IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA170/2020
[2021] NZCA 214

BETWEEN	THE QUEEN Appellant
AND	BENNY MILES MURAAHI Respondent

Hearing:	30 March 2021 (further submissions received 17 May 2021)
Court:	French, Brown and Clifford JJ
Counsel:	C A Brook and R K Thomson for Appellant J H M Eaton QC, I Jayanandan and H Kim for Respondent
Judgment:	28 May 2021 at 9 am

JUDGMENT OF THE COURT

A The application for leave to appeal a question of law under s 296 of the Criminal Procedure Act 2011 is granted.

B We answer the questions of law submitted for determination as follows:

(1) Does the giving of a warning under s 86B and s 86C of the Sentencing Act 2002 require only an oral warning which is then duly recorded?

Answer: Yes.

(2) If so was the Judge's decision to treat Mr Muraahi as a stage-1 offender under s 86B of the Sentencing Act 2002 made in error?

Answer: Yes.

C We decline to order a re-sentencing of the respondent.

REASONS OF THE COURT

(Given by French J)

Introduction

[1] The sentencing regime known colloquially as "three strikes" involves the giving of warnings and escalating consequences for repeat violent offenders under ss 86B to 86D of the Sentencing Act 2002.

[2] The warnings are fundamental to the operation of the regime and this case raises issues relating to how the warnings are to be given and proved.

[3] In a High Court sentencing, Peters J held that both an oral warning and a formal written notice were required before a warning was operative.[1] The Judge further held there was insufficient evidence of both those requirements having been satisfied in this case and therefore she did not have jurisdiction to sentence Mr Muraahi on the basis he was subject to previous warnings.[2]

[4] The Crown wishes to challenge those rulings and seeks leave to appeal on two questions of law under s 296(3)(a) of the Criminal Procedure Act 2011.

[5] The questions of law the Crown initially proposed for determination were:

(a) Did the learned High Court Judge err in law by determining that a "record of first warning" and a "record of final warning" under s 86A of the Sentencing Act require both an oral warning and written notice to be given?

(b) As a result, was the Judge's decision to treat Mr Muraahi as a stage-1 offender under s 86B of the Sentencing Act made in error?

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1 *R v Muraahi* [2020] NZHC 346 [High Court decision] at [18].
2 At [35].

[6] At the hearing, it became apparent that the first question as worded was too narrow because it used statutorily defined terms. We suggested that to capture the key issue the questions should be re-framed in the following way:

> Does the giving of a warning under s 86B or s 86C of the Sentencing Act 2002 require only an oral warning which is then duly recorded?
>
> If so was the Judge's decision to treat Mr Muraahi as a stage-1 offender under s 86B of the Sentencing Act 2002 made in error?

[7] There was no objection to that re-wording and we accordingly exercise our power under s 299 of the Criminal Procedure Act to amend the questions to be submitted for determination.

[8] As required by s 296 of the Criminal Procedure Act, the proposed questions of law have arisen in a proceeding which followed the determination of the charge. Further, the questions are ones of general importance and the arguments advanced have merit.

[9] The application for leave to appeal is accordingly granted.

The legislative regime

[10] The regime known as the three strikes legislation is contained in ss 86A to 86I of the Sentencing Act. Those sections which came into force on 1 June 2010, were added to the Sentencing Act to provide for "additional consequences for repeated serious violent offending".[3]

[11] The sections establish a three stage warning and sentencing system for anyone convicted of one of 40 specified offences defined as serious violent offences.

[12] As noted in *Hall's Sentencing*, the expression "three strikes" is not used in the legislation, the preferred expressions being stage-1, stage-2 and stage-3 offences and first and final warnings.[4]

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3 Sections 86A to 86I of the Sentencing Act 2002 were added to the Sentencing Act by s 6(1) of the Sentencing and Parole Reform Act 2010.

4 Geoffrey Hall *Hall's Sentencing* (online looseleaf ed, LexisNexis) at [SA86A.1].

[13] A stage-1 offence is defined as a serious violent offence committed by an offender at a time when the offender did not have a record of first warning and was aged 18 years or over.[5]

[14] Following conviction for a stage-1 offence, the court must give and record a first warning.[6] The court must also give the offender a written notice that sets out the consequences of committing a further serious violent offence.[7] The form of the notice is prescribed by the Sentencing Regulations 2002.

