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IN THE SUPREME COURT OF NEW ZEALAND
I TE KŌTI MANA NUI

SC 83/2019
[2020] NZSC Trans 14

DERMOT GREGORY NOTTINGHAM

Appellant

v

THE QUEEN

Respondent

Hearing: 28 May 2020

Coram: William Young J
Glazebrook J
O'Regan J
Ellen France J
Williams J

Appearances: Appellant appears in Person
C A Brook for the Respondent

CRIMINAL APPEAL

WILLIAM YOUNG J:
Mr Nottingham, you're appearing?

MR NOTTINGHAM:
Yes Sir, and Mr McKinney is a person to help with some of the documents.

WILLIAM YOUNG J:
Thank you. Ms Brook?

MS BROOK:
Tēnā koutou, e ngā Kaiwhakawā, ko Ms Brook ahau, e tū nei mō te Karauna.

WILLIAM YOUNG J:
Kia ora Ms Brook. Mr Nottingham?

MR NOTTINGHAM:
Yes Sir?

WILLIAM YOUNG J:
Do you want to make your submissions?

MR NOTTINGHAM:
Yes Sir. Do I…

WILLIAM YOUNG J:
Just go to the podium, yes. Can I just say this in advance. There seem to me to be two issues in the appeal, closely related. One is, does the Court of Appeal have jurisdiction to impose a sentence of 12 months

home detention, given that you'd already served some time on home detention. Secondly, if they did have jurisdiction, was it nonetheless contrary to policy to impose a sentence that had the practical effect of you serving more than 12 months' home detention. So that's what I would like you to address in your submissions.

MR NOTTINGHAM:

Yes Sir. There is the issue of the Crown seeking to have a third effective re-sentencing.

WILLIAM YOUNG J:

I understand that and if we get that far then we may have to hear you some more. But at the moment just park that and just deal with the two issues that I've mentioned.

MR NOTTINGHAM:

Okay Sir.

WILLIAM YOUNG J:

I understand that some of the material that you have put to the Court this morning might be material to that third issue?

MR NOTTINGHAM:

Yes Sir, it directly is.

WILLIAM YOUNG J:

Okay, we'll just deal with the two issues I've mentioned.

MR NOTTINGHAM:

Thank you Sir. I'd like to start that I'm honoured to appear in person in the Supreme Court of New Zealand and I hope that the outcome, whichever way it turns, does the term "supreme" and the $100 million spent on this building justice. "Supreme" means highest in rank or authority and the greatest or best there is, and I imagine that the term when used in relation to the judiciary

means a mixture of both, so I would submit that your position in the judiciary is the greatest or the best there is and due to that initial premise you are the highest in rank and authority. It was a great leap of faith by New Zealand Parliament removing the rights of New Zealanders to enjoy an appeal to the Privy Council. I do hope that when I read your judgment in my immediate future I can comprehend that I have been given a fair hearing and the issues decided on the facts and the law alone. As the Court will be well aware by the content of my application for recall, I was most unhappy and dissatisfied with what occurred at the initial hearing for leave and the initial outcome. I cannot speak the Māori language to introduce myself, and so do not understand what Ms Brook said with introducing herself. I also wish to mention the praise I have for the Corrections Department, as I imagine they do not get a lot, in the manner in which they have handled my health issues with hospitalisations and rehabilitation. I am genuinely indebted to the officers BG and Chandran CC. There are also the community worker officers who have dealt with my inability to work normally at community work. With their assistance I have lost 60 kilograms and am in a much healthier condition.

WILLIAMS J:
Well done.

MR NOTTINGHAM:
The first issue today is the matter of the Crown seeking to have this Court sentence me effectively for a third time – imprisonment.

WILLIAM YOUNG J:
Just leave that.

MR NOTTINGHAM:
I'm going to leave that. Sorry, I just wanted to deal with that and leave that. I'm just going to run through Sir sorry. The second issue I raise is that the sentencing decision should be easy to follow. As an example pre-sentence reports should only be obtained if their contents are taken into account and commented on by the sentencing Court and the appellate Court. It is not

good enough to ignore them as they are part and parcel of the sentencing process. The report in my case suggested community detention and no community work due to ill health. Judge Down ordered the report and then ignored it. The Court of Appeal did the same.

WILLIAM YOUNG J:
Mr Nottingham, that's ship that has sailed, I'm afraid.

MR NOTTINGHAM:
Yes I understand that Sir. I'm just trying to get up to speed with what you wanted me to go to. The Court of Appeal found certain things which I vehemently disagree with, and they sentenced me to a cumulative sentence of a number of months. Then they applied my current sentence that I had served, three and a half months, being doubled for home detention of seven months against that term and came to 24 months. So they alleged there was a sufficient reasoning to uplift. The Court of Appeal then suddenly changed, once it had got rid of the three and a half months as seven months, it's changed its mind and uplifted the concurrent sentences. So you had an uplift int eh cumulative sentencing. Then that was gotten rid of with the seven and a half months, and then there was the uplift in the concurrent sentencing.

In relation to the offence of, or the conviction sorry of breach of name suppression, the Court of Appeal found that I should serve effectively 10 months in prison and five months' home detention. Now I know what the Court is likely to say and that is, well, you got two years, or 12 months in any event for the lead offence. But that isn't the relevance. The relevance really is that the Court made such an error that it sentenced me to nearly double the maximum sentence in relation to that offence, and it did so with the knowledge that a defence witness, Dr Rhys Cullen, had admitted in his evidence that he had been charged by the police and prosecuted by the Crown for the same offence and that his charges were dropped so he faced no penalty.

So I only raise that because it is in relation to where the Court's mind was when they were considering these issues. You could say that was a simple mistake, and it may very well be a simple mistake, but I submit that –

WILLIAM YOUNG J:
What's the paragraph? What's the relevant paragraph in the Court of Appeal judgment?

MR NOTTINGHAM:
I don't think it's in the Court of Appeal judgment, Sir. It's on the actual warrant that was given to the Corrections Department. It had the offences in and the time served.

So you could say that was just a simple error but if a Court is capable of making simple errors then all of the other matters come into what I would call somewhat of disrepute. I would submit that a Court, especially a Court of Appeal, which in a lot of occasions is the last Court that New Zealanders see because we need leave to come to this highest authority and leave is more frequently denied than given and it has to be an important issue of law, so I submit that the standard for the entire judiciary is like the chain is the weakest link to the strength of the chain. It's the competency of the least competent Court and what I am saying on this particular issue, which is not going to be nice to hear for this Court, is that the Court of Appeal had an ulterior motive for sentencing me in the manner that it did which included getting rid of the three and a half months and then sentence me again to the maximum 12-month period. Now when I came to this Court I admit that submissions were somewhat light. I think there was three paragraphs on the issue that we're now arguing, but I intended if I got leave to argue it orally and I would have promoted that more significantly, which is unfortunate.

In relation to the issue of the sentencing to a further 12 month, and this is up to Your Honours, is it likely that the Court wasn't aware of the section involved which says that the maximum you can serve in relation to the same offending is 12 months?

WILLIAM YOUNG J:

It's section 80A, is it? Sorry, it's section 80B.

MR NOTTINGHAM:

B, yes, Sir.

WILLIAM YOUNG J:

It doesn't say "the sentence served". It says "sentence imposed" and the argument against you is that the sentence imposed was 12 months' home detention.

MR NOTTINGHAM:

Well, Sir, the –

WILLIAM YOUNG J:

Now we understand the practical effect would be a sentence of 15 and a half months' home detention which is really the point on which you got leave to appeal.

MR NOTTINGHAM:

Yes, Sir, and I –

WILLIAM YOUNG J:

So the question is – I mean it's not helpful really to say the Court of Appeal has an ulterior motive. The real issue I think is were they able to do it and if they were technically able to do it should they have done it, given what may be the legislative policy that underpins section 80B.

MR NOTTINGHAM:

Well, Sir, I didn't decipher that the sentence imposed – I'll start at the beginning. I believe that the sentence imposed is imposed by the sentencing Court which is the District Court. The sentence is then substituted by the appellate Court, so the term imposed is by the sentencing Court and the term

that is used, or should be used, is substituted, so that would follow that the time would be taken off, that in fact it was –

WILLIAM YOUNG J:
Well if they'd upheld the sentence of the District Court, then the time served would be time served and would count.

MR NOTTINGHAM:
Yes Sir. Yes Sir.

