NOTE: PUBLICATION OF NAMES, ADDRESSES, OCCUPATIONS OR IDENTIFYING PARTICULARS OF COMPLAINANTS PROHIBITED BY S 203 OF THE CRIMINAL PROCEDURE ACT 2011. SEE http://www.legislation.govt.nz/act/public/2011/0081/latest/DLM3360350.html

NOTE: PUBLICATION OF NAMES, ADDRESSES, OCCUPATIONS OR IDENTIFYING PARTICULARS OF ANY PERSON UNDER THE AGE OF 18 YEARS WHO IS A COMPLAINANT OR WHO APPEARED AS A WITNESS PROHIBITED BY S 204 OF THE CRIMINAL PROCEDURE ACT 2011. SEE http://www.legislation.govt.nz/act/public/2011/0081/latest/DLM3360352.html

NOTE: PUBLICATION OF DETAILS OF THE PREVIOUS CONVICTIONS OF THE APPELLANT IN SC 102/2025 PROHIBITED BY S 199A OF THE CRIMINAL PROCEDURE ACT 2011. SEE http://legislation.govt.nz/act/public/2011/0081/latest/LMS409626.html

IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI O AOTEAROA

SC 98/2025
[2026] NZSC 78

BETWEEN	F (SC 98/2025) Appellant
AND	THE KING Respondent

SC 102/2025

BETWEEN	N (SC 102/2025) Appellant
AND	THE KING Respondent

Hearing:	22 April 2026
Court:	Ellen France, Williams, Kós, Miller and Cooke JJ
Counsel:	R E Webby and S J Taylor-Cyphers for Appellant in SC 98/2025 J N Olsen and O W L Troon for Appellant in SC 102/2025 J M Pridgeon, C A Robertson and L J Sullivan for Respondent
Judgment:	11 June 2026

JUDGMENT OF THE COURT

A The appeals are allowed.

B The proceedings are remitted to the District Court for resentencing.

C Pursuant to s 57(1)(b) of the Bail Act 2000, F is granted bail on the terms currently applicable. Any application for variation to bail is to be addressed by the District Court.

D Pursuant to s 57(1)(c) of the Bail Act, N is remanded in custody. The question of bail pending resentencing is to be addressed by the District Court.

REASONS

ELLEN FRANCE, WILLIAMS, KÓS AND COOKE JJ
(Given by Williams J)

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Introduction

[1] These sentence appeals follow this Court's recent decision in *G (SC 130/2024) v R*, which changed the sentencing methodology for young offenders who have aged out of the youth justice system by the time they are charged.[1] *G* held that in the case of aged-out offenders,[2] the court must first take into account the likely outcome had the offender been dealt with under the Oranga Tamariki Act 1989 (OTA), before passing sentence under the Sentencing Act 2002. This was a significant change for a narrow group of offenders. The majority summarised its reasons in the following terms:[3]

> [9] In summary, the reasons for our approach are these. First, the gravity of offending and the culpability of an offender (assessed at stage one of the normal sentencing methodology) does not increase with the passage of time, and therefore with the aging out of a young offender. Second, and in light of the foregoing consideration, the fundamental importance of consistency in sentencing requires the same judicial response to offending young persons, regardless of whether they are charged before or after they have aged out. Third, tariff consistency in sentencing requires reference to the likely sentence had the offender been sentenced at the time of the offence. Fourth, the Sentencing Act, correctly construed, does not require otherwise—indeed, it provides processes that approximate those in the OTA in function. Fifth, taking any other approach would place New Zealand peculiarly out of step with cognate jurisdictions such as England and Wales, Canada and Australia. In order to properly address these matters, we set out the correct approach at the end of these reasons.

[2] The appellants, F and N, are aged-out offenders whose sentence appeals were decided by the Court of Appeal before the judgment in *G* was delivered. As a consequence, that Court did not take into account what the likely outcome would have been had F and N been sentenced as young people under the OTA. The appellants argue and the Crown accepts that the appeals must therefore be allowed.

[3] Two additional matters were raised for consideration by this Court. The first was whether the appropriate course now is to remit both proceedings to the District Court for resentencing or whether that exercise should be undertaken in

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1 *G (SC 130/2024) v R* [2026] NZSC 19.

2 An "aged-out offender" is someone who offends before turning 18 but is not charged until they are 19 or older. The Oranga Tamariki Act 1989 provides that such a person is not required to be brought before the Youth Court: at [1]; and see Oranga Tamariki Act, s 2(2)(d).

