IN THE SUPREME COURT OF NEW ZEALAND SC 102/2009

RAYMOND EVEREST HESSELL

Appellant

5 **v**

THE QUEEN

Respondent

10

Hearing: 19 April 2010

Coram: Elias CJ
Blanchard J
McGrath J

Appearances: R Lithgow QC with G King for the Appellant
C Mander and J Murdoch for the Respondent

CRIMINAL APPEAL

15

MR LITHGOW QC:

If the Court pleases, I appear together with my learned friend Mr King for the applicant.

20 **ELIAS CJ:**

Yes Mr Lithgow, Mr King.

MR MANDER:

May it please the Court, I appear with my learned friend Ms Murdoch for the respondent?

5 **ELIAS CJ:**

Thank you Mr Mander, Ms Murdoch. Yes Mr Lithgow. We've read your submissions of course. The point that troubles at any rate me and I think maybe my colleagues is the point made against you by the respondent that this regime was not applied to the appellant and we'd be grateful if you tackled
10 that head on?

MR LITHGOW QC:

Well of course that together with the following case of *R v AM*, because of the Court of Appeal's own wishes to make use of material put together by the
15 Sentencing Council which was abolished but all that material is held up at the Law Commission, a person was just taken at random in each case and there they were used to achieve its purpose now would be, it's an odd sort of thing for the Crown to say.

20 **ELIAS CJ:**

Well except they didn't really take the appellant, did they? They didn't apply it to him?

MR LITHGOW QC:

25 Well he's just the vehicle.

ELIAS CJ:

It's almost all obiter dicta.

30 **MR LITHGOW QC:**

Well I think Geoff Hall's book on sentencing law suggests that guideline judgments are by their very nature obiter dicta but they have got an increasing grip on New Zealand sentencing and if they're allowed to have a one hit go in the Court of Appeal and make major changes for no reason other than the

Court of Appeal want to, which maybe a good reason, it may be an excellent reason, and then not take advantage of having another tier of appeal because of a perceived perception that we now pretend it was actually about Mr Hessell when no one believed that for one split second. They didn't need an amicus to assist Mr Hessell. The amicus was there to put forward the proposition set out by the Sentencing Council and the same in the *R v AM* case and the bulk of the time was spent in both cases in relation to that so Mr Hessell is an example of some of the problems of a late guilty plea when you're entangled with a dispute with a co-accused who you're related to in some way but he is just the vehicle. Now I'm not saying the Court of Appeal didn't ever used to do that. In fact Lord Cooke sometimes just waited for cases to fly past that suited his purposes and he would grab them and the law would shift.

ELIAS CJ:

But they'd shift in relation to that case?

MR LITHGOW QC:

Well they sometimes have trouble just exactly seeing how that was so. I think my first ever case in the Court of Appeal was *Waka* which I thought I'd argued very well only to discover on more mature reflection that I was simply passing by on someone else's wave because His Honour had written about his intentions in relation to this extra judicially and my ignorance simply didn't give me the skills to understand the way in which you are used in that way. There's nothing the matter with it.

McGRATH J:

My experience certainly is though that with previous guideline cases the area of relevance, if you like, was far greater than it seems to have been in this case. If you go back at look at cases like *R v Mako* [2000] 2 NZLR 170 and that sort of matter the circle of relevance, if you like, was far bigger in relation to what was in the end said.

MR LITHGOW QC:

The relevance of the outcome or the relevance of the original case?

McGRATH J:

5 The relevance of the original case to the outcome.

MR LITHGOW QC:

Yes. well and in *R v AM* the case itself was a minute part of a wide ranging guideline decision on sexual offending, not as wide as the Court had wanted
10 to go but ultimately very wide. Mr Manukau, whose name was kind of suppressed out of that case by giving it a different name, he was a very small player in the whole thing and I doubt if more than 20 minutes was devoted to his interests. So what that would mean though, if that is –

15 **ELIAS CJ:**

That's often the case if the Court is coming to a position in a particular appeal by reference to comparable cases.

MR LITHGOW QC:

20 If it is, if the Crown's proposition is sustainable then the Court of Appeal method of simply embarking on a, on a guideline sentencing case must be at a very fundamental level wrong because if it's not amenable to appeal it is virtually first instance –

25 **ELIAS CJ:**

Well.

MR LITHGOW QC:

– on the instance that a Judge, individual Judge who wishes –

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BLANCHARD J:

It may not be amenable to appeal in a particular case, arguably, but there will be subsequent cases in which presumably the Court of Appeal will apply its guideline judgment and they will be susceptible at appeal and this Court can

at that point say, if it thinks it appropriate, no we don't agree on this particular aspect.

MR LITHGOW QC:

5 Well since most of the impact is in the District Court level, this court's hardly likely to get anywhere near it and that, with respect, would be –

BLANCHARD J:

Well that's not really correct. There will be plenty of instances where 10 sentence appeals come to the Court of Appeal.

MR LITHGOW QC:

There will be plenty but the impact within, over the weekend of the decision and by the Monday dramatically affects – since over 90 percent of all people 15 charged plead guilty, this has probably the widest application of any decision that a Court has made and although it may not be in relation to big stuff, anymore than in proportion, it affects everybody who's charged with the most trivial of offences, the pressure is on to plead guilty, that is the dominant characteristic of the defence lawyer's life now is getting a guilty plea in order 20 to obtain the maximum discount and not be wrong about that. Now if that can't, if that can't be examined by an Appellate Court then the first Appellate Court should never have been allowed to make the decision because it legislates something –

25 **BLANCHARD J:**

Well the problem with that is how else do you get a guideline judgment in place? If you're going to change the law so that a sentence is likely to be increased then it's going to be unfair to do that to the particular person. It has to be done prospectively.