WILLIAM YOUNG J:
I understand so it's a sort of a, the whole thing is paradoxical and it's a bit of a conundrum.

MR NOTTINGHAM:
Well Sir, you can make anything a conundrum if you wish to confuse the issues, but I believe that section 80 that you referred to, B, is very clear and that the maximum term that you can be sentenced to home detention for that series of offending that was imposed by the District Court on appeal would be 12 months, so that any Court looking at the matter would then say, well the maximum we can do, no matter what we do, is 12 months, if home detention is what we want to give this offender, and the Sentencing Act 2002 is quite clear that the sentence should be in the circumstances the least restrictive, which would be home detention. Now I think if you look at the fact that the Court in order to get rid of the seven months already served came up with almost like a suggested or imaginary sentence on a cumulative basis. Now I, all of these convictions related to eh same time and basically related to the same type of offending and that I wasn't given a warning by the police or by anyone else, and I wasn't subject to any notification. It was just we're gonna charge you, we're gonna arrest you and we're gonna take you to trial. So the issue with that is that why come up with a long cumulative sentence in those conditions.

WILLIAM YOUNG J:

Well in a sense, looking for the inner meaning of it all is probably not that helpful. I would hazard a guess that it was to avoid sending you to prison. Now, but whether that's right or wrong doesn't much matter because what we're looking at is could they do what they did. If they could, should they have done it given the legislative policy. Now they are, sorry I gave you the wrong section before, although section 80B is relevant to the primary section 80A.

MR NOTTINGHAM:

80A, yes.

WILLIAM YOUNG J:

So those are the issues, and I think we've got a fair, you know, we have a fair understanding of the legal and policy issues involved.

MR NOTTINGHAM:

80B, as I understand it, relates to –

WILLIAM YOUNG J:

More than one sentence.

MR NOTTINGHAM:

More than one sentencing, and so that is relevant and it was raised in my application for habeas corpus to the High Court by Justice, Van Bohemen J, he referred to that in relation to my particular circumstances, and I believe that it is, that is clear as well, and that if there was a re-sentencing, even when I had possibly committed other offending, which in this case I hadn't, it's still a maximum of 12 months. So the other issue which I wish to raise, and this was raised in a particular case that I read, that I'm sure the Court will be well aware of it, and that is that if I had been sentenced to prison I would normally serve a third and –

WILLIAM YOUNG J:

You'd be eligible for parole if deemed necessary, yes.

MR NOTTINGHAM:

Sorry, correct Sir, to be eligible for parole. I think I've been a model prisoner in home detention. I think I would have been a model prisoner in prison. So I would have served 10 and one-third months and been eligible for parole and subject to those conditions. But I have six months conditions after the expiry of this sentence anyway, which would be similar to my, likely to my parole conditions. So in effect I served two and half more months, or two and a bit months as home detention in detention, and if I served another three months, three and a half months, which is what the Court wanted, I would have served five and a half months more than had I been subject to parole at the first go, which I think on my record I would been. Now I think the Court would have been aware of all of this. That's what I think. But maybe I'm biased in relation to that, Sir.

WILLIAMS J:

What's your point there then? That you would have rather gone to jail to get the one-third possibility of release?

MR NOTTINGHAM:

Well, no, Sir. I'm not saying that. I'm saying that they didn't have an option to sentence me. Given my health conditions, they thought that possibly I –

WILLIAMS J:

They didn't think it would be good for you?

MR NOTTINGHAM:

No, well, sure –

WILLIAMS J:

They're probably right I would have thought but do you have a different view now?

MR NOTTINGHAM:

No, Sir, I am saying that in the conditions that they faced I may well have died. I absolutely agree with that. The issue with that is they understood that and possibly they didn't want to go to that extent. That's what I'm saying. And so they got the best of both worlds by making me stay in detention for a longer period and one which I am arguing is arbitrary.

So the issue here is that all of these simple errors, if it is accepted that they are relatively simple errors because I certainly can understand them, then there would be a motive and that motive doesn't have to be incredibly evil. It can just be a very smart way of getting the maximum sentence that they feel that they can impose that they feel is fair even though it's arbitrary, and that's all I'm saying, that I've been done an injustice, I suppose, by what I would consider as being a very smart way of doing it.

GLAZEBROOK J:

As I understand it your argument is pretty simple.

MR NOTTINGHAM:

It is, Ma'am.

GLAZEBROOK J:

The argument is simple. It says in the Act that you can't be sentenced to more than 12 months' home detention for the same offending. You have been sentenced to more than 12 months' home detention.

MR NOTTINGHAM:

Yes, Ma'am.

GLAZEBROOK J:

The sentence imposed means the sentence originally imposed. It doesn't mean any re-sentencing or increases on appeal. It means the original sentence and that's not able to be done.

MR NOTTINGHAM:

No.

GLAZEBROOK J:

And I think just to anticipate Justice Young's argument, if it can be done then it shouldn't be done because it's against the spirit of the legislation which says 12 months' home detention is the maximum, and you were required to be put on home detention because the least restrictive sentence has to be imposed.

MR NOTTINGHAM:

Yes, Ma'am. That's exactly –

GLAZEBROOK J:

Is that it in a nutshell?

MR NOTTINGHAM:

It is in a nutshell, Ma'am. The other issue that if Parliament had intended that such sentencing could occur above the maximums it would have said so. We are subject to the ICCPR and New Zealand Bill of Rights in relation to this type of sentencing and if it was intended that we could just go round ignoring sentencing or imposing interpretation under the Interpretation Act 1990 to come to a conclusion that is not in the spirit of something, then if it's not in the spirit of something it's not intended, so if it's not intended it shouldn't be read by this Court as being the case.

WILLIAM YOUNG J:

I think we've got this on board, Mr Nottingham.

ELLEN FRANCE J:

Could I just ask two questions, Mr Nottingham? Can you just remind me by what date do you say you had served the 12 months?

MR NOTTINGHAM:

The 9th of April.

ELLEN FRANCE J:

April.

MR NOTTINGHAM:

The date ran out at the 12th of April but it was a long holiday, Ma'am, so you take, under the Act, you take it.

Now the other issue which I suppose I should –

WILLIAM YOUNG J:

And when did you get bail?

MR NOTTINGHAM:

Nine, nine or 10 days after that, Sir, and that's why –

WILLIAM YOUNG J:

So you've served over 12 months?

MR NOTTINGHAM:

I've served over 12 months, Sir.

WILLIAM YOUNG J:

Okay, well, I think that's the key issue, is that…

ELLEN FRANCE J:

Yes, that was my – I just wanted to check. And then the other question was you referred to the warrant that the Court of Appeal produced after the appeal.

MR NOTTINGHAM:

Yes, Ma'am.

ELLEN FRANCE J:

Am I right that the start date expressed for the sentence there is the date of the Court of Appeal judgment, so that's 30 July 2019?

MR NOTTINGHAM:

Correct, Ma'am. Yes, and in relation to…

WILLIAM YOUNG J:

Have you got the warrant there?

MR NOTTINGHAM:

I've actually got the – you asked a question about what paragraph of the judgment of the Court of Appeal was involved.

WILLIAM YOUNG J:

Yes, sure.

MR NOTTINGHAM:

It is 113(f).

WILLIAM YOUNG J:

113.

MR NOTTINGHAM:

113(f). Page 61 of the case on appeal.

WILLIAM YOUNG J:

Yes.

MR NOTTINGHAM:

And it says, "In respect of each breach of suppression, five months' home detention concurrent with other sentences."

WILLIAM YOUNG J:

And Justice France is right, isn't she, in saying that the start date for the sentences is the date of the Court of Appeal judgment?

MR NOTTINGHAM:

Correct. I went back into detention on that date Sir. Into home detention.

ELLEN FRANCE J:

Thank you.