[15] The form relating to a first warning reads as follows:

> Form 12B
>
> Notice of consequences of first warning
>
> *Section 86B(4), Sentencing Act 2002*
>
> Case No:
>
> **Note**: In this notice, **serious violent offence** means any of the offences listed in the definition of that expression in section 86A of the Sentencing Act 2002 (a copy of the definition of serious violent offence is attached).
>
> **To [*full name, address, and occupation of defendant*]**
>
> 1 On [*date*], you were convicted of the following serious violent offence(s): [*list offences*].
>
> 2 I have given you a first warning, in which I warned you of the consequences if you are convicted of any serious violent offence committed after that first warning.
>
> 3 This notice records in writing the consequences that I explained to you.
>
> **Consequences of first warning**
>
> If you are convicted of any serious violent offence (except murder) committed after you received the first warning, you will receive a final warning. In addition, if the Judge imposes a sentence of imprisonment for that offence (other than life imprisonment for manslaughter, or preventive detention) then you will serve that sentence without parole or early release.

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5 Sentencing Act, s 86A.
6 Section 86B(1).
7 Section 86B(4).

> If you are convicted of a murder committed after you received the first warning, you will be sentenced to imprisonment for life. You must serve the life sentence without parole unless it would be manifestly unjust to do so. If you receive a life sentence without parole, you will not be released from prison. If serving the sentence without parole would be manifestly unjust, the Judge must specify the minimum term of imprisonment you will serve.
>
> Dated at [*specify*] Court at [*place*] on [*date*]
>
> Signature:
>
> (Judge)

[16] Although the form does not require the offender to acknowledge receipt of the notice, it appears to be common practice for courts to add a section headed "statement of service" for the offender to sign.

[17] In the event the offender subject to a first warning is convicted of a second serious violent offence (other than murder) they must serve the full term of any finite prison sentence imposed for that offence, termed a stage-2 offence.[8] A stage-2 offence is defined as a serious violent offence committed by an offender at a time when the offender had a record of first warning.[9]

[18] Following conviction for a stage-2 offence, the court must give and record a final warning as well as provide the offender with a written notice of the consequences of being convicted of another serious violent offence.[10] As in the case of a first warning, the form of the notice is prescribed by the Sentencing Regulations and reads as follows:

> Form 12C
>
> Notice of consequences of final warning
>
> *Sections 86C(7) and 86E(9), Sentencing Act 2002*
>
> Case No:
>
> **Note:** In this notice, **serious violent offence** means any of the offences listed in the definition of that expression in section 86A of the Sentencing Act 2002 (a copy of the definition of serious violent offence is attached).

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8 Section 86C(4).
9 Section 86A.
10 Section 86C(1).

To [*full name, address, and occupation of defendant*]

1 On [date], you were convicted of the following serious violent offence(s): [*list offences*].

2 You had a record of a first warning at the time you committed the offence(s).

3 I have therefore given you a final warning, in which I warned you of the consequences if you are convicted of any serious violent offence committed after that final warning.

4 This notice records in writing the consequences that I explained to you.

Consequences of final warning

If you are convicted of any serious violent offence (except murder or manslaughter) committed after you received the final warning, you will either be—

(a) sentenced to the maximum term of imprisonment for that offence. You will serve that sentence without parole unless that would be manifestly unjust; or

(b) sentenced to preventive detention. You will serve a minimum term of imprisonment of at least the length of the maximum term of imprisonment for the offence, unless that would be manifestly unjust. In that case, the Judge must specify the minimum term of imprisonment that you will serve.

If you are convicted of a murder committed after you received the final warning, you will be sentenced to imprisonment for life. You must serve the life sentence without parole unless it would be manifestly unjust to do so. If you receive a life sentence without parole, you will not be released from prison.

If serving the life sentence without parole would be manifestly unjust, the Judge must impose a minimum term of imprisonment of at least 20 years unless that would also be manifestly unjust. In that case, the Judge must specify the minimum term of imprisonment that you will serve.

If you are convicted of manslaughter committed after you received the final warning, you will be sentenced to imprisonment for life. The Judge must impose a minimum term of imprisonment of at least 20 years unless that would be manifestly unjust. In that case, the Judge must impose a minimum term of imprisonment of at least 10 years.

Dated at [*specify*] Court at [*place*] on [*date*]

Signature:

(Judge)

[19] Should an offender with two previous warnings commit a third serious violent offence (other than murder), then they must be sentenced to the maximum term of imprisonment prescribed for that particular offence unless the court is satisfied it would be manifestly unjust to do so.[11]

[20] The offence is a stage-3 offence defined as an offence that is a serious violent offence committed by an offender at a time when the offender had a record of final warning.[12]

[21] As will be apparent from the content of the prescribed notices, special provisions apply in the case of murder and manslaughter which for the purposes of this appeal it is not necessary for us to traverse.