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MR LITHGOW QC:

It's done to 10,000 people, tens of thousands of people in advance, but apparently the Crown's view is, which is an improper position if they go beyond their prosecution role and represent the Crown, that it's not amenable

to consideration by a higher Court. Now there's something so fundamentally wrong about that thinking that you can have a –

ELIAS CJ:

5 I would agree with that but surely the point is that in a properly constituted case it can be challenged. The problem is that there must be real doubts as to whether this is a properly constituted case because the guideline was not applied to him. The first case in which the guideline is applied can be appealed.

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MR LITHGOW QC:

But the –

ELIAS CJ:

15 I do take the point which I think is implicit in what you say, that in the meantime a lot of people are going to be treated under the guideline.

MR LITHGOW QC:

Well you say treated, I say hurt and this Court won't look at it. I mean what –

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McGRATH J:

You're saying that counsel –

BLANCHARD J:

25 Well yes, yes this Court will –

McGRATH J:

You're saying counsel's behaviour will cause that.

30 **MR LITHGOW QC:**

No.

McGRATH J:

Counsel will react in a certain way, advise clients in a certain way, they will plead guilty and that will be it?

5 **MR LITHGOW QC:**

There are so many inherent injustices in what the Court of Appeal have done because of their fundamental ignorance of practice at the core level because the amicus never acted for the defendant – ah, for accused people and the lawyer acting for Hessell had never been to the Court of Appeal before and 10 was completely outweighed and didn't understand what was happening and so a whole range of things. So we have to go to, we have to go to a specific example so within a very short period, let's say at the higher level, a serious fraud office case. I had a woman who had been told by her employer that her mortgage business was being investigated. They interviewed her and they 15 said they were going to refer it to the police. Five months later she gets a phone call from the SFO saying they want to interview her. About six weeks after that there's then an interview. A lot of things are discussed. I'm there. They say they'll get back to you. You hear not one word for another five months and then you're told you are to turn up at the Lower Hutt District Court 20 in two weeks and you'll be charged. So that's the first appearance.

ELIAS CJ:

Is this a submission?

25 **MR LITHGOW QC:**

That's the first appearance. What this case says is that between that and the second appearance you have to have everything in place for a guilty plea. Despite the fact she has four children at school and all these things that – she's on the cusp of home detention or imprisonment, that you're not entitled 30 to delay things for the purposes of any special reports that may be required or to give Court time to do a sentence indication. Now that's at that level –

ELIAS CJ:

Mr Lithgow, that is engaging with the merits of the appeal should we grant leave and you've made some very powerful points. The difficulty we are struggling with is whether consistently with our statutory jurisdiction we can grant leave in a case where the guideline was not applied. And your client was not affected.

MR LITHGOW QC:

Well the guideline should have been applied to him because this decision, that the event of trial guilty pleas are so low is also part of it because if that is to be the case, and it is the sheer cost of trials in New Zealand that is one of the problems, and the judicial resource and the many cases – not only the judicial resource but the Court staff resource and courtrooms, that if it is only to be nothing or maximum for 10 percent, then where is the so called process interest in anyone pleading guilty at that stage? I mean because that part of it is just as wrong as the other end of it.

ELIAS CJ:

What discount did he get?

MR LITHGOW QC:

Less than 10 percent because his –

ELIAS CJ:

Do we have the sentence?

McGRATH J:

89 of the Court of Appeal I think I saw it.

ELIAS CJ:

89?

McGRATH J:

A credit in the region of 10 percent.

MR LITHGOW QC:

And at 94 that the Judge had allowed 10 percent. I mean the guts of – I know that we've started sort of in a way that I hadn't intended but the arguments about Mr Hessell are very familiar in that it's a, the counsel was trying to get his side of events across in a very familiar situation where the police and the Crown play off a man and a woman against each other and the woman ends up with less. Now this is a, this is one of the things which the Court of Appeal do not accept as being a relevant reason to stop the clock but it should be a relevant reason to stop the clock because the prosecuting of both husband and wife, partners, father and son, by the police is a very common feature of a range of cases including drugs and sometimes violence, in this case it was sex, and defence counsel know that in the ordinary course if you hold firm, that the woman will either walk or get a substantially lesser sentence and usually the man will wear it.

ELIAS CJ:

We can't accept that sort of submission from you.

MR LITHGOW QC:

Why not?

ELIAS CJ:

Because what I'm trying to find out is whether the case can be properly set up for a proper hearing by this Court and I'm inviting you to show us how the judgment in fact did impact upon the appellant. I guess at page – at paragraph 94 there's some indication. We're really hampered in this because the larger points are very much to the fore and I can understand that. There isn't much concentration on the particular circumstances of the appellant.

MR LITHGOW QC:

Well I get back to something which just seems to have, if I might say, being paid lip service to, and that is that if the underlying case which has been lurched from obscurity, that the decision of the Court of Appeal becomes the

key focus, and then you can't appeal it because that's not up to much, and yet the Court of Appeal have used that to make significant changes, how can it be a proper justice system if you can't appeal? How can that be so?