MR NOTTINGHAM:

Thank you Ma'am. The last issue is that there are judgments that relate that the Court of Appeal or an appellate Court shouldn't deal with deductions for time served. It should be the Corrections Department as section 92 of the Parole Act 2002, I'm not sure of that, but it's one of those sections, and in this case I'm saying that the methodology which was adopted was that that cumulative sentence was to get rid of the three and a half months, to give them the option to then re-sentence me to the maximum and once again I am just trying to understand why they did it, and I've come to that conclusion. But from that, and we're not dealing with the issue of the Crown coming, wanting to imprison me again yet again on the third re-sentencing. But I submit that Justice Down said after the trial that Mr Nottingham is unlikely to serve any prison time, or words to that effect, to the jury. Then along came the Crown and suddenly we're looking at prison time. The pre-sentence report says, no prison, community detention, but we're looking at prison time, and in the Court of Appeal's decision, and this is the only matter I'm going to raise unless counsel raises the issue of prison and the Court wants me to deal with that, is that in relation to the name suppression breach, Justice Muir found that having no evidence that I sent the documents means nothing because someone sent them and that because there was no evidence, evidence could exist that the police haven't obtained. Now I've prosecuted a few prosecutions and I know that isn't the law, and there are other matters, I'm not going to go to them Sir, but there are other matters that I say indicate that I wasn't given a fair hearing in that matter. Now I have sent through a reference from Mr Steven Savory and that was in relation to a matter that I investigated while I was on bail between the, when the Court of Appeal hearing was going, and the reference is obviously –

WILLIAM YOUNG J:

I've seen that.

MR NOTTINGHAM:

Yes but the reason why I've raised it Sir is probably not for the reason that you think, and that is that I want you to think that I'm a nice guy, because when you take on those investigations Sir, and you are out to get money back from a fraudster, you're not a nice guy, and the idea is you go to get the money back. During that period, because of my convictions I was fearful, incredibly fearful that if the media got hold of the story that it could be turned around, as these other matters had been turned around, and that I'd face them all over the globe, and that they were subject to being attacked, and even though it was truthful, even though it was truthful, what they did was they conned a client of mine out of over $125,000. That doesn't matter. The person involved was scared. The person involved didn't like being called a fraudster by Mr Savory, and therefore I criminally harassed him. And that's the thing that I wanted to get through to this Court, that I'm not a bad person, and that I've done a lot of good things. Now in the recent thing, I don't know whether the Court's aware, I'm who sued the Prime Minister Jacinda Ardern. I wanted name suppression because of the death threats that would come. So the issue with suing "A", Kós J, Kós P rightly said, "But Mr Nottingham, you are well known and your work is commendable." Now during this whole sentencing process nothing was mentioned of my work. So it's a situation where I feel I haven't got a fair shake and I want this Court to remedy it if it can.

Those are my submissions, Sir.

WILLIAM YOUNG J:

Thank you. Ms Brook?

MS BROOK:

As the Court pleases, the first issue that the Court wished to hear argument on was whether or not the Court of Appeal had jurisdiction to impose the maximum term of home detention. Now I've set that out in some detail in my written submissions and I'm happy to go through that but I wonder if the Court has any questions about any aspect of that. The Crown's central submission

is that the words of section 80A do permit the Court of Appeal to impose that maximum term.

GLAZEBROOK J:
You probably have a way to go to convince me of that, so if you want to go through your submissions it would be useful for you to do so.

MS BROOK:
Certainly.

GLAZEBROOK J:
I don't necessarily mean in great detail but at the moment I'm attracted to Mr Nottingham's argument on the interpretation of that section.

MS BROOK:
So, Ma'am, the maximum is obviously prescribed in section 80A(3) which says a sentence of home detention may be for such period as the Court thinks fit but must not be for less than 14 days or more than 12 months. So that is the provision that the Crown relies on to say that the Court of Appeal's sentence of 12 months was within its jurisdiction. Mr Nottingham's argument, as I understand it, is that the words "a sentence" would encompass both the sentence imposed by the District Court and the sentence imposed by the Court of Appeal, whereas the Crown's argument is that the Court of Appeal quashed the sentence imposed by the District Court and then imposed a fresh sentence in respect of the…

GLAZEBROOK J:
So you could just keep on doing that forever. If it came up here we could impose another one?

MS BROOK:
That goes to the policy question, Ma'am, which I suggest is the –

GLAZEBROOK J:

But is it though, because it's in relation to the same offending and it has to be interpreted in accordance with section 80B as Mr Nottingham also pointed out.

MS BROOK:

Yes, Ma'am. To be clear, the situation is unique to Crown appeals for a start because if it's an appeal by an offender the sentence is only going to go down and the practice in –

WILLIAM YOUNG J:

That's true. I was looking at this in the – that is the effect of the Criminal Procedure Act 2011.

MS BROOK:

Yes.

WILLIAM YOUNG J:

That was my impression. Has it been dealt with by authority or has it just always been accepted that that's the case?

MS BROOK:

It's just always proceeded on that basis. I certainly wasn't able to find any authorities.

WILLIAM YOUNG J:

No. Thank you.

MS BROOK:

It's unusual to be in this Court and not citing a single common law authority but that was the position that the Crown found itself in on this occasion. It's simply the way that the statute has been applied, that the new sentence starts on the date that it is imposed on appeal for home detention. It is not the case for imprisonment. Imprisonment is treated differently and there are specific provisions about that that I've referred to in my written submissions.

WILLIAM YOUNG J:

What's the provision that says the new sentence starts from the date of the appeal, or is that just the effect of the way they structured the sentence?

MS BROOK:

Yes, and it's because the provisions in the Parole Act apply only to imprisonment. That means it's not the position for home detention which is governed by the Sentencing Act rather than the Parole Act.

ELLEN FRANCE J:

Conceptually, a successful appeal is not normally treated as a re-sentencing, is it?

MS BROOK:

Are you talking about a sentence on a Crown appeal or on a…

ELLEN FRANCE J:

Well, I'm not sure why it wouldn't apply to either conceptually.

MS BROOK:

My submission is that it's always a new sentence. If you're changing the sentence you must be imposing a new sentence and the –

WILLIAM YOUNG J:

So they've reduced the sentence to 10 months' home detention.

MS BROOK:

Yes, that would be to impose a new sentence and in fact this has happened in the past.

WILLIAM YOUNG J:

So when would it start from? Say the Court of Appeal has said, "The sentence imposed in the District Court was too severe. It should've been 10 months."

MS BROOK:

Yes.

WILLIAM YOUNG J:

"We therefore quash the sentence, impose a sentence of 10 months."

MS BROOK:

No, because you have to take into account the time that's already been served on home detention until the appeal has been heard so you would, in your sentence calculations, in exactly the same way as the Court of Appeal did in this case, when you're –

WILLIAM YOUNG J:

So if they didn't the sentence would start afresh and the only way to deal with that is to discount the sentence imposed in the Court of Appeal to allow for time served?

MS BROOK:

Yes. Now I appreciate that Mr Nottingham's submission is that Corrections should take that time into account. As I've set out in my submissions, that would be unlawful. Corrections is only permitted to take time served into account in relation to a sentence of imprisonment and only where –

WILLIAM YOUNG J:

I think he accepts that.

MS BROOK:

And only where the time that has been served was also imprisonment. There's no situation in which Corrections can take it into account.

WILLIAM YOUNG J:

Sort of cross-credit?

MS BROOK:

Yes, there's no cross-crediting in respect of home detention. So the Judges have to take it into account, and there have been situations in the Court of Appeal where they have reduced a sentence from, say, 12 months' home detention to 10 months home detention and they've overlooked this issue and the Crown has had to ask for the judgments to be recalled and re-issued with a lesser period of home detention because otherwise the effect is that that they've inadvertently sentenced the person to a longer period of home detention than they – well, they have inadvertently ensured that the person will serve longer on home detention than they had intended, if that makes sense.

WILLIAMS J:

Are there any other cases where this particular scenario has happened?

MS BROOK:

There was a defendant appeal –

WILLIAMS J:

No, I'm not talking about that case. I'm talking about a Crown appeal that produces cumulatively more than 12 months in the way that this would if you're right.

MS BROOK:

On a Crown appeal, the Crown only appeals when we're seeking imprisonment so this situation has not arisen before.

WILLIAMS J:

There's been no case in which you've been disagreed with over prison but the sentence has changed up?

MS BROOK:

No, not that I'm aware of. There's certainly been cases where, for example, *R v Cossey* [2019] NZCA 104 last year where we sought imprisonment and by

the time the sentence appeal was determined the offender had nearly completed the sentence of home detention and the Court of Appeal decided that it would just be best to leave it as is, but the judgment set out very clearly that the Crown was right, the original sentence was inadequate, but they didn't change the sentence. So they dismissed our appeal, but the judgment set out the reasoning why it would otherwise have been allowed.

WILLIAM YOUNG J:
So if we were with Mr Nottingham that the sentence shouldn't have been imposed in the way it was, what should we do?