3 Per Winkelmann CJ, Glazebrook, Williams and Kós JJ (footnote omitted).

this Court. The appellants and the Crown preferred remittal to the District Court. We agree.

[4] The second matter was whether further general guidance on sentencing methodology is required to supplement or clarify that provided in *G*. The Crown argued that this is needed. In oral submissions, F supported that to an extent. N generally did not in supplementary written submissions filed in reply. We take the view that supplementary guidance from this Court is generally unnecessary, save for the brief comments of a substantive nature we will make below on three matters.

F's offending

[5] F was found guilty of two representative charges of rape committed over a two-year period between 2014 and 2016.[4] He was aged between 15 and 16 years old at the time and was 22 when charged.[5] The victim is related to F. At the time of the offending, she was aged between seven and eight.

[6] In the District Court, Judge Cameron found for the purpose of sentencing that F had raped the victim five to 10 times over the course of the two years.[6] Reflecting the scale of that offending, the vulnerability of the victim, and the harm she suffered, the Judge located the offending within band two of *R v AM (CA27/2009)* (between seven and 13 years' imprisonment).[7] The Judge noted that premeditation and breach of trust were also present to a limited degree.[8] A starting point of eight years' imprisonment was adopted.[9] He then applied a 30 per cent discount for youth but rejected the submission that a further discount for good character should be given.[10] The end sentence was therefore five years and seven months' imprisonment.[11]

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4 *R v [F]* [2025] NZDC 2403 (Judge Cameron) at [4]. F's name is anonymised in this judgment in line with the Court of Appeal's approach: *F (CA126/2025) v R* [2025] NZCA 385 (Collins, Jagose and Gault JJ) at [1], n 1 citing *H v R* [2019] NZSC 69, [2019] 1 NZLR 675 at [54]–[58].

5 At sentencing, Judge Cameron made a finding that, "in all probability", the offending occurred while the defendant was 15 and 16 years old: see *R v [F]*, above n 4, at [10].

6 At [7].

7 At [22] citing *R v AM (CA27/2009)* [2010] NZCA 114, [2010] 2 NZLR 750 at [90(b)].

8 At [17] and [21].

9 At [25].

10 At [28].

11 At [29].

[7] On appeal, the Court of Appeal upheld that sentence.[12] The Court rejected F's submission that the *AM* guideline bands were inapplicable to youth offenders and that he should have received a much lower starting point.[13] The Court applied the approach taken in sentencing aged-out offenders prior to *G*, which was to treat youth as a matter addressed only at stage two of the sentencing methodology in *R v Taueki* in the usual way.[14] The Court also rejected F's submission that a further discount should have been given for good character.[15]

N's offending

[8] N was found guilty of one charge of rape committed when he was either 15 or 16.[16] He was 19 when charged. The victim of this offending, X, was about 18 at the time of the offending. N also faced multiple sexual offending charges involving another victim, Y. She was aged between 14 and 15 at the time. N was between 18 and 19 years old by then. In relation to that adult offending, N pleaded guilty just before trial to two representative charges of sexual conduct with a young person.[17] At trial he was either acquitted, or the jury was unable to agree on the verdict, in relation to the remaining charges. They comprised four sexual violation charges and one strangulation charge.[18]

[9] It was when X became aware of the offending against Y that she decided to come forward in relation to N's much earlier offending against her. This is why N had aged out of the youth justice system by the time he was charged with the earlier offending.

[10] In the District Court, Judge Cocurullo treated the rape of X as the lead offence.[19] Applying *AM*, the Judge situated the offending within band one (six to

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12 *F (CA126/2025) v R*, above n 4.
13 At [15]–[19].
14 *R v Taueki* [2005] 3 NZLR 372 (CA).
15 *F (CA126/2025) v R*, above n 4, at [22].
16 *R v [N]* [2024] NZDC 22796 (Judge Cocurullo) at [4]. N's name is anonymised in this judgment because it is suppressed pursuant to s 199A of the Criminal Procedure Act 2011.
17 At [5].
18 At [6], [26] and [38]. The jury was hung on its decision as to the rape charge in relation to Y, and found N not guilty of the other charges in relation to Y.
19 At [7].