5 **BLANCHARD J:**

But anyone else can appeal in a case where the guidelines are applied to them and they say the guidelines are wrong.

MR LITHGOW QC:

10 Well that's, that harks right back to the justice system being like anyone can go to the Ritz. That's simply unrealistic in terms of the amount of cases which will be determined and put up with and sentences served and things done before anyone gets anywhere near back to this Court. There are serious problems with Hessell at basic sentencing level and –

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McGRATH J:

What, your submission is really one of the urgency of the problem being addressed by this Court, isn't it?

20 **MR LITHGOW QC:**

It is. It is urgent because the Judges are inventing their own solutions which are not particularly principled because it is unworkable as it stands and I know Your Honour's are not big on anecdotes but Judges have said that Hessell has turned prosecutors, defence lawyers and Judges into a conspiracy of

25 deceit against the decision because they have to pretend to make it fit, because it doesn't fit. I mean it is a given that perhaps this Court is insulated from, that Hessell causes trouble that has to be sorted out. Either you say that's the way it's going to be and if that's the way it's going to be, that's the way it's going to be, or you address the particular problems of what is in reality

30 the first reasonable opportunity and that the, with a range of things in the middle, and that the Hessell situation, you get to the other end and say well, what are we going to say about these people who thought that they were resolving issues but it turns out nobody values them and that you, and that

you’re treated as, with a very, very minor type of discount even though you haven’t had a trial.

ELIAS CJ:

5 Well is it, is it possible – do you argue that the way the discount for guilty pleas was dealt with by the Court of Appeal was wrong. That it was too rigid and even though the Court said it was not applying the guideline sentences except for the future effectively they have because they have refused to enquire into whether in the circumstances 10 percent was sufficient?

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MR LITHGOW QC:

Yes. And they have, they have done it for the past as well as the future because people who were in the process of sentence indications, which take weeks to set up in big courts, people who were getting drug and alcohol 15 assessments were all being told that they had to bring these forward and get the plea inserted otherwise they couldn’t be helped under Hessell, all of this being anathema to a proper resolution of the underlying issues. See the – and the two propositions, the two cases that the Crown give to say that this Court has previously said that you didn’t want to get into this kind of thing, in 20 my submission don’t bear that meaning at all, *Burdett v R* [2009] NZSC 114 and *McGregor v R* [2008] NZSC 10, this is exactly the situation that you refer to as being amenable. In *McGregor* at paragraph 3 is that, “The Court will also be reluctant to interfere with the assessment of the Court of Appeal except where it is clear that some error of principle has been –”

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BLANCHARD J:

I don’t think you need to argue that. We accept that if this is a proper case in relation to Mr Hessell then there would be a question of principle to be determined. The problem is whether the Court of Appeal actually applied the 30 new guidelines to Mr Hessell despite saying that they weren't doing so?

MR LITHGOW QC:

Well the – well as I hope I’ve said, of course if what we say, if you’re going to set a guideline, what the correct guideline would be was applied to Mr Hessell

then he would have got a greater discount and that is because well of 25(g) if nothing else of the Bill of Rights Act which is normal sentencing principles it would be a one way ratchet if the principles – if more utilitarian guilty pleas analysis was adopted then Mr Hessell's guilty plea was worth a lot more.
5 Even if, even if the Court couldn't understand what was being said about his particular circumstances or couldn't accept that the nuances were really worth worrying about –

ELIAS CJ:
10 Were the facts before the Court?

MR LITHGOW QC:
The fact, well –

15 **ELIAS CJ:**
The facts in terms of how complicated it was?

MR LITHGOW QC:
Well it was a dispute over a summary of facts –
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ELIAS CJ:
Yes.

MR LITHGOW QC:
25 – and a meaning of a summary of facts, the meaning of words and how his culpability inter-related to that of the wife who got home detention.

ELIAS CJ:
So the actual case of Hessell does engage issues about the amount of
30 discount for late guilty plea, the fact that a disputed summary of facts isn't sufficient reason to defer. So it raises the question of first available opportunity?

MR LITHGOW QC:

Mmm, yes because as I've set out in the submissions, it is, well it previously had been considered that in the ordinary course defence counsel and whoever was in charge of the case at the stage it was at, would try to provide a single analysis of what the case was really about, to the Judge and not expect the Judge to sort this all out at sentencing. So he, let's say the counsel was wrong about the significance of the nuances he was trying to change but that that was his, the counsel's genuine belief as to the fairest and best way to progress a finding against his client, which was going to happen, that was true, that the client actually believed because really only the client and his wife and the girls knew where the truth lay on all this.

ELIAS CJ:

What I'm asking you is was all this material before the Court of Appeal?

MR LITHGOW QC:

Yes.

ELIAS CJ:

Right, because we don't have it.

MR LITHGOW QC:

Right, well I know that because I went through it, I was there during that phase. Mr King was going to argue the Hessell part of it but we got onto it sort of straight away. We hadn't anticipated that the Hessell part of it would be the main part of it but that Mr Mander argued for the Crown and his, Mr Hessell's lawyer went through all this.

ELIAS CJ:

All right Mr Lithgow, where would you like to take us, if you hadn't been interrupted. I found that helpful because I've now been able to concentrate on the particular case and it does seem to me, subject to what Mr Mander may say, that there maybe sufficient coat hanger there for the principal issues that you want to raise.

MR LITHGOW QC:

It's just having in my head the grounds of appeal under the Supreme Court Act. The emphasis is really on general or public importance –

ELIAS CJ:

Absolutely.