This case

2010 offending

[22] On 4 August 2010, Mr Muraahi, holding a hammer, robbed a medical centre. He pleaded guilty to aggravated robbery and was sentenced by Judge G T Winter on 15 October 2010 in the District Court to three and a half years' imprisonment.[13]

[23] Aggravated robbery qualifies as a serious violent offence for the purposes of the three strikes regime. The sentencing notes record the Judge giving Mr Muraahi a warning in the following terms:

> [11] In respect of these particular matters, you need to be advised on the aggravated robbery, that I am now going to give you a warning of the consequences of another conviction. You will also be given a written notice outlining those consequences which lists the serious violent offences that might trigger your path along the scale of greater and harsher terms of imprisonment. If you are convicted of any serious violent offence other than murder committed after this warning and if a Judge imposes a sentence of imprisonment, then you will serve that sentence without parole or early release. If you are convicted of murder committed after this warning, then you must be sentenced to life imprisonment. That will be served without parole unless it would be manifestly unjust. Now in that event, the Judge must

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11 Section 86D(2) and (3). See also the special provision in s 86D(4) regarding minimum periods of imprisonment for manslaughter.

12 Section 86A.

13 *R v Muraahi* DC Manukau CRI-2009-092-20647, 15 October 2010.

> sentence you to a minimum term of imprisonment then across all of these matters is that you go to jail for a period of three and one half years.

[24] The fact that the warning was given was recorded in Mr Muraahi's criminal and traffic history. The relevant entry reads:

> Imprisonment
> (Concurrent) -
> 15/10/2010 - 6
> Months, 3 Years /
> 15/10/2010 - First
> Warning Stage 1
> s86B(1)(b) SA

2014 offending

[25] Three and a half years later on 7 February 2014, Mr Muraahi and two associates, brandishing a firearm, robbed a bar. He was again charged with aggravated robbery and other offences. During the course of a sentencing indication on 25 September 2014, Judge G T Winter told Mr Muraahi that he would be subject to a second strike warning and that someone subject to a second strike warning would normally serve the full term of imprisonment without parole.[14]

[26] Mr Muraahi pleaded guilty the following day and in accordance with the sentencing indication was sentenced by Judge Winter on 19 November 2014 to a prison term of four years to be served without parole.[15]

[27] In his sentencing notes, Judge Winter referred to the fact that as a second stage offender, Mr Muraahi was liable for a second strike warning and that under the regime he must serve any long term sentence without parole.[16] The Judge went on to discuss whether in fixing the length of the sentence, the Court was entitled to take into account the fact that the sentence would be served without parole. The Judge concluded that it was and calculated his end sentence on that basis.[17]

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14 *R v Muraahi* DC Manukau CRI-2014-092-4111, 25 September 2014 at [21].
15 *R v Muraahi* DC Manukau CRI-2014-092-4111, 19 November 2014 at [22].
16 At [11].
17 At [12]–[22].

[28] According to the information provided to Peters J, the oral warning itself was not transcribed. However, Mr Muraahi's criminal and traffic history contains the notation that he was given the requisite final warning and he subsequently signed a document confirming he had been served with a notice of consequences. The notice was not signed by Judge Winter but by another District Court Judge, Judge McNaughton.

[29] Shortly after his release from prison, in March 2018, Mr Muraahi and other gang associates robbed a shop and a currency van at gun point. They conspired to commit a further aggravated robbery but were arrested before the plan was carried out.[18]

[30] Mr Muraahi was charged with two charges of aggravated robbery and one of conspiracy to commit aggravated robbery. This time he defended the charges but was found guilty at trial.

[31] At sentencing in the High Court, his counsel Ms Jayanandan submitted the Judge was required to sentence Mr Muraahi as a stage-1offender under the three strikes legislation, and not, as the Crown argued, a stage-3 offender. Ms Jayanandan acknowledged her client had received the oral warning required under the three strikes legislation on conviction for the 2010 aggravated robbery but contended there was no evidence he had received the required written notice. Then in relation to the 2014 aggravated robberies, there was evidence he had received the written notice but no evidence he had been given the oral warning.[19]

[32] Peters J held that both an oral warning and the written notice are components of the warning and that the offender must receive both before he or she is to be treated as having been warned. In so holding, the Judge followed a previous High Court sentencing decision[20] and one District Court judgment.[21] The Judge then went on to

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18 High Court decision, above n 1, at [4]–[13].

19 At [25]–[28].

20 *R v Patel* [2018] NZHC 2946.