MS BROOK:
Well, the Crown has –

WILLIAM YOUNG J:
I know what you say we should do but I want to deal with that separately, but just say that we were of the view that 12 months' home detention was either not available or shouldn't have been imposed given the policy, so what would be the order of this Court because we're likely to fall into the trap that the Court of Appeal on occasion has fallen into.

MS BROOK:
Yes, well, I've set out the calculations in my written submissions which the Crown says lead to a short sentence of imprisonment being imposed. If this Court considers that home detention is no longer available because Mr Nottingham has already served now more than 12 months' home detention in a practical sense because he's served the three and a half months on the District Court sentence and then the eight and a half months on the sentence imposed by the Court of Appeal, that would mean that home detention of any length is no longer available to this Court if the Court accepted Mr Nottingham's submission about jurisdiction.

WILLIAMS J:

Except for the approach the Court of Appeal took, you say, which is in the end, well, let's let bygones be bygones.

MS BROOK:

Except that then he's still got some more home detention to serve. If you dismiss the appeal then the original sentence would stand because he's got bail at the moment on the sentence imposed by the Court of Appeal.

WILLIAMS J:

The Court of Appeal's sentence would stand.

MS BROOK:

He's still got some time left to run on that. So if that was the approach that this Court wanted to take you would have to – I think what you would have to do is allow the appeal, quash the sentence imposed by the Court of Appeal and just either convict and discharge or perhaps impose some community-based sentence that this Court thought was appropriate.

WILLIAMS J:

You'd have to do something more is your point?

MS BROOK:

Yes.

GLAZEBROOK J:

Isn't that a catch-22? Well, maybe we're on the third issue which personally I don't even get to but – because I think the Crown is on a Catch-22 in respect of this, because you can't say that it wasn't right, the Court of Appeal, to take into account the time served already on home detention, even if they were going to send someone to prison. So say they said, well actually it shouldn't have ever come under two years imprisonment. It should have been, as they did.

MS BROOK:

Yes.

GLAZEBROOK J:

But they couldn't then say, but we're not going to take into account the time already served because that would be manifestly excessive, and so if they can't have more than 12 months' home detention, then they can't have anything, can they?

MS BROOK:

Well then it's imprisonment.

GLAZEBROOK J:

No, why? Because that would be manifestly excessive at that stage because – say you say well it should have been two years three months imprisonment but I have to impose the least restrictive possible, and I understand Mr Nottingham's argument, that all sorts of reasons in any event to say that home detention was appropriate over imprisonment, you couldn't say, well I'll sentence somebody to two years three months without taking into account the restrictive conditions of home detention could you?

MS BROOK:

I'm sorry, I'm not quite sure I follow. So the Court of Appeal, are you saying if the sentence that the Court of Appeal had thought was appropriate was two years three months imprisonment before taking into account the home detention?

GLAZEBROOK J:

Yes.

MS BROOK:

So then taking that into account you get two years.

GLAZEBROOK J:

Yes.

MS BROOK:

Yes, then the Court's obliged to consider home detention and obliged to impose the least restrictive sentence that is appropriate in the circumstances. So in that situation if home detention wasn't available for a jurisdictional reason, if this Court was to consider that, no he's already served too much home detention, then the Crown submission would be well now the least appropriate that's – sorry, the least restrictive sentence that's appropriate in the circumstances would be imprisonment. Because if it was a lesser sentence, say community detention, if the Court thought that that community detention was appropriate in the circumstances, it would have been obliged to start with that.

GLAZEBROOK J:

But surely it would have to. It can't say home detention isn't available and pretend that – because home detention is available in the sense that presumably at that stage there was still about nine months of home detention to go.

MS BROOK:

Yes, I think I must have misunderstood Your Honour's example. I thought you were saying that if home detention wasn't – that the 12 months would be –

GLAZEBROOK J:

Well for a jurisdictional reason if you could impose any more than one year's home detention, why would the least restrictive sentence be to impose imprisonment. I don't understand.

MS BROOK:

You can never impose more than a year's home detention.

GLAZEBROOK J:

Well exactly. So I don't see how the least restrictive is to then, because you can't do that, just add on some imprisonment. Is that your submission or have I just misunderstood it?

MS BROOK:

I'm sorry Ma'am. I'm not following the question. There's no magic about 12 months' home detention. The reason 12 months is the maximum is because the threshold jurisdictionally for home detention is two years' imprisonment. On a two year sentence, leaving aside the three strikes legislation which doesn't apply here, the maximum period of detention on a two year sentence is 12 months, because you automatically serve half of a short-term sentence and release. There's no parole on a short-term sentence. That is why the maximum term of imprisonment is 12 months' home – of home detention, is 12 months, because if you could be sentenced to more than 12 months home detention, where you thought the appropriate sentence was two years or less, you'd be serving more time in detention on home detention than you would have if you had been sentenced to imprisonment. That's why the threshold, the maximum is 12 months.

GLAZEBROOK J:

Sorry, my question was, assuming you couldn't serve any more than 12 months.

MS BROOK:

Yes. Do you mean in total, taking into, if you were in an appeal situation, the person has already served some home detention?

GLAZEBROOK J:

Well, what the Court of Appeal did here was impose an added period over and above the period that had already been served.

MS BROOK:

Yes.

GLAZEBROOK J:
If they couldn't do that.

MS BROOK:
Yes.

GLAZEBROOK J:
What do you say they should do?

MS BROOK:
Well they'd have two options. They could either impose the remaining period of home detention going up to 12 months, and in this case it would have been a maximum of eight and half months available for the Court of Appeal to impose. If they considered that that was inadequate, then they would have had to sentence Mr Nottingham to imprisonment.

GLAZEBROOK J:
I just don't see how they could, that's my point.

MS BROOK:
How they could sentence –

GLAZEBROOK J:
Because it couldn't be inadequate because they get down to a two year, they can impose home detention, and should because that's the least restrictive.

MS BROOK:
Yes.

GLAZEBROOK J:
Why would they say, oh well that's the least restrictive but I don't think that's enough, even though that's the statutory maximum, I think I'll impose a bit more.

MS BROOK:

Well that's why the Crown says that this is not the correct interpretation of section 80A.

GLAZEBROOK J:

It might say that but I'm saying if you're wrong.

MS BROOK:

Yes.

GLAZEBROOK J:

What do you say happens?

MS BROOK:

As I just said, the Court would only have the choice of the lesser term of home detention being less than the sentence that they have determined is appropriate or imprisonment, or perhaps some combination.

GLAZEBROOK J:

I just don't see how you could even say that imprisonment is appropriate in circumstances where you have to do the least restrictive sentence, and not only is it the least restrictive but it's the totally appropriate sentence as Mr Nottingham's submissions are.

MS BROOK:

The Crown says it's not the least restrictive sentence that's appropriate in the circumstances if you can't impose enough of it to meet the criminality of the offending because the –

GLAZEBROOK J:

But you can't impose enough of it because the statute tells you you can't.

MS BROOK:

But the statute also imposes an imperative to ensure that the sentence is sufficient to reflect the criminality of the offending and that's sections 83 to 85

of the Sentencing Act which govern the use of concurrent and cumulative sentences. The Court –

GLAZEBROOK J:
That doesn't take into account personal circumstances though, does it, and it doesn't take into account deductions for time already spent on restrictive?

MS BROOK:
That's part of the sentencing exercise. It's the end sentence that has to reflect the criminality of the offending.

WILLIAMS J:
And personal circumstances and time served.

MS BROOK:
Exactly, yes.

WILLIAM YOUNG J:
Just going back to this third question of imprisonment, while it may seem a logical answer to the argument, the problem, and this is a variant of what Justice Glazebrook has put to you, a re-sentencing in this Court will have to allow for the additional seven months of home detention.

MS BROOK:
Yes.

WILLIAM YOUNG J:
We would get to a situation where on probably any view of it the starting point would be under two years.

MS BROOK:
Well under I would have thought.

WILLIAM YOUNG J:
Yes.

MS BROOK:

Yes, in fact, I've set those calculations out.

WILLIAM YOUNG J:

Sorry, I've read them but whereabouts?

MS BROOK:

It's right at the end of my written submissions, Sir. It's at paragraph 25. So adopting that approach the final sentence would be just under 18 months' imprisonment.