eight years' imprisonment), and adopted a six-year starting point.[20] He identified breach of trust and premeditation as aggravating features.[21] He then added an 18-month uplift for the offending against Y before applying discounts totalling 45 per cent for youth, personal factors and the late guilty pleas in relation to Y.[22] This produced an overall end sentence of four years and one month's imprisonment.[23]

[11] N appealed against both conviction and sentence. In the Court of Appeal, his conviction appeal was dismissed but the sentence appeal was allowed.[24] As to the sentence appeal, the Court held that the Judge was wrong to treat breach of trust and premeditation as aggravating features of the offending against X.[25] Although N and X were in a relationship at the time, he had not assumed a position of responsibility in relation to her; and while his behaviour was selfish and persistent, the offending was spontaneous rather than premeditated.[26] A starting point below band one of *AM* was therefore appropriate as the offending was less serious than the lower band one examples given in *AM*.[27] A starting point of five years and six months' imprisonment was adopted, to which an 18-month uplift for the offending against Y was added.[28]

[12] The Court also held the discounts for youth and other personal background factors were too low.[29] The Court set a global discount of 45 per cent for youth and background, before deducting a further five per cent for the late guilty pleas.[30] Applying those discounts, the Court imposed an end sentence of three years and six months' imprisonment, reducing the original sentence by seven months.[31]

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20 At [20].
21 At [13]–[14].
22 At [23] and [27]–[35].
23 At [36].
24 *[N] v R* [2025] NZCA 452 (Campbell, Venning and Eaton JJ) [*[N] v R* (CA)]. Leave to appeal to this Court against the Court of Appeal's decision on N's conviction was dismissed: *[N] v R* [2025] NZSC 202 (Ellen France, Williams and Kós JJ).
25 *[N] v R* (CA), above n 24, at [78].
26 At [80]–[81].
27 At [87].
28 At [96].
29 At [105] and [111].
30 At [111] and [115].
31 At [116].

Submissions

F's submissions

[13] F submits that, in light of *G*, his appeal should be allowed and the matter remitted to the District Court for resentencing in preference to this Court undertaking that exercise. It is submitted that remittal to the District Court will allow F's rehabilitative needs to be addressed through programmatic interventions and the outcome of those interventions to be taken into account at resentencing.

[14] It is submitted that had *G* been applied, a community-based sentence was likely despite the seriousness of the offending. That is because in F's case there is no subsequent long-standing pattern of similar offending suggesting the presence of a resilient trait. Sentencing purposes such as deterrence, denunciation, or community safety do not, therefore, require a departure from the likely OTA outcome. Further, as F had no prior criminal history, he was unlikely to have met the threshold for transfer to the District Court under s 283(o). It is submitted that the likely disposition under the OTA would have been a s 282 or s 283(a) discharge following completion of a plan recommended by a family group conference (FGC). It is submitted therefore that F should have been accorded the opportunity to achieve an equivalent outcome through the sentencing process.

N's submissions

[15] For the reasons traversed by F, N also asks that his appeal be allowed and the matter remitted to the District Court for resentencing. His submissions contend that, if N's offending against X had been dealt with in the Youth Court, the likely outcome would have been discharge under s 282 or s 283(a) subject to successful completion of any steps required under the FGC plan. Emphasis is placed on the causative background factors in relation to N referred to by the Court of Appeal.[32]

[16] For the two charges involving Y, it is submitted that the appropriate starting point would be around three to three-and-a-half years' imprisonment, with substantial reductions for youth, personal background, and the guilty plea. This, it is submitted,

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[32] At [110].

would have produced a nominal end sentence of about 14-and-a-half to 19 months' imprisonment. N submits that, if sentenced on those charges alone, he would have received a non-custodial sentence. Even if he had received a custodial sentence, the time he has already spent in custody exceeds what would have been imposed.

Respondent's submissions in both appeals

[17] The Crown submits that F and N were sentenced correctly under the law as it stood at the time, but accepts *G* changed the methodology for sentencing aged-out offenders. The new approach must now be applied to both appeals and accordingly the appeals must be allowed. The Crown agrees with the appellants that they should be remitted to the District Court for resentencing. The Crown acknowledges that in the District Court, ss 25–27 of the Sentencing Act can be used to allow rehabilitative and accountability interventions to be pursued and updated reports obtained for the Court before resentencing. It is also submitted that the District Court is generally better placed to assess what the Youth Court outcome would likely have been once the result of these processes is known. The Crown does not, however, concede that the current sentences were necessarily manifestly excessive. Rather, the Crown submits, that assessment will depend on the information gathered for the purpose of resentencing.