21 *R v Allen* [2018] NZDC 14972, [2019] DCR 227. The Judge also cited a decision of this Court, *Do v Police* [2016] NZCA 420, [2016] NZAR 1354. However, that decision did not address the issue of whether giving both a written and oral warning was a pre-requisite to the validity of the warning.

consider the evidence regarding Mr Muraahi's previous warnings and concluded that it was insufficient to establish that both requirements had been satisfied.[22] This meant that she did not have jurisdiction to sentence Mr Muraahi as a stage-3 offender or even as a stage-2 offender.[23]

[33] The Judge accordingly sentenced Mr Muraahi on the basis that he was a stage-1 offender but one with a serious criminal history.[24] She gave Mr Muraahi an oral first warning and then instructed the registrar to hand him a written notice of consequences in Form 12B.[25] The Judge then sentenced Mr Muraahi to 13 years' imprisonment with a minimum period of imprisonment of seven years and six months.[26]

[34] That outcome prompted the Crown to seek leave to bring the current appeal. In its view, a requirement to produce both a transcript of the oral warning and a copy of the notice of consequences presumably with additional proof that it was actually served on the offender is not necessary under the statute and is impractical. The practical concerns arise from the fact that the courts' filing systems are still largely paper-based, manual systems leading to obvious difficulties in locating original hard copies especially several years after the event.

Additional information obtained for the appeal

[35] Prior to the hearing before us, the panel initially seized of the appeal asked counsel to conduct further inquiries regarding four matters. In response, the Crown provided affidavit evidence from Ms Rope, a services manager working at the Manukau District Court where Mr Muraahi was sentenced in 2010 and 2014. Some of the information was within Ms Rope's own personal knowledge, and some of it was obtained from the Chief District Court Judge as well as other Ministry of Justice (Ministry) sources.

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22 High Court judgment, above n 1, at [32]–[34].
23 At [35].
24 At [36].
25 At [38]–[39].
26 At [51]–[52].

The Ministry's case management system (CMS)

[36] The first of the Court's requests related to the CMS data base system operated by the Ministry and the fact it was possible to generate a copy of a formal notice of consequence of warning both in relation to the 2010 and 2014 offending when accessing Mr Muraahi's file on the system.

[37] As explained by Ms Rope, CMS is designed to reflect the existence of the official court record. The fact of a judicial direction and its nature will be entered into the system but not the verbatim or oral record of the direction. Verbatim directions are recorded in a minute or transcript which is held on the physical court file.

[38] Information is entered into CMS by "users" who are all qualified Deputy Registrars. CMS has been developed with business rules aimed at ensuring the data entry is both accurate and compliant with the applicable legislation. The entered data is used to help registries administer cases and produce necessary court documents.

[39] Where a defendant is convicted and sentenced for a three strikes offence, a user enters that information into CMS. When the charge outcome is updated as convicted and sentenced, a separate pop up message appears prompting the user to check whether a warning was directed by the judge. If the judge has recorded on the charging document that a warning was given, then that warning is entered in CMS. CMS is only able to generate a notice of consequences document if the warning has been entered.

[40] We pause here to interpolate that although this was not part of Ms Rope's affidavit evidence, the Crown in its submissions noted that criminal and traffic histories are also derived from the CMS database.

Judicial procedure for signing a notice of consequence

[41] As already mentioned at [28], the 2014 notice in this case was not signed by the sentencing judge (Judge Winter) as contemplated by the prescribed form but by

a different Judge. That was one of the reasons which persuaded Peters J it was not safe to infer from the notice that Judge Winter had given an oral warning.[27]

[42] According to the information obtained by Ms Rope:

> In the usual course that written notice would be signed by the Judge who gave the warning. But such signing cannot universally always be the case. The fact is that for various reasons the Judge who gave the warning may simply not be available when for operational reasons (in the interests of justice) it is necessary or desirable for the notice to be given promptly to the offender.
>
> In those limited circumstances a Judge who is available may sign the notice following the earlier giving of the warning and recording of it (which earlier events constitute the relevant entries for the permanent court record). This is done to facilitate more timely conveying of the consequences in writing.
>
> For completeness, enquiries have been made of the Judge in this case who signed the notice, and the Judge does not recollect the matter.

District Court file retention policy

[43] This Court asked counsel to ascertain whether the physical District Court files in this case have been destroyed and if so how long are District Court files retained before they are destroyed.

[44] Ms Rope advises that the formal court record is retained permanently in the District Court.

[45] However as regards the physical District Court files, the Ministry has been authorised since 2013 to dispose of them under a disposal authority endorsed by the relevant Heads of Bench and the Chief Archivist.

[46] The minimum retention period for District Court criminal files is ten years after case completion.

[47] When Mr Muraahi's files were requested in November 2019, the ten-year period had not expired. However despite an extensive search, the files were not able to be located. The fact the files are missing has been attributed to poor file

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[27] At [34].

management practices at the relevant court. There is no evidence they have been destroyed.