MR LITHGOW QC:

They're the first two grounds. I know that that doesn't mean that they are the most important but that's what you would expect from a second level Court of Appeal and although there is the grounds that there has been a miscarriage of justice in the case of a criminal case, the first grounds are clearly there. It's important because of the number of cases if affects –

BLANCHARD J:

Wouldn't you be better to move to the specific criticisms of the guidelines?

MR LITHGOW QC:

Well I've, we've set out firstly the first reasonably opportunity criticism.

BLANCHARD J:

And you're saying that's far too rigid and there's no real enquiry as to what was on the particular facts the first reasonable opportunity?

MR LITHGOW QC:

Well I start from the beginning and that is that the fundamental omission that there is no identification of what criminal defence lawyers actually do and that, and there is no evaluation that what they do is worth doing and that it serves the interests of the Court. The only reference to the role of the lawyer is that of representation, a technical expression which refers back to section 30 of the Sentencing Act which was a prerequisite for putting people in jail. But what the reality of life in the District Court is that it is unusual to have a lawyer

that will ultimately be there when the resolution is achieved on the first appearance. That's because a lot of people are arrested and brought to Court. They see a duty solicitor, they have to apply for legal aid.

5 **McGRATH J:**

This is all part of your submission, there's no proper legal advice?

MR LITHGOW QC:

There is no opportunity –

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McGRATH J:

And that's not, that's not evaluated. That's the essence of what you're saying?

15 **MR LITHGOW QC:**

Yes there's no time to do it but this has become worse because of an attack on lawyer of choice under the legal services regime by Dame Margaret Bazley and is now part of government policy to find a different way of allocating legal aid and the problem with that is that you will be allocated a lawyer who's never

20 met you before, it'd be like going to a general practitioner and it being considered undesirable to have the one you had last time so that's –

BLANCHARD J:

That hasn't come in yet, has it?

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MR LITHGOW QC:

No but that is on the agenda.

BLANCHARD J:

30 Mmm. Well we may have to deal with that if and when it comes in.

MR LITHGOW QC:

So if we look at the kinds of simple things which happen of which the Court of Appeal didn't see the reason to stop the clock probably the one that is most

frightening for lawyers is, is not so big in Wellington but, is the very young gang prospect. Someone who appears to be taking responsibility very easily and without any real knowledge of, of background and reluctant to discuss it. It is very important that the dust settles to find – get that person's confidence
5 to find out whether in fact they are the person who did the deed and this is a very basic problem with Polynesian culture and Maori culture up against the English law. Individual responsibility versus family or gang joint responsibility.

ELIAS CJ:

10 In fact some work done by the Ministry of Justice suggests that Polynesian defendants defer pleading guilty because they are so ashamed in relation to their families.

MR LITHGOW QC:

15 Exactly. It takes a long time, a variable time, not necessarily rigidly within 21 days even if you can get to see them and their family in that time, but you have to sort out who are the decision makers within the extended group. Of course the lawyer's obligation is to the individual client but to try and pretend that a Polynesian or Maori young person will make a decision in defiance of
20 wider family is unrealistic and you are the, from their point of view you are both their lawyer but you are the representative of the criminal justice system as well. There's reasons for that which have become exacerbated and that is if you ever went to Courts and appeared for people you would remember being in a vast milling mass and –

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BLANCHARD J:

I don't think you need to embroider the argument bearing in mind that this is an application for leave. Your point, I think, is that second appearance should not have been chosen as the first reasonable opportunity.

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MR LITHGOW QC:

What –

BLANCHARD J:

That it's far too mechanistic.

MR LITHGOW QC:

It is too mechanistic but you have to get out of your mind an idea about what happens at this first and second appearance. Over in the Wellington District Court –

BLANCHARD J:

Yes I have Mr Lithgow, I have got that out of my mind.

MR LITHGOW QC:

You won't see a Judge. You will see –

BLANCHARD J:

Is your point, that the first reasonable opportunity isn't necessarily the second appearance and very often won't be?

MR LITHGOW QC:

Very seldom will be.

BLANCHARD J:

That's the short point isn't it?

MR LITHGOW QC:

Yes, yes and because –

BLANCHARD J:

And that the Court of Appeal shouldn't have chosen something as rigidly as that?

MR LITHGOW QC:

Absolutely not.

BLANCHARD J:

Well we don't need to get into lots of other examples.

MR LITHGOW QC:

Well it is interesting to know that the Wellington Court has evolved a hearing
5 at –

ELIAS CJ:

Mr Lithgow?

10 **MR LITHGOW QC:**

– a 50 day mark.

ELIAS CJ:

Mr Lithgow?

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MR LITHGOW QC:

Yes.

ELIAS CJ:

20 We understand the point that you're making. The issue for us is whether to grant leave. You've identified five points on which you say leave should be granted. I was earlier exploring with you whether they are raised by Mr Hessell's appeal. Subject to what Mr Mander says I think you've made considerable headway, at least with me, in indicating that the first reasonable
25 opportunity point is raised by Mr Hessell's appeal. Do you want to, keeping in mind that this is a leave hearing –

MR LITHGOW QC:

Absolutely.

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ELIAS CJ:

– do you want to address the other points in the same way?

MR LITHGOW QC:

All I wanted to, and I would like to get clear, is that people are not appearing in Courts before Judges who are asking them things anymore. That is a figment of the past. They appear before registrars who process them and you can be committed for a jury trial without ever seeing a Judge.