WILLIAM YOUNG J:

Yes, but I mean it would be odd that if the correct sentencing approach had been adopted in the – I suppose it's such a sequential process that logic may go out but if we got to the view that the appropriate sentence is two years or thereabouts which in the ordinary course of events would be commuted to home detention and, in fact, the appellant has served around 12 months' home detention, it would be an outcome to say, "Well, now you've got to go to jail."

MS BROOK:

Yes, Sir. The problem there I think is that the Crown wasn't envisaging that you could decrease the sentence that the Court of Appeal has said is appropriate which is 31 months because leave has not been granted to challenge that part of the Court of Appeal's judgment. It's solely as to the jurisdiction to impose in those circumstances a sentence of 12 months' home detention. So the starting point is that if Mr Nottingham had not served, if, for example, he had got bail pending appeal immediately upon being sentenced so there was no period of home detention to take into account, he would have been sentenced to 31 months' imprisonment. The Court of Appeal considered that was the appropriate sentence. Having settled on the final sentence, you then have to take into account the practicalities of the situation that you are faced with which is that the appellant before you has in fact served some time already which will not be taken into account by

Corrections and can only be taken into account by the sentencing Judge. Well, in this case the sentencing Court. Now there's a discretion as to how you take that into account. The Court of Appeal took the position most favourable to Mr Nottingham which was effectively to give him a one-for-one discount as if he had served three and a half months' imprisonment and they gave him seven months' discount which then brought him curiously to exactly the jurisdictional level at which imprisonment could be imposed and I would respectfully agree that the Court of Appeal did not want to sentence Mr Nottingham to imprisonment if they could possibly avoid it, and so getting down to that 24-month threshold meant that they could impose home detention.

It might be helpful if I at this point I turn to the second issue which is –

WILLIAM YOUNG J:
If I can just ask, say we said we allowed the appeal and we were of the view that the appropriate sentence that should have been imposed by the Court of Appeal was seven and a half months, is it beyond our power to say, and that sentence, so we reduce the sentence imposed by three and a half months, in which case the time served would now count?

MS BROOK:
Well then you're going to give him more home detention –

WILLIAM YOUNG J:
Why.

MS BROOK:
Starting from the date of your judgment, and he's already served more than 12 months.

WILLIAM YOUNG J:

Can't we just amend the Court of Appeal judgment so that it applies as it if were a sentence of seven and a half months' home detention – of eight and a half months' home detention.

MS BROOK:

No, because you can't backdate the start date of a sentence of home detention.

WILLIAM YOUNG J:

But if we amend the Court of Appeal's judgment you say we can't do that?

MS BROOK:

I don't see that Sir because under the Criminal Procedure Act your ability, you can only allow the appeal if you're satisfied that a different sentence be imposed, so you have to impose a new sentence. You quash the original sentence and you impose a new one, and that's where you have a practical problem that if you impose any period of home detention it will start as at the date of your judgment. So you must take into account whatever time has been served prior to that, and if your view is that in total, regardless of which Court has imposed it, you can't sentence somebody to more than 12 months home detention for the same offence, then you now cannot impose home detention because he's already served more than 12 months.

WILLIAMS J:

You painted yourself into your own corner.

ELLEN FRANCE J:

That suggests that there may be a jurisdictional issue because that just seems a very odd result that you come to.

MS BROOK:

Well that's just the consequence of the fact that unlike sentence of imprisonment the only sentence in which the time served is automatically

taken into account, is imprisonment. All other sentences just start on the day that they are imposed, and you have to take into account anything that's already happened at the time you are fixing your sentence. That's why sentencing can become quite a complicated exercise. But of course this issue is only really going to arise on appeal, and of course it's only really going to arise, in the sense that we're talking about, on a Crown appeal, because otherwise the sentence is only going to go down.

WILLIAMS J:
If imposed means the sentence of Judge Down, because substituted is a different thing, as Mr Nottingham suggested, then the start date is that date.

MS BROOK:
So the Crown says that substituted sentences are a very specific thing. In the Sentencing Act there are powers to substitute one sentence for another. The Corrections Department can apply to the Court to substitute community work for home detention, home detention for imprisonment if there's been a change in circumstances for some reason. On appeal you are, although we often see in judgments the terms "we reduce the sentence" or "we impose a substituted sentence" you are imposing a new sentence.

WILLIAMS J:
Is there a definition of "substituted sentence"?

MS BROOK:
There's lots of provisions about substitutions as in the Sentencing Act.

WILLIAMS J:
Yes, I've seen that, but that doesn't necessarily mean that the term "substituted" always means that, particularly where you've got a lacuna.

MS BROOK:
No, but on appeal, and if you look at section, I think it's 144, I'll just find it, of the Criminal Procedure Act. So section 250.

WILLIAMS J:

Let me just catch up with you please.

MS BROOK:

Certainly Your Honour.

WILLIAMS J:

Yes, I'm with you.

MS BROOK:

So section 250 provides that the appeal Court can only allow the appeal if satisfied that a different sentence should be imposed.

WILLIAMS J:

Okay. And it also specifically refers to the sentence imposed on conviction, which reinforces the Crown submission that on each, at first instance and on appeal we are talking about different sentences being imposed.

WILLIAM YOUNG J:

Right, so say we just allowed the appeal and set aside the judgment of the Court of Appeal, the problem, would it, the problem is that Mr Nottingham's post-Court of Appeal judgment home detention sentence wouldn't count, you'd say?

MS BROOK:

I've taken that time into account in my calculations and my written submissions.

WILLIAM YOUNG J:

No, but I'm just trying to look sort of –

MS BROOK:

No, it won't count. You will have to take it into account. So if your view –

WILLIAM YOUNG J:

Say we just reinstated the judgment, the sentence imposed by, in the District Court?

MS BROOK:

I'm sorry, repeat that?

WILLIAM YOUNG J:

Say we just said the Court of Appeal has made an error which we should resolve but the tidiest way to resolve it is that we reinstate the order made in the District Court.

MS BROOK:

You'd have to reimpose that sentence.

WILLIAM YOUNG J:

Why? Wouldn't we just be cancelling the Court of Appeal's order?

ELLEN FRANCE J:

What's the section?

MS BROOK:

The Criminal Procedure Act just doesn't –

GLAZEBROOK J:

250, but I don't see that 250 actually says anything. It's certain not been the way you normally look at appeals that you're actually imposing a different sentence. You're just changing the sentence that's been imposed below.

MS BROOK:

Where it's imprisonment. Where it's imprisonment that follows but not –

GLAZEBROOK J:

But you're showing us 250 which is some matter of principle, you say, which applies to every sentence. I don't see…

WILLIAM YOUNG J:

It must be a different – I think she's point she's saying, is referring to, is that a different sentence should be imposed, so the implication is that a different sentence will be imposed. Now whether that follows or not is another –

GLAZEBROOK J:

No, but I understand that, that this is generic. So she says, well, as I understood the submission, it was a different sentence should be imposed apart from imprisonment but 250 doesn't say that.

MS BROOK:

No, Ma'am, what I meant is that when the Court imposes a new sentence of imprisonment on appeal the time served already on that sentence becomes pre-sentence detention. It's not part of the sentence. It is pre-sentence detention which is then automatically taken into account by Corrections.

WILLIAMS J:

So you're right, there's some discretion in this case, but I wonder whether you're just applying a level of prescience and perfection to Parliamentary counsel that probably isn't deserved.

GLAZEBROOK J:

Show me where it becomes pre-sentence detention because that sounds very odd because it wasn't pre-sentence detention. It was post-sentence detention. So does it specifically say that?

ELLEN FRANCE J:

It's a defined term.

O'REGAN J:

It's in the Parole Act.

WILLIAM YOUNG J:

Is it? Well, what provision is it?

O'REGAN J:
That's only when a sentence of imprisonment is changed so it doesn't really arise in this case.

GLAZEBROOK J:
Yes, but I want to see the provision because I – it just seems very odd to turn what is post-sentence imprisonment into pre-sentence imprisonment.

MS BROOK:
So pre-sentence detention is defined in section 91 of the Parole Act which is in the Crown's bundle of authorities, and it effectively includes any detention in a prison before you are sentenced and so if you are re-sentenced on appeal all of that time that you've served –

WILLIAM YOUNG J:
I'm not so sure about that.

GLAZEBROOK J:
No, I don't think that's right.

WILLIAM YOUNG J:
I'm not so sure about that.

MS BROOK:
I'm pretty sure that's the effect of this Court's decision in *Booth v R* [2016] NZSC 127; [2017] 1 NZLR 223. This Court has already fairly conclusively determined that.