[18] Applying *G* to F's appeal, the Crown says the current record does not show that he would have been a suitable candidate for a discharge in the Youth Court. The Crown says F should also be assumed to have denied the offending in the Youth Court, and that on the present information, there is no certainty he would have engaged constructively with an FGC process or treatment. The Crown says higher-level Youth Court responses, or even transfer to the District Court under s 283(o), were realistic possibilities given the seriousness and duration of the offending, the age of the victim, the absence of accountability, and the limited time available in the Youth Court for appropriate intervention before F would have aged out.

[19] Applying *G* to N's appeal, the Crown likewise says the only available assumption is that in the Youth Court, N would also have denied raping X, and the charge would have been proved at trial in that Court. The Crown argues the record

does not permit a confident conclusion that N would have received a discharge or other lesser Youth Court outcome, because he consistently denied the offending, showed minimal remorse, insight, or willingness to engage in rehabilitation and has only very recently and equivocally indicated willingness to undertake treatment.

[20] At a more general level, the Crown submits that sentencing aged-out offenders according to the principles in *G* raises complex methodological issues. The Crown invites this Court to provide further guidance on a number of questions, some of which are relevant to these appeals, but most of which anticipate problems that may arise down the track in other cases relating to aged-out offenders. These questions include how to ascertain the applicable version of the OTA for sentencing purposes; how to assess whether the offender would have denied the charge in the Youth Court; how FGCs and related interventions should be approximated in the general courts; how courts should sentence aged-out and adult offending when combined in a single sentencing exercise; what "community-based" sentence was intended to embrace as that term is used in *G*; and whether *G* should have limited retrospective effect, assuming it to be a guideline judgment.

Appellants' replies

[21] For F, Ms Webby supports the Crown's request for further clarification on a more general front, to assist with navigating the additional complexity in sentencing practice occasioned by the decision in *G*, and to avoid inconsistency between different courts in its application. For N, Mr Olsen argues that it is largely unnecessary for this Court to address the additional matters raised by the Crown either because further clarification is not required at all, or because they do not arise in these appeals. He accepts however that two matters raised by the Crown might warrant further clarification. The first is the correct approach to selecting the applicable version of the OTA and the second is whether *G* was intended to have limited retrospective effect.

Analysis

The appeals must be allowed and the proceedings remitted to the District Court for resentencing

[22] It is unnecessary to rehearse in any detail the reasons of the majority of this Court in *G*. It is sufficient to reiterate that it introduced an "adjustment to the *Taueki* framework" to ensure that in relation to aged-out offenders like F and N, consideration is given at the start of the sentencing evaluation to the likely disposition under the OTA.[33] For obvious reasons, that was not done in the sentencings of F and N. Their appeals must therefore be allowed.[34]

[23] As foreshadowed, and for the practical reasons advanced by the parties, we accept that both proceedings should be remitted to the District Court for the required interventions and assessments to be completed before the appellants are resentenced in that Court. The District Court is obviously better placed to monitor offender progress over the course of the interventions, and to undertake the required sentencing assessments when they are concluded.

[24] Beyond that, it is both unnecessary and inappropriate to address the submissions of the appellants and respondent on inferences about the attitudes the appellants will bring to resentencing.

The request for further guidance

[25] To place in context the Crown's request for further guidance on the application of *G* to future cases, it is useful to start with the summary of the new approach to sentencing aged-out offenders set out in *G*:[35]

> [87] To sum up, in aging-out cases, the likely outcome under the OTA must be considered as part of the normal sentencing methodology.
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> [88] If a community-based response would have been reasonably likely under the OTA, then the court must normally apply a consistent outcome in

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33 *G (SC 130/2024) v R*, above n 1, at [74] per Winkelmann CJ, Glazebrook, Williams and Kós JJ.

34 We note that F and N's appeals were already pending at the time *G (SC 130/2024) v R* was decided. This means they would have succeeded even if *G* was applied with the limited retrospective effect of a guideline judgment (see further [44]–[45] below).