Information held by the Department of Corrections

[48] When the Department of Corrections receives a prisoner, a file is normally created. This Court asked whether the department had been asked to search its files relating to Mr Muraahi.

[49] Ms Rope reports that upon request the Department of Corrections has provided a copy of a notice of consequences of first warning dated 15 October 2010. The notice has been signed by Judge Winter and according to a statement of service was served on Mr Muraahi at the prison on 24 August 2011. A signature which purports to be that of Mr Muraahi appears alongside a statement acknowledging receipt of the notice.

[50] The existence of this document was not known to Peters J. Had it been brought to her attention, the Judge is unlikely to have made the finding that there was insufficient evidence of Mr Muraahi ever being given a notice of consequences in relation to the 2010 offending.

Information obtained after the appeal hearing

[51] After the appeal hearing, we obtained a copy of a minute from the courts' document management system. The minute, which is dated 19 November 2014 and described as a minute of Judge McNaughton, reads:[28]

> [1] Mr Muraahi, I am doing this because the Judge who sentenced you is not in the building. Given your conviction for aggravated robbery you are now subject to the three strikes law. This is now your final warning which will explain the consequences of another serious violence conviction. You will also be given a notice outlining these consequences and a list of what the serious violent offences are.

[28] *R v Muraahi* DC Manukau CRI-2014-092-4111, 19 November 2014 (Minute of Judge McNaughton).

> [2] Firstly, if you are convicted of any serious violent offence, other than murder or manslaughter, then you will be sentenced to the maximum term of imprisonment for each offence. That will be served without parole or early release unless it would be manifestly unjust. If you came back before the Court on an aggravated robbery, which has a maximum penalty of 14 years, that would be the sentence, 14 years' imprisonment. That is what that means.
>
> [3] Secondly, if you are convicted of manslaughter committed after this warning you will be sentenced to imprisonment for life. The Judge must order you to serve at least 20 years' imprisonment, unless the Judge considers it would be manifestly unjust to do so, in which case the Judge must order you to serve a minimum of at least 10 years' imprisonment. Again what this means is life imprisonment is the maximum for manslaughter, and if you were convicted of manslaughter that would be the penalty imposed, life.
>
> [4] If you are convicted of murder after this warning then you must be sentenced to imprisonment for life. The Judge must order you to serve this sentence without parole unless it would be manifestly unjust to do so, and if the Judge finds it is manifestly unjust to do so then the Judge must impose a minimum period of imprisonment of at least 20 years, unless that would be manifestly unjust in which case the Judge must sentence you to a different minimum period of imprisonment.
>
> [5] If you are sentenced to preventive detention you must serve the maximum term of imprisonment of the most serious offence you are convicted of, unless a Judge considers that would be manifestly unjust.

[52] The existence of this document was obviously also not known to Peters J. As Ms Jayanandan points out, it is not signed by Judge McNaughton. However when combined with the notice of consequences that was signed by Judge McNaughton, we consider it likely that had the minute been brought to her attention, Peters J would not have made the finding there was insufficient evidence of the oral warning not being transcribed in 2014.

Arguments on appeal

The Crown's position

[53] The Crown's position is that on a correct interpretation of the legislation, the written notice of consequences is not a warning in itself. That is not its intended purpose or function. At best, it as an aide memoire for the offender. The failure to give it or the inability to prove that it has been given does not invalidate or render imperfect the record of an oral warning.

[54] The Crown acknowledges the two previous decisions *R v Patel* and *R v Allen* relied on by Peters J. However, it submits that in *Patel* the need for a dual warning was not a contested issue and therefore there was no analysis. As regards *Allen*, the Crown accepts the Judge in that case did engage in analysis but contends it was based on a misinterpretation of the relevant provisions.

[55] In relation to the requirement for a record of the warning, the Crown submits that production of the transcript of the oral warning is not necessary. By the time the need for proof of the giving of an oral warning arises, it would likely be difficult if not impossible to obtain a transcript. The provisions were designed to avoid this practical difficulty by making it clear that the "record of warning" means only the court's entry of a record that the offender was given an oral warning. Nothing more is required.

Mr Muraahi's position

[56] Counsel for Mr Muraahi however submit that Peters J was correct to follow those previous decisions and require proof of both an oral and a written warning. They also cite another High Court judgment to the same effect. In *R v King* Whata J held that without satisfactory evidence the offender was given a written notice of consequence for a previous strike offence, the Court must proceed on the basis that the statutory requirements were not met and thus the strike warning was invalid.[29] Counsel further submit we should answer the question of law posed by the Crown on the basis of the information that was before Peters J , rather than the additional information obtained subsequently.