WILLIAM YOUNG J:
It's going to cut one way or another but say someone is sentenced to three years for burglary, they appeal, Court of Appeal reduces the sentence to two years six months.

MS BROOK:
Yes.

WILLIAM YOUNG J:

The start date, I mean –

MS BROOK:

The start date is still, for imprisonment, the start date of a sentence is still the date that it was first imposed in the District Court. There are specific provisions about imprisonment which do not apply to home detention.

WILLIAM YOUNG J:

Yes, sorry, but it's – okay.

WILLIAMS J:

Can I just test you on a –

GLAZEBROOK J:

All right, so where does it – well, then it can't be pre-sentence detention when it's been either increased or decreased in trial, can it?

WILLIAMS J:

No, it's post-sentence detention.

MS BROOK:

What I meant is that the Corrections Department takes it into account. It doesn't have to be taken into account by the appeal Court.

GLAZEBROOK J:

No, we understand that, it's just that it doesn't – if the start date is the date the sentence was originally imposed then it's not pre-sentence detention.

MS BROOK:

For imprisonment that's correct.

WILLIAMS J:

Can I just test you –

GLAZEBROOK J:

Well, you just told us it was, so…

WILLIAM YOUNG J:

The range of sentences, you can look at a – so for imprisonment – and we know that there are the start date calculations that are in the Parole Act.

MS BROOK:

Yes.

WILLIAM YOUNG J:

But for imprisonment, the Court of Appeal if it reduces a sentence, or increases it, will simply say the sentence is reduced or increased? It's not –

MS BROOK:

The appeal Court will?

WILLIAM YOUNG J:

Yes, the appeal Court, so it's not really re-sentencing. I mean it would never have been in my mind as a Court of Appeal Judge that I was re-sentencing someone when increasing or decreasing a sentence. Now I can't remember what the warrant said, I've got a feeling that the start date for the sentences would have, that the sentence commencement date would have been the date of the sentence imposed in the trial Court.

MS BROOK:

The statute specifically provides the start date of imprisonment is the date of the original sentencing, even where it's reduced – substituted on appeal.

GLAZEBROOK J:

Do you want to give me the reference please?

MS BROOK:

Yes that's not in the Crown's bundle so it'll just take me a minute to find it.

GLAZEBROOK J:

That's fine.

MS BROOK:

So "start date" is defined in the Parole Act, and this is section 4, a "start date" is defined as the date on which an offender who is subject to a sentence begins to be subject to it.

ELLEN FRANCE J:

Sorry what was the section?

MS BROOK:

This is section 4, the interpretation section of the Parole Act.

ELLEN FRANCE J:

Right.

WILLIAM YOUNG J:

It rather presupposes that the sentence is that imposed by the trial Judge as varied by the appellate Court.

MS BROOK:

That's the effect of this Court's decision in *Michael Marino v The Chief Executive of the Department of Corrections* [2016] NZSC 52 (6 May 2016).

WILLIAM YOUNG J:

Yes, but that didn't concern, that didn't deal with appeals, did it? It just dealt with…

MS BROOK:

It dealt with when does a sentence start.

WILLIAM YOUNG J:

Yes.

MS BROOK:

Because the question was, do you start serving your sentence when you are first remanded in custody.

WILLIAM YOUNG J:

Yes, I vaguely remember it, but it's not dealing with this issue, which is a Judge at trial sentences someone to X penalty and that's varied on appeal. Now so with prison and you say well there's this statutory framework around it, the sentence is effectively varied, it's treated as starting to run when first imposed. That's right?

MS BROOK:

Section 79(1) of the Parole Act provides that, "The start date of a sentence," and this is a sentence of imprisonment, "that is substituted for a sentence that was quashed or otherwise set aside on appeal (the original sentence), is the start date of the original sentence."

WILLIAM YOUNG J:

Okay, great, thank you. That's helpful.

WILLIAMS J:

Can I just test you then on your 250 argument, this is where I said perhaps we're just attributing rather too much omniscience to PCO, and the use of the word "imposed" there.

MS BROOK:

Yes, so can I just bring up my Criminal Procedure Act again.

WILLIAMS J:

Sure.

MS BROOK:

Yes I'm with you.

WILLIAMS J:

And you say that "imposed" there is on purpose. "Substitute" is a whole other thing and you find that in the Sentencing Act in particular circumstances and not others, and the relevant provision in the Sentencing Act 80A says "imposed" not "substituted". Okay. So take a look at 251(2)(b).

MS BROOK:

Yes, (2)(b) which says you can vary the sentence or any part of it.

WILLIAMS J:

Yes, so that "the sentence" is not the sentence of the appellate Court, it's the original sentence, which hasn't died, but gets buried.

MS BROOK:

In some circumstances, yes, but the Crown says –

WILLIAMS J:

Well in any circumstance the Court decides it wants to do that.

MS BROOK:

Well Sir (2)(a) says that you, within the limits allowed by law, "Set aside the sentence and impose another sentence (whether more or less severe)…". So that's dealing with, in my submission, where you are, the sentence stays to be the same type but you –

WILLIAMS J:

I see that point but that depends on (a) being exhaustive and the Court being prepared to tie itself into a straightjacket in the way that you're really arguing that we are tied, and the Court of Appeal is tied, for the sake of the use of "imposed" and "substitute" when "vary" allows them to do exactly what you say they can't do.

MS BROOK:

Sir, I suppose my submission is that "vary" means vary the type of sentence, not its length.

WILLIAMS J:

Why does it mean that?

MS BROOK:

Because (a) specifically provides for more or less severe.

WILLIAMS J:

That doesn't necessarily follow. Again that assumes a level of drafting perfection that may not necessarily be there.

WILLIAM YOUNG J:

It also produces pretty awkward consequences.

WILLIAMS J:

Exactly. Why would you read it that way?

MS BROOK:

Let's –

GLAZEBROOK J:

Often when you're setting aside a sentence and imposing another sentence you're saying I set aside the – I allow the appeal. Say Mr Nottingham had been sentenced to imprisonment, I allow Mr Nottingham's appeal, the starting point was far too high. It should have been X. I'm now under two years and I'm going to impose home detention. So of course I've got to set aside the sentence of imprisonment to impose another sentence, being the more appropriate one, home detention.

MS BROOK:

So then you're still going to have the problem though of how to take into account the time that's already been –

WILLIAM YOUNG J:

Don't need to.

GLAZEBROOK J:

No, no. That's just irrelevant. What we're trying to work out here is what the appeal Court is doing and can do.

WILLIAM YOUNG J:

But it can, it could simply say we could vary the Court of Appeal's sentence by saying we impose a sentence of eight and that we vary it to eight and a half months.

WILLIAMS J:

Why not, because then we don't –

GLAZEBROOK J:

Or time served. Basically time served which is quite often done on appeal.

GLAZEBROOK J:

But assuming we have to impose the sentence, vary it, we could vary it in which case that mops up all the time that's been spent, doesn't it?

WILLIAMS J:

Without the need for intellectual yoga.

MS BROOK:

I guess what's concerning me is that this would be quite a change to –

WILLIAM YOUNG J:

But it'd be a change for the better, wouldn't it?

MS BROOK:

– current practice which I'm not saying can't be done.

WILLIAM YOUNG J:

No.

MS BROOK:

Just I'm concerned about unintended consequences that –

GLAZEBROOK J:

But the unintended consequences seem to be all the way that makes it actually incredibly difficult. So the Court can't say, you say, without setting some new start date, because where do you say the start date has to be, the appeal Court start date? Where does it say explicitly in the Act anywhere that the start date is the one of the appeal Court?

MS BROOK:

Well, because –

GLAZEBROOK J:

I mean, for instance, say I'm an appeal Court. Mr Nottingham had been sentenced for 12 months – sorry to pick on Mr Nottingham, it's just he's there – that he had been sentenced to 12 months. On appeal I decide that was far too high and it should have been six months, and you say if he'd already served six months, because the start date would be the date of the appeal I'd actually have to re-call the judgment which you said has happened and do it properly. So where's the explicit section that says the new sentence starts on the date of appeal? Or are you just relying on "imposed" and "varied" and…

MS BROOK:

No, Ma'am.

WILLIAM YOUNG J:

I think the reliance is on section 250(2)(b) and section 251(2)(a), and you say it's implicit in those sections. Now that doesn't…

MS BROOK:

And also in the fact that for imprisonment there is an express provision that provides that the start date is the date of the original sentence when there is a new sentence imposed on appeal and there isn't such a provision for home detention in the Sentencing Act.