35 Per Winkelmann CJ, Glazebrook, Williams and Kós JJ.

> setting the starting point at stage one of the normal sentencing methodology under the Sentencing Act.
>
> [89] As noted, ss 25–27 of the Sentencing Act can if necessary do some of the facilitative work of FGCs under the OTA in this respect in terms of encouraging offender responsibility and accountability.
>
> [90] It is acknowledged that an outcome absolutely identical to that likely under the OTA may not be possible under the Sentencing Act or even appropriate given the offender's maturity when sentenced, but imposing an identical outcome is not the point. Rather the key objective is to achieve substantively consistent justice despite the changed circumstances of the offender.
>
> [91] The question is therefore whether a community-based sentence is still appropriate to the circumstances of this (now adult) offender. If yes, then, within the range of options available to the court under the Sentencing Act, from discharge without conviction to imposing the maximum period of home detention with conditions, an appropriate sentence must be arrived at that reflects relevant sentencing purposes, principles and factors.

[26] Thus, as part of the process of ascertaining what the likely OTA outcome would have been, an aged-out offender may seek to access rehabilitative and accountability interventions that approximate those that would have been available in the youth justice system. The court can use mechanisms such as those in s 25 of the Sentencing Act to facilitate this. For example, s 25 allows the court to adjourn sentencing for further inquiry into the appropriate method of disposition,[36] or to allow the offender to complete rehabilitation or restorative justice steps.[37]

[27] On the other hand, the majority acknowledged that there will be some cases in which a community-based disposition cannot be adopted:[38]

> [84] … the likely outcome under the OTA may not, in the event, produce a community sentence. For example, the seriousness of the index offending or the culpability of the offender may mean discharge or a community-based sentence was never going to be appropriate even at the time of the offending. Sections 275 and 283(o) provide potential examples of this class of exception.
>
> [85] A community-based sentence may also not be appropriate where the offending has become an established pattern persisting well into adulthood that may suggest rehabilitation is too unlikely a prospect to be pursued through such a sentence. In other words, a longstanding pattern of similar offending may suggest that the earlier offending was not a passing phase typical of young

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36 Section 25(1)(a).

37 Section 25(1)(b)–(e). See also s 24A.

38 *G (SC 130/2024) v R*, above n 1, per Winkelmann CJ, Glazebrook, Williams and Kós JJ (footnotes omitted and emphasis in original).

> offenders, but a more resilient trait. If so, general deterrence, denunciation and community safety may need to carry greater weight in sentencing.
>
> [86] Where the offender is also being sentenced, as in this case, for offending committed as an adult, the sentence for the adult offending would proceed in accordance with the relevant guideline judgment, which may mean a custodial response. … The sentencing judge will then need to consider the effect (if any) of the non-adult offending and the response that would have been reached under the OTA in setting the final sentencing outcome. Because youth-related circumstances and considerations will already have shaped the OTA response for the aged-out offending, only the *adult* offending will be likely to attract a further youth discount where the facts warrant it.

Overlap between *G* and the *Taueki* sentencing methodology

[28] The Crown submits that a requirement to have regard to the OTA outcome when setting a sentencing starting point "sits uncomfortably with the two-stage *Taueki* methodology" and further clarification as to how this should be approached would assist. For N, Mr Olsen submits that no further clarification is required on this point.

[29] As we said, *G* introduces an "adjustment" to *Taueki* in relation to aged-out offenders:[39] if a community-based outcome would have been reasonably likely under the OTA, *then that will be the starting point* for the purposes of the *Taueki* sentencing methodology.[40] However if, for reasons related (for example) to the gravity of the offending or the offender's culpability, that outcome would have been unlikely under the OTA, then a community-based outcome will not be the starting point.[41] Further, subsequent events (considered at stage two) may suggest that while a community-based outcome was likely under the OTA, it is no longer appropriate.[42]

Process and inference

[30] The Crown submits the general approach to aged-out offenders must be that where an offender denies the offending when charged, enters a not guilty plea and elects trial by jury, the court must infer that had the aged-out offender been charged at the time of their offending, they would also have denied the offending in the

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39 At [74] and [81] per Winkelmann CJ, Glazebrook, Williams and Kós JJ.
40 At [88] per Winkelmann CJ, Glazebrook, Williams and Kós JJ.
41 At [84] per Winkelmann CJ, Glazebrook, Williams and Kós JJ.
42 At [85] per Winkelmann CJ, Glazebrook, Williams and Kós JJ.

Youth Court and proceeded to trial. The Crown seeks confirmation that this approach is appropriate under *G*. Mr Olsen submits it is not consistent with *G*.

