In relation to residential restrictions, s 33(1) of the Parole Act requires that the proposed residence be in an area in which the chief executive operates a residential restriction scheme.[56] This statutory requirement presumably exists to ensure the Department has the operational capacity to administer the scheme. If the court were free to impose a condition of a kind similar to a residential restriction condition without the s 33(1) requirement – as the majority of the Court of Appeal appears to allow – then the court could impose such a condition in an area where the Department does not have the necessary resourcing or operational capacity to administer the scheme. In effect, this would require the Department to ensure it had the capacity to administer a residential restrictions regime in any area of New Zealand, no matter how remote or difficult to access.

[76] Against this background, we agree with the dissenting judgment of Williams J in the Court of Appeal that the obvious purpose of the explicit exclusion in s 93(2B) is to prevent courts from effectively exercising, without safeguards, the same power that the Parole Board can only exercise with safeguards.[57] We are unable to read the words of s 93, and of s 93(2B) in particular, as intended to allow courts to impose conditions which require an offender released from a short term of imprisonment to

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56 Similarly, in relation to community detention, s 69C(2)(b) of the Sentencing Act requires a curfew address to be in an area in which the chief executive operates a community detention scheme. Section 80A(2)(b) contains a similar requirement in relation to home detention.

57 CA judgment, above n 10, at [107].

live at a particular address subject to a curfew enforced by electronic monitoring without the safeguards present when the Parole Board imposes residential restrictions.

[77] The legislative history of s 93(2B) supports this interpretation. In the Sentencing Act (as enacted), a court was empowered to impose on release of an offender sentenced to a short term of imprisonment "any special conditions including, without limitation, any conditions of a kind described in section 15(3)(a) to (c) of the Parole Act 2002".[58] This power excluded only s 15(3)(d) of the Parole Act, which allowed the imposition of a requirement to take prescription medication. At that time the Parole Act did not include residential restrictions, whereabouts conditions or electronic or intensive monitoring conditions in the list of special conditions which could be imposed under the that Act.[59]

[78] Section 93 of the Sentencing Act was then amended in 2004 to include a new s 93(2B), which defined special conditions as follows:[60]

> **special conditions** includes, without limitation, conditions of a kind described in section 15(3) of the Parole Act 2002, other than an electronic monitoring condition as referred to in section 15(3)(f) of that Act

[79] In 2007, the definition was amended again:[61]

> **special conditions** includes, without limitation, conditions of a kind described in section 15(3) of the Parole Act 2002, other than an electronic monitoring condition as referred to in section 15(3)(f) of that Act, or a residential restriction condition as referred to in section 15(3)(ab) of that Act

[80] In 2016, the definition was amended to exclude the reference to an electronic monitoring condition so that it read (as it does now):[62]

> **special conditions** includes, without limitation, conditions of a kind described in section 15(3) of the Parole Act 2002, other than a residential restriction condition referred to in section 15(3)(ab) of that Act

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58 Sentencing Act (as enacted), s 93(1)(b). The special conditions in s 15(3) of the Parole Act (as enacted) were (a) conditions relating to residence; (b) conditions requiring participation in a programme; (c) conditions of non-association with persons; and (d) conditions requiring taking prescription medication.

59 See Parole Act (as enacted), s 15.

60 Sentencing Amendment Act 2004, s 9(1).

61 Sentencing Amendment Act 2007, s 49(4).

62 Sentencing (Electronic Monitoring of Offenders) Amendment Act 2016, s 9(1).

[81] The intent, as taken from the explanatory note to the Bill which led to this last amendment, was to remove legislative barriers to the electronic monitoring of whereabouts conditions imposed on offenders released from a sentence of imprisonment of two years or less, but to retain the prohibition on a court from imposing residential restrictions:[63]

> At present, section 93 specifically excludes the imposition by the court of an electronic monitoring condition. The amendment removes that prohibition. However, the prohibition on residential restrictions will continue. In other words, it will be possible for the court to impose an electronic monitoring condition in order to monitor an offender's compliance with a condition relating to his or her whereabouts (for example, a prohibition on going to an ex-partner's home) but not in respect of residential restrictions confining the offender to his or her home at certain times or at all times, *because such conditions are not available*.