WILLIAM YOUNG J:

But of course that's consistent –

MS BROOK:

But I would just like to check –

WILLIAM YOUNG J:

Sorry, just pause. That isn't inconsistent with the variation approach.

WILLIAMS J:

Where appropriate.

WILLIAM YOUNG J:

Where appropriate.

MS BROOK:

Well, as I say, my concern is about unintended consequences and it's the unintended –

GLAZEBROOK J:

What are they going to be, these unintended consequences?

MS BROOK:

That's my point is it's the unintended consequences that I'm not thinking of right now.

WILLIAMS J:

Fair enough.

GLAZEBROOK J:

No, but the consequences that you've said of people having to have in mind that they're going to have a start date of something or other and then do that wrong and not take things into account seemed to me to be much worse.

MS BROOK:

No, Ma'am, I'm thinking of unintended consequences of the different interpretations of sections 250 and 251 of the Criminal Procedure Act.

WILLIAMS J:

I'm not sure whether my colleagues would be of this view, but if you're really worried about unintended consequences that we shouldn't go lumbering into, do you need a moment to think about what they might be?

MS BROOK:

I would appreciate that opportunity but it might be more than a moment.

WILLIAMS J:

You might want to talk to the presiding Judge about that.

ELLEN FRANCE J:

Could I just – sorry, just one thing, Ms Brook, for home detention, section 80X deals with the commencement date.

MS BROOK:

Yes, that's what I was just looking at. So a sentence of home detention commences the day it is imposed unless it has been deferred by the sentencing Judge.

WILLIAMS J:

Yes.

ELLEN FRANCE J:

So the question then is, well, when is it imposed or what does "imposed" mean?

MS BROOK:

Yes, and the Crown's submission is it's imposed by the appeal Court.

WILLIAMS J:

Not if it's varied.

GLAZEBROOK J:

I just can't –

WILLIAM YOUNG J:

But it could be unless it varies a sentence already imposed. It's susceptible to an answer. If the word "vary" is treated as – if, sorry, section 251(2)(b) is treated as conferring a standalone power and isn't read down by reason of 251(2)(a) then the commencement date problem is, it can be, on the face of it can go away. Now you say you're concerned about unintended consequences, and that's fair enough, and we may have to deal with it just by allowing you to put a submission in if necessary.

MS BROOK:

I would appreciate that opportunity because my concern is that if this is, if that is the interpretation then there will be two different approaches to calculating end dates, depending on whether the sentence has been imposed or reduced on appeal, because in one scenario the – so for instance if somebody has their sentence reduced from imprisonment to home detention, I suspect – well my submission would be that that must be imposing a new sentence, which would start from the date of that judgment, whereas if they reduce if from 12 months to 10 months, if the start date is then the date of the original sentencing, I foresee…

WILLIAMS J:

But that's, I mean –

WILLIAM YOUNG J:

But it's an easy calculation because it starts from the original date.

WILLIAMS J:

The point is, these are not rules, these are discretions, so what guides you are the needs of justice, which is what we're trying to do in this case, I would have thought. So if "vary" is the appropriate approach, and it's available on the proper meaning of that word, and justice requires it, why not. Of course the signal about justice requiring it would have to be clear, but you'd want intended consequences, don't you think?

MS BROOK:

Yes, I think if I was given the opportunity to provide some further written submissions on the point –

WILLIAM YOUNG J:

Yes, no, of course this has been put on you. Of course you're entitled to have an opportunity to think it through.

MS BROOK:

And I would take that up, because I feel I'm just going to muddy the waters further if I –

WILLIAM YOUNG J:

Okay. Ms Brook, I think it's fair to say, and if I'm wrong my colleagues will correct me, that there is not a lot of appetite to impose a sentence of imprisonment at the –

MS BROOK:

I accept that.

WILLIAM YOUNG J:

So we're probably more concerned about coming up with a sensible outcome for, which isn't full of tripwires, for appellate Courts when dealing with sentences of home detention.

MS BROOK:

Well in this particular case, if you essentially want to keep Mr Nottingham in the position that h's currently in, having served 12 months or just over of home detention, you would simply quash that sentence, and his sentence of community work would stand.

WILLIAM YOUNG J:

But the difficulty with that is that the criminal record wouldn't really be an accurate representation of what's happened, and that –

MS BROOK:

That happens all the time, Sir, with respect, it happens all the time and then we just have to look at the sentencing notes or the appeal decision to see –

WILLIAM YOUNG J:

But the simplest thing would be to vary it. If that power exists we could vary the sentence imposed in a Court of Appeal.

MS BROOK:

I'm confident Corrections would interpret that as being a new sentence –

WILLIAM YOUNG J:

I understand, but assume that we do have –

O'REGAN J:

If we did that that would mean the Court of Appeal should have dismissed the appeal, because they imposed –

WILLIAM YOUNG J:

I know.

O'REGAN J:

They would then have imposed the same sentence.

WILLIAM YOUNG J:

Yes, that's right. So the thing is, as I say, it's a bit of a conundrum.

O'REGAN J:

Pretty clear they didn't intend to do that.

MS BROOK:

They did not.

WILLIAM YOUNG J:

No. Well the trouble is unless we do that we can't catch –

WILLIAMS J:

Yes, that was then, this is now.

WILLIAM YOUNG J:

– all the home detention served.

ELLEN FRANCE J:

The alternative is that that suggests that you can't, as a matter of jurisdiction, impose more than 12 months. If you can't do that then some of these other problems disappear, don't they?

WILLIAMS J:

And others might apply.

MS BROOK:

But some others might arise is the – these are the problems that we know about, and sentencing Judges and appeal Judges know how to apply, as the Court of Appeal did, changing the practice now I just would like the opportunity to think that through and think about what other –

WILLIAM YOUNG J:

Okay, how long would you like to do that?

MS BROOK:

Two weeks?

WILLIAM YOUNG J:

All right.

MS BROOK:

I'd like to consult with the Department of Corrections about it, which is why I'm asking for that much time.

WILLIAM YOUNG J:

All right. So two weeks and another, what, another two weeks for you Mr Nottingham to respond?

MR NOTTINGHAM:

Yes.

WILLIAMS J:

I have to say that from the point of view of a first level appellate Judge, both divisional and permanent, this was just an issue we never thought about at all. It's not as if we were conscious about making decisions about imposition and variation and so on. These were just sort of mechanical procedures for the most part.

GLAZEBROOK J:

And just assumed you were actually varying –

WILLIAMS J:

Exactly.

GLAZEBROOK J:

– the sentences as we said to you.

O'REGAN J:

But it doesn't make any difference with imprisonment so it doesn't matter.

WILLIAMS J:

No but even with home detention. We just, these weren't conceptual issues for us to confront, except now on these difficult cases that Mr Nottingham's case presents.

WILLIAM YOUNG J:

But say sentences like disqualification, say someone appeals against a two-year period of disqualification from driving and the Judge says, oh, I reduce it to 18 months, wouldn't that be just treated as a variation of a sentence?

MS BROOK:

Well I'd have to check the provisions of the Land Transport Act about that.

WILLIAM YOUNG J:

Okay.

MS BROOK:

And I feel we're straying.

WILLIAM YOUNG J:

Sure.

WILLIAMS J:

Yes, also that maybe an unintended consequence.

MS BROOK:

That's exactly the point, is that there might be unintended consequences like that.

GLAZEBROOK J:

The whole point about the sentencing regime, and the whole point about not having to take into account time served in that way, was actually to get rid of these conundrums that somebody had to go, oh well, this is a new sentence so I have to calculate, mostly because Judges usually calculate them very

badly. Now obviously there's not a one for one necessarily in terms of electronic bail, time spent on bail delay, so that's a discretionary measures that comes in and Judges can do discretionary. What they're not very good at is maths, and anything that gets rid of –

WILLIAMS J:
I resemble that comment.

GLAZEBROOK J:
There are so many cases where that math – and actually the Corrections can get the maths wrong as well, and there have been cases of that, so because those things are complicate it's better to if you're sentencing just do the sentencing and not fiddle around with mathematical calculations.

WILLIAM YOUNG J:
All right. So we've covered the ground with you Ms Brook, subject to you making the inquiries and then coming back to us in 10 working days.

MS BROOK:
In relation to the first issue jurisdiction?