[31] It is an important feature of the OTA that offenders are given an opportunity to be brought to acceptance of responsibility even when they start with denial. If successful, this encourages the offender to change, which improves the prospects of rehabilitation and reduces the risk of reoffending, and can bring a more meaningful sense of closure for victims. In the adult system, that opportunity may be taken by an aged-out defendant prior to plea (for example via the sentence indication procedure in s 61 of the Criminal Procedure Act 2011). Applying s 25 of the Sentencing Act, it may also be taken by an aged-out offender after guilt has been established. Either way, the outcome will be highly relevant to sentence. If the offender chooses not to avail themselves of the opportunity to accept responsibility, that too will be relevant. This means that by the time of sentencing, the court will usually know, without resort to inference, whether the offender has come to accept responsibility.

[32] It follows that where aged-out offenders entered not guilty pleas before *G*, this in expectation of a sentence based on *AM*, it cannot automatically be inferred that they would have done so had *G* applied instead. We did not understand the Crown to suggest otherwise, given its acceptance that F and N should have an opportunity to obtain the benefit of appropriate rehabilitative and accountability interventions.

[33] There will be a further category of aged-out offenders who, unlike F and N, get the opportunity, post-*G*, to plead guilty and accept an OTA-consistent sentence, but nonetheless choose to instead go to trial and are found guilty. As we explained in *G*, had the relevant charges in that case been found to be "proved" at trial in the Youth Court before G aged out, further youth justice interventions would have followed before final disposition.[43] This additional opportunity reflects the fact that immaturity can be an important factor in an offender's refusal to accept responsibility. The legislature considered that even after a trial, more can still be done to bring young offenders to acceptance. The question for us is whether aged-out offenders should also get that second chance.

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[43] At [43] per Winkelmann CJ, Glazebrook, Williams and Kós JJ.

[34] The Crown is right that acceptance of responsibility is central to community-based sentencing under the OTA, and it will also be central to analogous sentencing for aged-out offenders under the Sentencing Act. The usual and best evidence of acceptance will obviously be the entry of a guilty plea. But we do not exclude the possibility that a court-directed, post-trial intervention aimed at bringing an offender to accepting responsibility could result in a community-based sentence. The case would, however, need to be a clear one. For example, if at the time of sentence, the aged-out offender is still an emerging adult with the maturity deficits described in *G* that affect an offender's ability to accept responsibility, and if the outcome of the post-trial intervention is positive, that may provide sufficient justification.[44] On the other hand, where offending is historical and the offender is a mature adult at the time of trial, the case for a second chance is weak without more.

[35] We acknowledge that offender engagement with community-based sexual violence programmes is resource intensive. The associated judicial monitoring of offender progress also expends the limited time and resources of judges, counsel, officials and professional experts. Care must be taken to ensure that this time and resource is not wasted and that bringing the prosecution of aged-out defendants to final resolution is not unduly delayed. The required steps must be genuinely pursued by the offender, and all involved must proceed with expedition in the interests of justice for both offenders and victims.

[36] It is unnecessary for this Court to go beyond these observations at this stage. It is far better for trial and sentencing courts to work through the practical steps required to give effect to *G* themselves, and to solve any issues that may arise in the circumstances of actual cases. Burdening that process of adaptation with a discourse from this Court on issues that do not arise in these appeals is unlikely to assist.

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[44] At [38(a)] per Winkelmann CJ, Glazebrook, Williams and Kós JJ; and see for example: *Dickey v R* [2023] NZCA 2, [2023] 2 NZLR 405 at [76]–[86] citing *Churchward v R* [2011] NZCA 531, (2011) 25 CRNZ 446 at [50]–[55] and [77]–[91]; *H v R*, above n 4, at [33]; and *M (SC 13/2013) v R* [2024] NZSC 29, [2024] 1 NZLR 83 at [61].

Combined sentencing for aged-out and adult offending

[37] The Crown asks this Court to confirm that where an aged-out offender is to be sentenced for adult offences likely to result in a sentence of imprisonment alongside aged-out offending, an uplift on the adult sentence for the aged-out offending will be appropriate as a matter of principle. Mr Olsen submits that a generalised approach to combined sentencing is not appropriate because of the variety of circumstances in which aged-out offending may arise (including the varying effects on youth sentencing of different statutory controls).