ELIAS CJ:

Yes.

MR LITHGOW QC:

And now most people are committed for jury trials without ever seeing a Judge and without there being an event and it is important to see how Hessell impacts on that because a separate regime has been invented, quite outside the Summary Proceedings Act, by Judges in Wellington to create a 50 day hearing where a Judge will actually talk to the people to see if they understand the possibilities of pleading guilty and the significance of that and 50 days might be about right. That's for ones that are otherwise going to trial. Obviously for more minor ones that's very different.

Now that's about, and I've given lots of examples of things which the Court of Appeal had not accepted as reason to stop the clock. I think the –

BLANCHARD J:

I don't think we need the examples. As the Chief Justice was trying to say to you, you've made this point.

MR LITHGOW QC:

All right.

BLANCHARD J:

I for one understand the significance of what you're saying without need for further examples.

MR LITHGOW QC:

All right. Well then we'll deal with –

5 **ELIAS CJ:**

And you don't need to persuade us of the public importance of this.

MR LITHGOW QC:

All right. The question of remorse then, this is, obviously counsel's preference would be that if leave was granted that it would be, the appeal would be a significant exercise, and we'd invite the Court not to choose some headings and not others but just to let it evolve because a lot more research and work has to be done. But the remorse issue as set out was, in my submission, analysed perfectly well by the Court of Appeal. We simply wish to put before the Supreme Court that the other decision is a better one. That is that remorse should be, more often than not, a separate reduction. That's partly, of course, because the Sentencing Act gives it a discrete heading and the objection by the Court of Appeal was that it's very hard to tell if, people can assert remorse but it's very hard to tell if they're really sorry. But the Sentencing Act actually uses the expression "remorse shown by the offender", not remorse asserted by the offender or remorse listed by the offender and there will be very, very different situations. Of course the Court of Appeal haven't ruled it out but it's in the very nature of guideline judgments that they develop a rigidity and while they made use of, and in the case that the Crown have annexed of *R v AM*, they made use of a huge amount of material that was put together by the Sentencing Council and I don't know if the Court is familiar with the Sentencing Council's format but in each case the Sentencing Council provided separate modules for departing from guideline so how to do it, what sort of situations there would be and practical outcomes so that that just wasn't left to a general idea that people would not treat the guidelines as rigid. Now that hasn't been taken up –

BLANCHARD J:

Well the short issue, which I accept is a question of principle, is how remorse is factored in. Whether the Court of Appeal's approach to it is the correct one or whether the alternative approach that you've contended for is the correct
5 one.

MR LITHGOW QC:

Yes.

10 **BLANCHARD J:**

And you don't need to expand on that.

MR LITHGOW QC:

Thank you. Now if, I know it's not your preferred way of doing things but
15 Mr King knows an awful lot more about murder which is being deferred by the Court of Appeal and he could usefully address you briefly on that on Hessell if you wish to look at that further and on the what is meant by the general proposition that there's problems with guideline decisions generally.

20 **McGRATH J:**

Does that mean you're finished now?

MR LITHGOW QC:

Well in terms of the things that I was going to address.

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McGRATH J:

Yes.

MR LITHGOW QC:

30 The argument is fully set out there and there are questions left hanging which are obviously available. Did Your Honour wish to ask anything more about remorse or timing?

McGRATH J:

Or first opportunity?

MR LITHGOW QC:

5 Or first opportunity.

McGRATH J:

No, what you're saying is hearing Mr King on murder would conclude your argument?

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MR LITHGOW QC:

Murder and –

BLANCHARD J:

15 And the Hessell case.

MR LITHGOW QC:

And Hessell.

20 **McGRATH J:**

In particular.

MR LITHGOW QC:

And what we've said there about the difference between New Zealand and
25 Australia on guideline judgments anyway so the, the end point would be that we would prefer –

McGRATH J:

That's all, you've answered my question.

30

MR LITHGOW QC:

– to do the lot. To keep the lot, argue the lot and see how it fell.

ELIAS CJ:

Thank you Mr Lithgow, yes Mr King?

MR KING:

5 Can I just very briefly address the personal circumstances of Mr Hessell first because in my submission it answers, I hope, as best we are able, the question that was posed right at the commencement of this hearing. The point is well made and is articulated by the Court of Appeal in paragraph 77 of the Hessell judgment and they say, "We deal with Mr Hessell's appeal on the 10 basis of the law as it stood at the time of his offending, not on the basis of guidelines set out above." In my submission that approach is a proper one if in fact application of the promulgated guidelines would not have resulted in a lesser sentence for Mr Hessell. The argument on behalf of the applicant is that if the guidelines or if guidelines are properly set out then that would have 15 a direct benefit to Mr Hessell's own circumstances for two particular reasons. Firstly, he was only accorded around, and I say arguably less, than 10 percent discount to reflect his guilty plea. Now if the Court were to take a less rigid approach to both first reasonable opportunity and also the benefit to be accorded later guilty pleas and the circumstances that relate to those, then in 20 my submission Mr Hessell would be demonstrably entitled to something more than 10 percent.