[82] This legislative history shows that the special conditions a court can impose on an offender for a short term of imprisonment have always been defined non-exhaustively and without limitation, except for those instances in which Parliament has intended to exclude the power to impose kinds of conditions which it considered more appropriate (1) for the Parole Board to impose and (2) for offenders subject to longer terms of imprisonment. It shows that Parliament saw the s 93(2B) exclusions as limiting courts' powers. The s 93(2B) carve out now only excludes residential restrictions. The parliamentary intention apparent from this legislative history was to preclude the imposition by a sentencing court of special conditions which operate to detain an offender in their home.

[83] We conclude, then, that the combination of the special conditions which required the appellant to reside at a particular place, to observe a curfew, to submit to electronic monitoring to enforce the curfew and to be under the general supervision of a probation officer meant that the appellant was, in substance, sentenced to residential restrictions which the Courts did not have the power to impose.

[84] However, before we leave this issue, we should acknowledge that in June and November 2018 the Judges were faced with a difficult situation – on the evidence before them, the appellant had no home or other suitable place to go but needed a very

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63 Electronic Monitoring of Offenders Legislation Bill 2015 (18-1) (explanatory note) at 4 (emphasis added).

high level of supervision and support to mitigate the risk the appellant posed to themselves and others.

Was intensive monitoring imposed on the appellant?

[85] An intensive monitoring condition is defined in s 107IAC(2) of the Parole Act as a condition:

> … requiring an offender to submit to being accompanied and monitored, for up to 24 hours a day, by an individual who has been approved, by a person authorised by the chief executive, to undertake person-to-person monitoring.

The Court of Appeal judgment

[86] The majority did not address the appellant's argument that a special condition of intensive monitoring may not be imposed where the sentence is a short term of imprisonment. That was because the majority found that, combined, the monitoring and residence conditions did not equate to intensive monitoring. It said:[64]

> Although it might be suggested that the combination of a requirement to stay at a particular residence, an overnight curfew and electronic monitoring come close to an unreasonable extension of [their] confinement after [they have] served a sentence of imprisonment, we make two points in response. First, such conditions are acknowledged by Parliament as being justified if they are designed to meet the purposes specified in s 93(3). Second, they are no more coercive than the types of restrictions imposed on an alleged offender released on electronically monitored bail pending trial, who is entitled to a presumption of innocence.

[87] The majority saw as significant that the District Court's orders did not specify that the appellant would be accompanied at all times between 8 am and 8 pm. Rather, that appeared to be a requirement of the programme which had been put in place by the Department to implement the Court order.[65]

[88] Williams J accepted the appellant's contention that a sentencing court is constrained from imposing intensive monitoring on an offender released from a short-term sentence who is not subject to an extended supervision order (ESO).[66] However, he considered that there was no evidence that the District Court knew the

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64 CA judgment, above n 10, at [71].
65 At [72].
66 At [92].

rehabilitative programme would simply result in the appellant being accompanied and monitored for 12 hours a day. Nor was there evidence that the programme was in fact being run in that way. And he said that, even if it were, such a programme would not amount to intensive monitoring as intensive monitoring means full-time, or at least substantially full-time monitoring. He said that if counsel's allegations were true, the appellant was only being accompanied and monitored by an approved individual for 12 hours a day, which did not amount to full-time monitoring.[67]

Submissions

[89] The appellant says that, in substance, the conditions imposed upon them amounted to intensive monitoring. The appellant contends that intensive monitoring can only be imposed upon an offender who is subject to an ESO. Section 93 of the Sentencing Act does not, the appellant says, confer a power to impose intensive monitoring as a special condition on a short-term sentence of imprisonment.

[90] In June 2018, Judge Farish declined to impose a condition that the appellant be accompanied and monitored between 8 am and 8 pm, the Judge acknowledging she had no jurisdiction to do so.[68] But the appellant says the Judge did order both the curfew and attendance at the programme. The evidence of the probation officer was that there were two staff available at all times to work with the appellant. The appellant says that the evidence suggests that the conditions allowed the appellant to be accompanied and monitored 24 hours a day. The Judge acknowledged that the supervision order she declined to make was to a certain extent covered by the residential condition described above at [8(a)].[69]

Analysis

[91] We first address whether a sentencing court may impose an intensive monitoring condition on an offender sentenced to a short term of imprisonment. Section 15(3)(g) of the Parole Act authorises the Parole Board to impose intensive monitoring as a special condition when an offender is released from a long-term

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67 At [94]–[96].
68 Judge Farish variation, above n 6, at [9]. See above at [51].
69 At [9].

sentence of imprisonment. But that section says "an intensive monitoring condition … must, and may only, be imposed if a court orders (under section 107IAC) the imposition of an intensive monitoring condition".