WILLIAM YOUNG J:
Yes.

MS BROOK:
For completeness I might just quickly canvas the second issue about policy, but before I do that just to, I didn't get to answer Your Honour Justice Williams' question about the practice of appeal Courts varying and substitution and so on. The Crown is acutely aware of these issues, and always sets it out in our submissions, so it might be that it isn't something that the Court of Appeal has had to confront –

WILLIAMS J:
We just follow the Crown blindly on these matters, is that what you're saying?

MS BROOK:

But the other point is that typically the Court of Appeal and this Court are obviously dealing with the offending at the higher end of the spectrum, because the first instance court is the High Court for lower, lesser sentences if I can put it that way. So it's not common for these issues to come before those very senior courts. It is an issue that's confronted all the time in the High Court.

WILLIAMS J:

So is there a High Court authority around this material?

MS BROOK:

No, the practice has simply been to, as I've described, that Corrections takes into account the time served on home detention, and it's taken into account by the sentencing Judge or the appeal Judge at the time that they are deciding what the appropriate sentence should be.

WILLIAM YOUNG J:

Well I think obviously you will be looking at –

MS BROOK:

I'll find some examples.

WILLIAM YOUNG J:

– how, the starting date for all sentences that are served over a period of time.

MS BROOK:

Yes.

WILLIAM YOUNG J:

Thank you.

MS BROOK:

So moving then to n the seemingly unlikely event that the finding of this Court is in support of the Crown's submission that the Court of Appeal did have

jurisdiction to impose 12 months' home detention, the second question which the Crown accepts is a very real question, is should you. Should you do it, even if you can do it, and the Crown would absolutely agree that there would be circumstances in which the Court should be very cautious about imposing the maximum term of home detention on somebody who has perhaps already served, you know, a significant period of time on home detention. But the Crown assertion is that this case isn't one of them because, of course, Mr Nottingham won't be in the position of having served more than 12 months' home detention in one go. The analogy is with, for example, let's say somebody is sentenced to three and a half months' home detention for one offence, and then eight months later sentenced to the maximum term of home detention or some other offence, we of course would not expect the Court to hesitate about that. The difference here is that it's for the same offence, and that's what's –

WILLIAMS J:
That's quite a big difference.

MS BROOK:
Yes it is, but again I'm just coming back to my point that that situation is only going to arise on Crown appeals, and our practice in this situations is either to arrange to have the appeal heard as soon as possible, to minimise the amount of home detention that is served before the appeal is or, as in this case, to have the respondent put on bail, which preserves both parties' positions for that period of time.

WILLIAMS J:
Then the bail point gets us to this point, doesn't it, where you get cumulatively with a break in the middle, potentially more than 12?

MS BROOK:
But, well, theoretically you would anyway, wouldn't you? I'm not sure I follow that. There's always –

WILLIAMS J:

Well it takes us –

MS BROOK:

There'll always be a period of time served on home detention before the Crown files its appeal and puts you on bail.

WILLIAMS J:

Yes.

MS BROOK:

It doesn't arise and hasn't arisen until now because, as I say, the Crown's not really interested in increasing a sentence of home detention. There's just –

WILLIAMS J:

So far.

MS BROOK:

There's no utility in that.

WILLIAMS J:

No.

MS BROOK:

The Crown brings appeals when it considers that somebody has been sentenced to home detention and should be sentenced to imprisonment.

WILLIAMS J:

But that's a matter of policy and who knows? That could change.

MS BROOK:

The Court of Appeal might have something to say about that but yes. Yes, I agree.

WILLIAMS J:

Possibly but, you know, that's an internal…

MS BROOK:

Yes. Well, the reason for it is because there are numerous Court of Appeal authorities which say we're not going to allow a Crown appeal unless we get to the point that a sentence of home detention was jurisdictionally unavailable at first instance.

WILLIAMS J:

So are you really saying that it's not just a matter of practice but that there's a principle –

MS BROOK:

Yes.

WILLIAMS J:

– that is imposed on the Crown in this regard? That's what you said I think with a number of Court of Appeal decisions making that point.

MS BROOK:

Well, what they're saying is that they wouldn't allow a Crown appeal. I suppose it wouldn't stop us from trying to bring one.

WILLIAMS J:

You can have a go, yes, fair enough.

MS BROOK:

Yes, and of course that principle comes from cases where the Crown has sought imprisonment. To my knowledge we have never appealed on the basis that the sentence should still be home detention but a longer term, so that situation just hasn't arisen but yet and I take the point that it's theoretically possible. It seems unlikely because given the time it takes for an appeal to be heard it's just practically not something that we do.

WILLIAMS J:

Yes, okay.

MS BROOK:

Those are my submissions unless the Court has any further questions for me.

WILLIAM YOUNG J:

Thank you, Ms Brook. Do you want to make your submission in reply, Mr Nottingham?

MR NOTTINGHAM:

Yes, I can.

WILLIAM YOUNG J:

Mr Nottingham.

MR NOTTINGHAM:

I'm just a simple man and I've read the Act and I have never presumed to be intelligent enough to be a Judge but if I sentenced someone I would take into account their health and the least restrictive issues and that would trump an uplift in sentence of three months. That's all we're looking at is three months.

So if we look at His Honour's comments about yoga, I think this is more mental gymnastics than yoga. When someone has to think about the intended consequences, there has a sort of a feeling when they haven't come to Court about what they would be that they're looking to try. They may be there. I don't know. We'll wait and see. But what I would do is I would say, even if there was an uplift, I would then say we don't want to send Mr Nottingham to prison so therefore we are confined by the sections and that therefore we can only impose 12 months and home detention. I wouldn't go into the culminative sentencing and all of that issue. I would simply say we're bound by that and therefore I sentence him to or I dismiss the appeal and the home detention stays as it is. I think the sections are clear. I don't see the mental gymnastics that have infiltrated this argument and that's just, I'm

obviously not of the intellect of the Court, but I am saying that the sections involved, section 80A and section 80B, are manifestly clear that on the issue of the same charges no less than 14 days and no more 12 months can be imposed and it ends there. If in fact the Court of Appeal was going to impose home detention, it would have been aware of those matters and it should have simply dismissed the appeal and related the reasons for dismissing the appeal even though they wanted an uplift.

What the issue here too is, and I'll end on this, it's repeating my initial submission, that these matters of sentencing have to be understood by the public. So when we go into these sorts of intricacies and the public sees them and there is an outcome that is an injustice because the Court of Appeal wanted to sentence me to home detention because of my health, and the Crown comes along wanting to sentence me to another term of imprisonment, a re-sentence, then it becomes almost like the public will lose contact for the Courts and that's not what we want in relation to sentencing. We want it clear, concise and simple, and I think Parliament intended that and when this Court raises the issues of varying and various other things and my argument as does substituted mean imposing. Of course they mean the same thing. To define them differently is to create what I believe is an intellectually dishonest wall and that wall should be smashed down in this decision by this Court.

Those are my submissions.

WILLIAM YOUNG J:

Thank you, Mr Nottingham. Subject to the submissions from the Crown and from you, we'll reserve our decision and take time to consider it and deliver it in writing in due course.

O'REGAN J:

Does bail continue? Does bail automatically continue?

WILLIAM YOUNG J:
Does bail, what's the – if necessary.

GLAZEBROOK J:
Is bail until a decision or…

WILLIAM YOUNG J:
Yes.

ELLEN FRANCE J:
I think it's pending the decision of the Court. Sorry, no, pending the hearing of the appeal.

WILLIAM YOUNG J:
Okay, we continue bail until the decision.

MR NOTTINGHAM:
Thank you, Sir. There is one last issue. I've raised it in my submissions but I don't want the Court to overlook them and that is that I've served some more time period so if the Court does decide in my favour then those extra days I would like to be attributed against community work.

WILLIAMS J:
These are the nine to 10?

MR NOTTINGHAM:
These are the nine to 10 days, Sir, yes, and I have been subject to detention in relation to the lockdown but that might not be applicable to this particular case.

ELLEN FRANCE J:
Sorry, Mr Nottingham, you won't have been doing community work?

MR NOTTINGHAM:
No, I have.

ELLEN FRANCE J:

You have?

MR NOTTINGHAM:

I have, Ma'am, but they've been very kind in the way that I've been able to do that, but I have about 40 hours left.

WILLIAM YOUNG J:

Thank you, we'll retire.

COURT ADJOURNS: 11.28 AM