Related to that is the fact that Mr Hessell received no discount whatsoever for remorse. Now in the guidelines the Court of Appeal have made it clear that 25 remorse is really something that in the main is washed up in the discount for a guilty plea. Now whilst when someone is receiving a full 33 percent, that might be fair to say that's for guilty plea and for a little bit of remorse. When the discount gets so small as to be 10 percent, the reality is that remorse is simply not going to be factored into that equation. In Mr Hessell's own case 30 there were arguments about how remorseful he was. There were arguments about how his plea should be approached because there were, undoubtedly, arguments about the structure of the summary of facts. The summary of facts which was before the Court made it clear that his partner, who received a sentence of home detention, was in His Honour Justice Heath's terms "equally

culpable" but that was a change from the earlier proposition where it was at least arguable that he was being put forward as the main offender. Now the Court of Appeal didn't accept those arguments –

5 **ELIAS CJ:**
What, in the summary facts first put forward?

MR KING:
Yes. So it was who initiated the offending and so on. You note that the Court
10 of Appeal make the comment very early in the piece that the summary of facts, as it was, made it difficult to ascertain who initiated what and whether it was man, woman or indeed complainant, that's what they submit. So now these arguments were rejected in the Court of Appeal but in my submission had they been approached on a basis where there was greater flexibility, and
15 flexibility would incorporate obviously the concept of disparity, instead of a rigid approach based on discount for guilty plea, based on we're not going to recognise remorse. So the point is, Your Honours, that of the grounds that are sought to be advanced on the philosophical basis, that is first reasonable opportunity, remorse and flexibility, on all of those arguments, if the Court
20 were to adopt the approach which will be advocated, that would result in a different approach to Mr Hessell's case and it would be argued a greater discount would be required. It is submitted that the Court of Appeal saying we're not applying these guidelines to Mr Hessell is not valid if in fact the guidelines, if appropriately applied to him, if appropriately structured, would
25 have resulted in a greater discount then they should have been and would have been undoubtedly. It's inconceivable, in my submission, that if the Court of Appeal took the view that Mr Hessell was entitled to a 25 percent discount under the guidelines we're promulgating, but he only got 10 percent from Justice Heath, it does sound like these guidelines don't apply to him, they're
30 only going to apply for him tomorrow. It's inconceivable, in my submission, that the Court of Appeal would have done that.

So it's argued that the only ground that is sought to be argued in the substantive appeal, that would not have a direct effect on Mr Hessell's

personal circumstances and arguably the outcome of his case, is the murder appeal. The others, first opportunity, well, he only got 10 percent. He argued he was entitled to more because there were discussions over the summary facts and so on. The issue of remorse. He got nothing at all for remorse and
5 the issue of flexibility, well does that, is that wide enough to include disparity. If a person equally culpable, getting home detention, he getting two years, eight months in prison. So in my submission this isn't just a hook or a hanging the hat on Mr Hessell's case. This is a genuine appeal advanced on his behalf to –
10

ELIAS CJ:
We don't have the sentencing remarks so how was disparity treated?

MR KING:
15 They deal with it on the basis that on the face of it there appears to be something in it but when one looks at the fact that it was a very early guilty plea from the –

ELIAS CJ:
20 That's the Court of Appeal?

MR KING:
The Court of Appeal do articulate all of that.

25 **McGRATH J:**
Yes, focusing on the mother's facts.

MR KING:
That's right Sir.
30

McGRATH J:
Can I ask you this Mr King? Do I take it that in relation to Mr Hessell's circumstances everything that you would wish to argue, these issues of principle, all of the facts are in the record already?

MR KING:

Yes.

5 **McGRATH J:**

You're not going to be seeking to supplement the facts in any way?

MR KING:

Exactly. Now can I draw your, and to answer that if you look at paragraph 91
10 of the Court of Appeal decision, sorry the Court of Appeal judgment, the discount the Judge gave in respect of the guilty pleas. He submitted the discount for them and for Mr Hessell's remorse should have been greater. That is the first issue. Well that covers the two issues. What discount he was entitled to for pleading guilty and the concept of remorse and whether he was
15 entitled to a discount for that but again I repeat the point looking at this particular case if remorse is supposedly washed up in the concept of guilty plea then he's only getting 10 percent for both of them then that is arguably, even on the promulgated guidelines, it's a very harsh outcome for him and if the Court accepts –

20

McGRATH J:

All I was asking you about was the evidence and you're saying this, there is no need to supplement it and you're pointing –

25 **MR KING:**

That's right.

McGRATH J:

– to the fact that it was an issue and argued on the basis of the record in the
30 High Court?

MR KING:

Absolutely Sir.

McGRATH J:

Thank you.

MR KING:

And at paragraph 94 and 97 of the Court of Appeal judgment those matters are laid out as the argument as it was.

McGRATH J:

Thank you.

MR KING:

So in my submission this is an entirely appropriate case for this to be dealt with and it does have a direct bearing on Mr Hessell's case and again, I hope I'm not repeating, but the point is significant, that it's one thing to say the guidelines aren't being applied to Mr Hessell but the guidelines should be applied to Mr Hessell if it would result in a more favourable outcome. If it wouldn't, for example a harsher outcome, then obviously the Bill of Rights precludes it but 25(g), in my submission, has application, at least by analogy to his predicament that he was entitled to the benefit of the guidelines, if they would have benefited him.