[92] Section 107IAC(1) in turn provides that a sentencing court may make an order requiring the Parole Board to impose an intensive monitoring condition when making an ESO in respect of an offender. The effect of this statutory scheme is that, for the purposes of parole, intensive monitoring conditions are only made where an ESO is in force.

[93] The purpose of the ESO regime is to manage the risk posed by individuals who have committed serious violent and sexual offences in the past and who "pose a real and ongoing risk of committing serious sexual or violent offences" following receipt of a determinate sentence.[70] It is of significance that an ESO may only be ordered if the following statutory threshold set out in s 107I is met:

> **107I Sentencing court may make extended supervision order**
>
> (1) The purpose of an extended supervision order is to protect members of the community from those who, following receipt of a determinate sentence, pose a real and ongoing risk of committing serious sexual or violent offences.
>
> (2) A sentencing court may make an extended supervision order if, following the hearing of an application made under section 107F, the court is satisfied, having considered the matters addressed in the health assessor's report as set out in section 107F(2A), that—
>
> (a) the offender has, or has had, a pervasive pattern of serious sexual or violent offending; and
>
> (b) either or both of the following apply:
>
> (i) there is a high risk that the offender will in future commit a relevant sexual offence:
>
> (ii) there is a very high risk that the offender will in future commit a relevant violent offence.
>
> (3) To avoid doubt, a sentencing court may make an extended supervision order in relation to an offender who was, at the time the application for the order was made, an eligible offender, even if, by the time the order is made, the offender has ceased to be an eligible offender.

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70 Parole Act, s 107I(1).

(4) Every extended supervision order must state the term of the order, which may not exceed 10 years.

(5) The term of the order must be the minimum period required for the purposes of the safety of the community in light of—

(a) the level of risk posed by the offender; and

(b) the seriousness of the harm that might be caused to victims; and

(c) the likely duration of the risk.

[94] The threshold for imposing intensive monitoring as a condition on a long-term sentence of imprisonment is, by parity of reasoning, high.

[95] The logic of the statutory scheme is, as Williams J found,[71] that the limitation in s 15(3)(g) of the Parole Act carries over to conditions that may be imposed on short-term sentences of imprisonment under the Sentencing Act. That logic is inescapable since intensive monitoring is only available under the Parole Act when an ESO is in place.

[96] Did the conditions imposed here amount to intensive monitoring? We do not consider that they did. The information before Judge Farish did not detail anything that would amount to intensive monitoring as per the definition in s 107IAC(2).[72] What was described was supported accommodation, with agency staff available to residents "24/7". To use the language of the s 107IAC(2) definition, the appellant was not required to submit to being "accompanied" by those agency personnel at all times in a "person-to-person" arrangement.

[97] We have considered whether the combination of the presence of agency staff and GPS monitoring could be said to amount to intensive monitoring. Although this undoubtedly constituted monitoring of the appellant's movement 24 hours a day, it is not, in light of the statutory definition, a tenable interpretation.

[98] We therefore conclude that a court sentencing an offender to a short-term sentence of imprisonment has no jurisdiction to impose intensive monitoring as a

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71 CA judgment, above n 10, at [89].

72 See above at [85].

condition, unless the offender is subject to an ESO.[73] The conditions imposed in this case did not amount to intensive monitoring.

Result

[99] We have found that the combination of the special conditions requiring the appellant to reside at a particular place, to observe a curfew, to submit to electronic monitoring to enforce the curfew and to be under the general supervision of a probation officer meant that the appellant was, in substance, sentenced to residential restrictions, contrary to the prohibition in s 93(2B) of the Sentencing Act. The sentencing Courts therefore had no jurisdiction to impose them. Accordingly, the appellant's appeal against sentence is allowed in respect of those conditions. Whilst in the ordinary course this Court would address what other conditions, if any, should be imposed in their place, since the conditions have expired before the hearing of this appeal, no further orders are required in that regard.

[100] The appeal is allowed.

Solicitors:
Crown Law Office, Wellington for Respondent

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[73] We note that it is unlikely that an ESO would be imposed where an offender is sentenced to a short term of imprisonment, so that the issue of imposing an intensive monitoring condition is unlikely to arise. Further, even if an ESO was imposed, there might be difficulties with transferring the intensive monitoring regime to the present context. In the absence of full argument, we have not addressed these matters.