[57] In support of their central contention of a dual oral/written requirement, counsel essentially relied on the reasoning in *R v Allen*.[30] They emphasised the importance of the offender understanding the effect of the warning, especially given the potentially draconian consequences for them. An oral warning on its own was not sufficient for the full import of the warning to be understood and therefore not sufficient to deter the offender from future offending as intended by Parliament.

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29 *R v King* [2019] NZHC 537 at [40]–[44].
30 *R v Allen*, above n 21, at [33]–[35].

Most offenders are nervous and anxious during sentencing hearings. It is an emotionally charged time and it was not realistic to suggest that an offender is in a position to be able to take in everything that is said.

[58] Counsel urged a rights consistent interpretation of the legislation and further pointed out that as a matter of language and logic the offender can only be said to have been warned of the consequences of re-offending, if they are told of the 40 offences that qualify as a serious violent offence. The list is an extensive one. It covers a wide spectrum of offences including offences that might not immediately spring to mind as a serious violent offence. Reading out the list was not done for obvious reasons at sentencing and so for an offender the only practical means of knowing what those offences are is to be given the written notice.

[59] Finally, for completeness we note that the fact the warnings in this case appear to have been given at sentencing rather than on conviction as contemplated by the legislation was not an issue before the High Court or us.

Analysis

[60] We have carefully considered the arguments advanced on behalf of Mr Muraahi but in our view the structure and wording of the relevant provisions is such that it permits of no other interpretation than the one advanced by the Crown.

[61] The full text of ss 86B and 86C reads as follows:

> **86B Stage-1 offence: offender given first warning**
>
> (1) When a court, on any occasion, convicts an offender of 1 or more stage-1 offences, the court must at the same time—
>
> (a) warn the offender of the consequences if the offender is convicted of any serious violent offence committed after that warning (whether or not that further serious violent offence is different in kind from any stage-1 offence for which the offender is being convicted); and
>
> (b) record, in relation to each stage-1 offence, that the offender has been warned in accordance with paragraph (a).
>
> (2) It is not necessary for a Judge to use a particular form of words in giving the warning.

(3) On the entry of a record under subsection (1)(b), the offender has, in relation to each stage-1 offence (for which a record is entered), a record of first warning.

(4) The court must give the offender a written notice that sets out the consequences if the offender is convicted of any serious violent offence committed after the warning given under subsection (1)(a).

86C Stage-2 offence other than murder: offender given final warning and must serve full term of imprisonment

(1) When, on any occasion, a court convicts an offender of 1 or more stage-2 offences other than murder, the court must at the same time—

(a) warn the offender of the consequences if the offender is convicted of any serious violent offence committed after that warning (whether or not that further serious violent offence is different in kind from any stage-2 offence for which the offender is being convicted); and

(b) record, in relation to each stage-2 offence, that the offender has been warned in accordance with paragraph (a).

(2) It is not necessary for a Judge to use a particular form of words in giving the warning.

(3) On the entry of a record under subsection (1)(b), the offender has, in relation to each stage-2 offence for which a record is entered, a record of a final warning.

(4) If the sentence imposed on the offender for any stage-2 offences is a determinate sentence of imprisonment, the court must order that the offender serve the full term of the sentence and, accordingly, that the offender,—

(a) in the case of a long-term sentence (within the meaning of the Parole Act 2002), serve the sentence without parole; and

(b) in the case of a short-term sentence (within the meaning of the Parole Act 2002), not be released before the expiry of the sentence.

(5) If the sentence imposed on the offender for 1 or more stage-2 offences is a short-term sentence (within the meaning of the Parole Act 2002) and any conditions are imposed on the offender under section 93, then, despite anything in that section, those conditions take effect on the sentence expiry date (within the meaning of the Parole Act 2002).

(6) If, but for the application of this section, the court would have ordered, under section 86, that the offender serve a minimum period of imprisonment, the court must state, with reasons, the period that it would have imposed.

> (7) The court must give the offender a written notice that sets out the consequences if the offender is convicted of any serious violent offence committed after the warning given under subsection (1)(a).

[62] The scheme of the provisions is that the giving of the warning and the recording of it must happen at the same time. It is at that point, as subs (3) of both s 86B and s 86C makes clear, that the offender has a record of first or final warning as the case may be. That is important because of the definition of stage-1 and stage-2 offences. It will be recalled that the existence of a record of a warning is part of the definition.