Just very briefly on the issue of murder. In my submission it's surprising really that the Court of Appeal did not grasp it. It's my submission that recognising or getting guilty pleas from the charges of murders are the ones that really have the greatest benefit to society. They are traditionally the most stressful, the most costly, the most difficult trials that we have in our justice system and if they can be avoided then it's appropriate that guidelines be set out for that as well. The various approaches that have been promulgated have been applied in different ways but the so called Boldt approach of giving a discount only in respect of the period in excess of 10 years, well that's been applied. Other Judges have taken different views and I would submit that it's in everybody's interest. And it's a matter of principle. You don't need, with respect, a particular case to voice it on because it's actually almost easier to apply when it's given in generic terms.

ELIAS CJ:

Well maybe if we were a legislature but don't we have to have a case?

5 **MR KING:**

Well if we're in the bright world of guideline judgments Ma'am then as this case –

ELIAS CJ:

10 Well are we though? What's the authority for the bright world of guideline judgments?

MR KING:

There's been a – well certainly it's –

15

ELIAS CJ:

It's a question I'm going to ask Mr Mander.

MR KING:

20 Exactly and in my submission there is undoubtedly a trend in the Court of Appeal and they've been embarking upon a campaign of delivering guideline judgments, they make that point very clearly in Hessell and they refer to it again in *R v AM* in the Crown bundle. That is there's a, they're conscious and express decision that they are going to go down that path. How they fit into 25 the justice system is perhaps difficult to analyse. There is the Amendment Act which talks about guideline judgments at paragraph I think is it 6A of the Amendment Act, 6A and 21A of the Amendment Act.

ELIAS CJ:

30 Which Amendment Act?

MR KING:

The Sentencing Amendment Act Ma'am.

ELIAS CJ:
Right. What does it say?

MR KING:
5 Section, the Sentencing Amendment Act 2007 No 2 says, "6A Application of sentencing guidelines. (1) A sentencing guideline applies to the sentencing of an offender in a District Court, the High Court, Court of Appeal or Supreme Court for an offence on or after the date on which the guideline comes into force."

10

BLANCHARD J:
Is that talking about sentencing guidelines established by the Court of Appeal or sentencing guidelines established by the Sentencing Council?

15 **MR KING:**
It refers to sentencing guidelines, it means sentencing guidelines produced by the Sentencing Council enforced under the Sentencing Council Act 2007 so it doesn't strictly refer to Court of Appeal ones but what it does do, in my submission, is at least arguably support the approach of the Court of Appeal
20 in setting guidelines but it doesn't specifically, and I was going to make that point Sir, I had the definition section noted for that. And then I think there's section 21A as well and this again is in the Amendment Act, 21A, same principle applies Sir, "Court must adhere to sentencing guidelines. When sentencing an offender, a court must impose a sentence that is consistent
25 with any sentencing guidelines that are relevant in the offender's case, unless the court is satisfied that it would be contrary to the interests of justice to do so."

ELIAS CJ:
30 Well it couldn't be argued that the –

MR KING:
Sentencing Council again.

ELIAS CJ:

– Court of Appeal sentencing guideline is within that –

MR KING:

5 No.

ELIAS CJ:

– so that people are compelled to apply it for that reason –

10

MR KING:

That's right.

ELIAS CJ:

15 – or Judges are compelled to apply. It's only the effect of precedent that achieves the same effect.

MR KING:

That's precisely correct in my submission and –

20

ELIAS CJ:

And nor do either of those provisions provide the Court of Appeal with –

MR KING:

25 The authority to – the difficulty is –

ELIAS CJ:

Beyond the traditional way in which –

30 **MR KING:**

Precisely.

ELIAS CJ:

– the Court has identified cases and given some guidance.

MR KING:

5 Yes. It's always been recognised that there is a role, obviously, in setting precedents in the Court, that it isn't just error, correction in an individual case but there are principles to be enunciated for the benefit of all and obviously the principles of consistency and predictability and so on do have a place. It's the extent to which they are to be used and in my submission if we are 10 going to have them, and we do have them, and we have had them now from *Terewi*, to *Taueki* to *Mako*, we've had them going back for a long time, relatively speaking. Then what we do need, with respect, is tools on how they are to be used. It's one thing for the Court, and I argued *Taueki* and I argued strongly, look we've had the experience with *Terewi*, when you set 15 things in bands then you're stuck within the ranges of those bands. You might be able to move within them but the band approach of guideline tariff sentences is very inflexible so they did at least introduce that paragraph saying it's not meant to be inflexible but the reality is –

20 **McGRATH J:**

There's a range in between the fixed points.

MR KING:

Yes but the reality is, it's extraordinarily difficult to get outside that range, 25 even in very exceptional factually specific cases where the needs for denunciation and punishment and so on are not as great as they are in the run of the mill cases where the personal circumstances are so extreme one is just handcuffed, with respect, in the sentencing Courts in that approach. So to say it's flexible there needs to be useful enunciation of when it is that 30 guidelines can be departed from and to what extent and just saying they're not meant to be rigid guidelines is, with the greatest of respect, of no assistance at all. The reality is, in the District Courts and when sentencing is taking place that it's nigh on impossible to –

ELIAS CJ:
Does it also impact on appellate review? Is it common to see judgments saying it's within the range?

5 **MR KING:**
Yes.

ELIAS CJ:
Yes.

10

MR KING:
Yes in my submission it absolutely is. *Taueki* is a good example. For example that was a GBH case of course as we're all familiar, 14 year maximum, but that in subsequent cases has been applied by reducing –

15

ELIAS CJ:
Yes.