[38] This matter does not arise directly in these appeals and will be addressed in the forthcoming judgment of this Court in *Mulford v R*.[45] It should however be noted that in combined sentencing scenarios, the court must select a lead offence. As Miller J held in *G*, the selection must take into account that offending as a young person may involve less overall gravity than adult offending, even if the aged-out offence carries a higher maximum penalty than the adult offence.[46]

Community-based sentence

[39] The majority in *G* made a number of references to the likelihood of community-based sentences for aged-out offenders and implicitly included within that term sentences such as home detention. In its submissions, the Crown refers to the (narrower) definition of community-based sentence in s 44 of the Sentencing Act and suggests this is at odds with the broader usage in *G*. That is true, but beside the point. In *G*, the majority said:[47]

> [91] The question is therefore whether a community-based sentence is still appropriate to the circumstances of this (now adult) offender. If yes, then, within the range of options available to the court under the Sentencing Act, from discharge without conviction to imposing the maximum period of home detention with conditions, an appropriate sentence must be arrived at that reflects relevant sentencing purposes, principles and factors.

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45 See *Mulford v R* [2025] NZSC 194.
46 *G (SC 130/2024) v R*, above n 1, at [150].
47 Per Winkelmann CJ, Glazebrook, Williams and Kós JJ.

Applicable version of the OTA

[40] The Crown also sought guidance on the correct approach to ascertaining which version of the OTA should apply in aged-out sentencing. This too is an issue that does not arise in these appeals, though we agree it is potentially of wider importance. This is because the upper age limit under the OTA was increased from 16 to 17 years from 1 July 2019.[48] Should the version of the OTA at the time of offending (including its age limit) apply or, as Mr Olsen argued, does cl 20 of sch 1AA to the OTA control the question?

[41] The effect of cl 20 (which was inserted into the OTA by s 16(4) of the Oranga Tamariki Legislation Act 2019) is that after 1 July 2019, any proceeding brought against a person who was 17 years old at the date of their alleged offence must be "commenced and dealt with" under the OTA as if the upper age limit was 17 at that date. In other words, cl 20 overrides the upper limit of 16 years old as at the date of the offence in the pre-2019 version of the OTA.[49]

[42] It must be noted however that, as cl 20(4) provides, s 2(2)(d) of the OTA was unaffected by the increase from 16 to 17 years. Section 2(2)(d) is the aging-out off-ramp discussed in *G*. It provides that, even if the subject was a young person at the time of the alleged offence, proceedings commenced against them after they turn 19 need not be pursued in the Youth Court.[50] Strictly speaking, although cl 20 retrospectively increased the jurisdiction of the Youth Court, it did not change the aging-out line. This is the basis upon which, in *RL v R*, Gordon J recently held that cl 20 did not have the effect of widening the catchment of aged-out cases caught by *G*.[51]

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48 Children, Young Persons, and Their Families (Oranga Tamariki) Legislation Act 2017, ss 2(3) and 7(4).

49 For discussion of the effect of cl 20, see *Kaa v R* [2024] NZCA 172 at [31]. This case related to an application under s 322 of the Oranga Tamariki Act, which allows a Judge to dismiss charges subject to the Oranga Tamariki Act for undue delay between the commission of the alleged offence and the hearing.

50 See sch 1AA cl 20(4); and the discussion in *G (SC 130/2024) v R*, above n 1, at [46] per Winkelmann CJ, Glazebrook, Williams and Kós JJ.

51 *RL v R* [2026] NZHC 908 at [54]. In that case, the offender submitted that at the time of the offending in 2001, he was either 17 or 18, and under the version of the Oranga Tamariki Act then in force, fell outside the definition of "young person". As the proceedings were commenced after 1 July 2019, however, the offender argued that the new definition of "young person" applied, and he had "aged out": at [48].

[43] We do not consider that it is appropriate to say more in the context of these appeals where the issue does not arise and we make no comment on the correctness of the approach taken in *RL*. Given the potential complexities involved in the construction of cl 20, any further consideration of the question by this Court should be undertaken against a factual background in which the issue is material and with the benefit of prior consideration in the Court of Appeal.

Retrospective effect of *G*

[44] Although not raised directly in written submissions, the Crown submitted orally that this Court should clarify that *G* was not intended to have full retrospective effect in accordance with the declaratory theory of the common law, but should have the more limited retrospective effect customarily applied in guideline judgments.[52]

[45] We reject this submission. *G* is not a guideline judgment and must be applied on its terms for future cases, and in any case where an applicant is able to persuade the court to reopen a sentencing outcome.