[63] What then constitutes the recording or record required by ss 86B(1)(b) and 86C(1)(b) respectively? In our view, that is effected in the District Court by the Judge recording on the charging document that the warning has been given. A permanent record of the warning will subsequently be created when the information on the charging document is entered into the Ministry's CMS system and is then able to be generated in an offender's criminal and traffic history. This record held by CMS will generally be sufficient evidence that an oral warning was in fact given as CMS is designed to reflect the permanent court record and has been developed with business rules aimed at ensuring data entry is both accurate and compliant with legislation. The fact that a permanent record is entered into CMS contemporaneously by a Deputy Registrar who is present at the hearing further supports this position.

[64] We acknowledge the importance of the notice of consequence for the reasons identified by Ms Jayanandan in this case and Judge Harvey in *R v Allen*.[31] We also acknowledge that the legislation uses the word "must" in connection with the giving of the notice. But of itself the fact the giving of the notice is mandatory does not mean the notice is part of the warning or that the warning is somehow invalidated or not complete unless and until the notice is given. Having regard to the preceding sub-sections, if that were Parliament's intention, clearer words would have been used to link the notice to the record of wording. The two are however clearly and deliberately separated and distinct.

[65] It follows in our view that the phrase "record of warning" is only capable of being interpreted as a record of the fact that an oral warning has been given. We would

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[31] See also the observations made by this Court in *Do v Police*, above n 21, at [14].

also add that contrary to the view taken in *R v Allen*, such an interpretation does not render the requirement of a written notice "otiose".[32] Or to put it another way, in order to give meaning to the statutory duty, it is not necessary for the oral warning to be vitiated. The very fact of the existence of a duty is in itself meaningful and gives expression to Parliament's intention the offender be given information and the importance it placed on that.

[66] We acknowledge that during the passage of the legislation in the House, Hansard records parliamentarians including the then Minister of Police and Corrections as explaining that offenders will be warned both verbally and in writing.[33] However any significance that might be attached to those statements is far outweighed by the text and other aspects of the legislative history.

[67] The three strikes regime was inserted into the Sentencing Act by the Sentencing and Parole Reform Act 2010. When the Bill that was to become the Sentencing and Parole Reform Act was first introduced, it did not contain any provision requiring the offender to be served with a written notice. The inclusion of such a requirement was recommended at the select committee stage in response, it appears, to advice provided to it in the relevant Departmental Report.[34] The Report was provided by the New Zealand Police.[35]

[68] The Report noted that when a court makes an order or decision relating to an offender, it is usual practice to provide the offender with something in writing outlining what has just happened. It went on to say that at present the Bill did not require anything in writing to be provided to the offender in relation to a first or final recorded warning, although it was always intended this would happen operationally.[36]

[69] Officials recommended that a provision be inserted into the Bill requiring an offender who receives a first or final warning to be given a written notice to this effect, observing that "[a]s the notice is essentially a courtesy, failure to provide

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32 *R v Allen*, above n 21, at [25].
33 (25 May 2010) 663 NZPD 11227.
34 Sentencing and Parole Reform Bill 2009 (17-2) (select committee report) at 5.
35 New Zealand Police *Sentencing and Parole Reform Bill: Departmental Report* (12 March 2010).
36 At [305].

the notice should not invalidate the warning".[37] The Report further stated that the notice would either be given to the offender before he or she leaves the court or at the prison in the event of a custodial sentence or posted to their home.[38]

[70] The Select Committee recommendation was for an amendment "to require a Court to give an offender a written notice of warning setting out the substance of the warning that has been issued in the Court".[39]

[71] The Bill was then amended by including a requirement that at the same time as the court issued the oral warning, it must also provide a written notice setting out the substance of the warning:[40]

> "**86B Stage-1 offence: offender given first warning**
>
> "(1) When a court, on any occasion, convicts an offender of 1 or more stage-1 offences, the court must—
>
> "(a) warn the offender of the consequences if the offender is convicted of any serious violent offence committed after that warning (whether or not that further serious violent offence is different in kind from any stage-1 offence for which the offender is being convicted); and
>
> "(b) give the offender a written notice that sets out the substance of the warning given to the offender under **paragraph (a)**; and
>
> "(c) record, in relation to each stage-1 offence, that the offender has been warned in accordance with **paragraph (a)**.
>
> "(2) It is not necessary for a Judge to use a particular form of words in giving the warning.
>
> "(3) On the entry of a record under **subsection (1)(c)**, the offender has, in relation to each stage-1 offence (for which a record is entered), a record of first warning.
>
> …
>
> "**86C Stage-2 offence other than murder: offender given final warning and must serve full term of imprisonment**
>
> "(1) When, on any occasion, a court convicts an offender of 1 or more stage-2 offences other than murder, the court must—

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37 At [306].
38 At [307].
39 Select committee report, above n 34, at 5.
40 Sentencing and Parole Reform Bill 2009 (17-2), cl 5(1).