Result

[46] The appeals are allowed.

[47] The proceedings are remitted to the District Court for resentencing.

[48] Pursuant to s 57(1)(b) of the Bail Act 2000, F is granted bail on the terms currently applicable.[53] Any application for variation to bail is to be addressed by the District Court.

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[52] See discussion in *Taylor v R* [2018] NZCA 498, [2019] 2 NZLR 38 at [16]–[20] as to the declaratory approach to judgments in the sentencing context, and, in contrast, the discussion in relation to guideline judgments in *Cheung v R* [2021] NZCA 175, [2021] 3 NZLR 259 at [47]–[48].

[53] F was granted bail in *F (SC 98/2025) v R* [2026] NZSC 26 (Ellen France, Williams, Kós, Miller and Cooke JJ). It was then extended by minute: *F (SC 98/2025) v R* SC 98/2025, 22 April 2026. If the bail conditions imposed by this Court have been varied in the District Court, the varied conditions apply.

[49] Pursuant to s 57(1)(c) of the Bail Act, N is remanded in custody. The question of bail pending resentencing is to be addressed by the District Court.[54]

MILLER J

[50] I differed from the majority reasons in *G (SC 130/2024) v R*, but they now state the law.[55] So I agree that the appeals must be allowed and the appellants must be resentenced in the District Court.

[51] I also agree that in the present appeals this Court should resist the Crown's plea for guidance on reconciling *G* with the Sentencing Act 2002. With their knowledge of both the circumstances of the cases before them and the suitability of available sentencing options, trial courts are better equipped to work it out.[56]

[52] It is appropriate, however, to clarify that the two-step methodology in *G* should not be confused with the *R v Taueki* methodology.[57] If this is not made clear at the outset, there is a risk that sentencing courts will go wrong by taking an unduly restrictive approach at the second step.

[53] Under *G* the notional Youth Court outcome replaces the *Taueki* adult starting point for qualifying offenders. The Youth Court outcome is an end sentence, not a starting point. So the second stage cannot be confined to considering whether personal circumstances operate as aggravating or mitigating factors. The question at that stage is whether the notional Youth Court outcome should change. It is better thought of as an evaluative exercise rather than a calculation, and it will produce a wider range of outcomes than is normal in adult sentencing practice. I agree with the majority

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54 N was also granted bail pending appeal in this Court: *N (SC 102/2025) v R* [2026] NZSC 7 (Ellen France, Williams and Kós JJ). Bail was also extended by minute: *N (SC 102/2025) v R* SC 102/2025, 22 April 2026. We record that, pursuant to s 57(2) of the Bail Act 2000, N did not make an application for bail pending resentencing. In the circumstances, to preserve his rights under s 57(2) of the Bail Act, we have remanded him in custody pending an application for bail in the District Court.

55 *G (SC 130/2024) v R* [2026] NZSC 19.

56 See above at [36] per Ellen France, Williams, Kós and Cooke JJ.

57 *R v Taueki* [2005] 3 NZLR 372 (CA). Compare above at [29] per Ellen France, Williams, Kós and Cooke JJ.

reasons that, as in the Youth Court, the offender's willingness to accept responsibility will be highly relevant.[58]

[54] It follows that, having ascertained the Youth Court outcome had the offender been dealt with at the time, the sentencing court should:

(a) consider what has happened between the offending and the sentencing;

(b) assess those developments through the lens of applicable Sentencing Act purposes, principles and factors; and

(c) stand back and decide what sentence is appropriate.

[55] I agree with the majority reasons that there will be cases in which the notional Youth Court outcome is a custodial sentence following transfer to the District Court;[59] in such cases, sentencing in the District Court may be relatively straightforward. There will also be cases in which subsequent offending determines the sentence type and perhaps duration.

[56] Where the notional Youth Court outcome remains appropriate, the sentencing court may need to adapt it to available options under the Sentencing Act. For example, a defendant who would have received a discharge under s 282(1) or s 283(a) of the Oranga Tamariki Act 1989 will need to seek a discharge without conviction under s 106 of the Sentencing Act, but having regard to the starting point it may be somewhat easier in practice to satisfy the s 107 criterion.

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58 See above at [31] per Ellen France, Williams, Kós and Cooke JJ.
59 See above at [29] per Ellen France, Williams, Kós and Cooke JJ.