"(a) warn the offender of the consequences if the offender is convicted of any serious violent offence committed after that warning (whether or not that further serious violent offence is different in kind from any stage-2 offence for which the offender is being convicted); and

"(b) give the offender a written notice that sets out the substance of the warning given to the offender under **paragraph (a)**; and

"(c) record, in relation to each stage-2 offence, that the offender has been warned in accordance with **paragraph (a)**.

"(2) It is not necessary for a Judge to use a particular form of words in giving the warning.

"(3) On the entry of a record under **subsection (1)(c)**, the offender has, in relation to each stage-2 offence for which a record is entered, a record of final warning.

…

[72] Had this remained the ordering of the sub-sections, then the argument for Mr Muraahi might have been stronger although even then the record of first or final warning remained defined as a record kept by the court of the fact an oral warning had been given.

[73] However as the result of a Supplementary Order Paper, the requirement to provide a written notice was removed from the list of things that must be done on an offender's conviction for a stage-1 or stage-2 offence. There was no longer to be any specified time for service of the notice and it was relegated to the last sub-section as it appears now in the Sentencing Act, thereby further underscoring that the notice is not part of the warning nor is it part of the recording of the warning.[41]

[74] The explanatory note to the supplementary order paper relevantly states that it "separates the written warning given to offenders from the oral warning administered by a Judge to permit forms for written warnings to be prescribed by regulations".[42] Significantly, the form that was ultimately prescribed is not entitled "Notice of Warning" but rather "Notice of consequences of first warning". That is to say, it is a notice dealing with something that has already been effected or completed.

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41 See Sentencing and Parole Reform Bill 2009 (17-3).

42 Supplementary Order Paper 2010 (123) Sentencing and Parole Reform Bill 2009 (17–3) (explanatory note) at 3.

[75] In *R v Allen*, Judge Harvey relied on the fact that in the Child Protection (Child Sex Offender Government Agency Registration) Act 2016 (the Child Protection Act), there is a provision which expressly states that failure to give a mandatory explanation to an offender does not affect the validity of the sentence or order or the offender's reporting obligations. The Judge reasoned that if Parliament had intended the same result in relation to a failure to give the required notice under the Sentencing and Parole Reform Act, it would have been an easy matter for it to have said so. The absence of a similar provision in the Sentencing and Parole Reform Act was the Judge considered significant.[43]

[76] However, this reasoning overlooks that the provision under the Child Protection Act is concerned with the very different context of a mandatory explanation that is required to be given by the Judge in open court when sentencing. In those circumstances, if Parliament did not intend the failure to vitiate the sentence, it was obviously necessary for it to say so. Further, the same section contains a post sentence notice requirement under which the Registrar of the court must give written notice to the offender of their reporting obligations. The notice requirement is mandatory as in the legislation at issue in this case.[44] And like the post sentence notice requirement in this case, there is no express provision about the consequences of failing to serve the notice.

[77] It follows that in our view, if anything, the provisions in the Child Protection Act support the Crown's interpretation rather than the other way around.

[78] For all these reasons, we conclude that both parts of the question of law must be answered in the affirmative.

[79] That then gives rise to the question of whether Mr Muraahi should now be re-sentenced. The Crown's application for leave to appeal asked for that to be done in the event this Court considered the Judge's sentencing decision was erroneous. However, at the hearing, Ms Brook indicated this was not the Crown's primary focus or purpose in bringing the appeal. Further, as she pointed out, the 13-year sentence

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43 *R v Allen*, above n 21, at [26]–[29].

44 Child Protection (Child Sex Offender Government Agency Registration) Act 2016, s 12.

that was imposed on Mr Muraahi was only one year less than the maximum penalty prescribed for aggravated robbery anyway. The Crown did not therefore strongly advocate for a re-sentencing.

[80] Under s 180 of the Criminal Procedure Act, we have a discretion whether or not to correct an erroneous decision by imposing a new sentence. In all the circumstances, and in light of the position taken by the Crown, we have decided not to exercise that power.

Outcome

[81] The application for leave to appeal on a question of law under s 296 of the Criminal Procedure Act is granted.

[82] We answer the questions of law submitted for determination as follows:

> (1) Does the giving of a warning under s 86B or s 86C of the Sentencing Act 2002 require only an oral warning which is then duly recorded?
>
> Answer: Yes
>
> (2) If so was the Judge's decision to treat Mr Muraahi as a stage-1 offender under s 86B of the Sentencing Act 2002 made in error?
>
> Answer: Yes

[83] We decline to order a re-sentencing of the respondent.

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