MR KING:
20 – it to the 10 years. You use the same maths, you just reduce it to reflect the 10 year maximum or seven year maximum or a five year maximum so these things do have a way of just going well beyond and this case is a classic example, with respect.

25 **ELIAS CJ:**
Well it was a little chilling to read the Court of Appeal talking about discount creep.

MR KING:
30 Yes. Precisely. And to talk about, despite the fact the Sentencing Act makes it very clear that remorse is something that needs to be taken into account in sentencing, that's what the legislation has said. The Court, and that's in section I think 9(2), we've set it out, section 9(2)(f), "Any remorse shown by the offender or anything as described in section 10." That sets out remorse as

a discrete mitigating factor. Now that has effectively been overridden by the Court of Appeal saying, well it's not. It's just something which is dragged into guilty plea discount which is a separate factor and that highlights, in my submission, both a jurisprudential argument about what is the proper place and role of guideline judgments but more importantly how are they to be applied at the coal face. When can the guidelines be departed from, to what extent and for what reasons. And that's why the case of *Markarian v The Queen* [2005] HCA 25, the Australian case is set out before you because this was something that the Australians have, like all of us, have grappled with and it does demonstrate the differing approaches. The so called two tier approach, much favoured in New Zealand, where you look at the offence and you decide what that's worth and then you factor in an increase or a decrease for personal circumstances and so on, against the so called judicial synthesis, the approach of a Judge being able to do what is proper in the correct case. Obviously having regard to those core concepts of predictability, of consistency, of like cases being like, but at least not being, being fettered, in being able to impose an appropriate outcome in an appropriate case. So as we go into this regime where the Court of Appeal have signaled an intention that this is just the start of another round of guideline judgments, we've already got *R v AM*, now for sexual violations where again how they are to be approached is a matter of huge public importance in the criminal justice system and I hope I'm not seen to be overstating that but it has a really significant bearing on the practice of criminal law –

McGRATH J:

Are there other guideline judgments imminently coming up?

MR KING:

Well they've, we don't know because they don't –

McGRATH J:

There's none they've actually made known –

MR KING:

Not that I'm aware of Sir. We knew that the *R v AM* was out because Mr Lithgow argued it. It was predicted in Hessell because when the appointment of amicus became known and the Court of Appeal had made it
5 clear that they were looking for a vehicle, sorry, they were looking for a vessel with which to wrestle and Mr Hessell was that vessel. They saw, they heralded that but I'm not aware of others but they certainly have said, we are looking at going down this path.

10 **ELIAS CJ:**

Murder –

MR KING:

Yes.

15

ELIAS CJ:

Sorry –

MR KING:

20 That's all I wanted to say on those aspects Your Honour.

ELIAS CJ:

The rationale for guideline discounts cannot be consistency at all, can it, because those cases are closely supervised?

25

MR KING:

In terms of the legislation –

ELIAS CJ:

30 Yes.

MR KING:

– 104, 102, 103?

ELIAS CJ:

Yes. I just meant terms of, in terms of wider need to achieve consistency in sentencing.

5 **MR KING:**

Oh not that's right, I think that's – each murder is, by definition I suppose, needs to be assessed on its individual merits but what would be nice is if you were able to advise a client, facing a charge of murder, of what the likely difference in discount would be in terms of not pleading or pleading early, mid
10 and so on.

ELIAS CJ:

It's going to depend very much on the statement of facts, isn't it?

15 **McGRATH J:**

Isn't it also true Mr King though that Mr Lithgow's argument on urgency because of the large numbers affected down below has got nothing – I mean presumably appeals against minimum terms are coming up pretty regularly –

20 **MR KING:**

I've got one now, dealing with exactly this issue.

McGRATH J:

Yes and that might, so we would have a vehicle to address the murder issue
25 that might actually involve a murder charge. If we didn't give leave in this case we'd get the vehicle fairly soon?

MR KING:

You might, with respect though, be opening a lot of floodgates. There's a lot
30 of murder sentencings that have taken place with these different approaches. If we're waiting until a murder case comes forward, it might be six months away before a decision is released, we're going to have many dozens waiting –

ELIAS CJ:

Why are there different approaches because I thought the Court of Appeal had addressed this –

5 **MR KING:**

They said it's –

ELIAS CJ:

– in *Williams*?

10

MR KING:

– unfinished business, well, no *Williams*, *Williams* is effectively by Hessell been seen as too harsh. *Williams* said that a discount for guilty plea was not consistent with the premise that you only go below the 17 year non parole

15 period in 104 cases in whatever the threshold was –

McGRATH J:

Manifestly unjust.

20 **MR KING:**

Manifestly unjust and they said a guilty plea was not sufficient to say it'd be manifestly unjust. Hessell at least changes that approach but it promulgates several different types. Where you give discount, how much you give. Now there was a gentleman here in Wellington who was charged with double

25 murder and was arrested at midnight on a Friday or Saturday morning, appeared in Court on the Saturday morning, in front of a JP, was remanded through to the following Thursday to appear in front of a Judge. At that point the Crown sought a section 38 report, the old 121 psychiatric report. That was opposed by counsel because they wanted to get a private one and they

30 said that you don't need to go there, we'll do it. The report came through, he pleaded guilty at his third appearance. The Crown argued that he wasn't entitled to the full range of discount because it was not done at the first reasonably opportunity, the second appearance. The reality that somebody charged with double murder would plead guilty within six days of the offence,

because they appeared in Court in front of a Justice of the Peace on a Saturday and then a Judge on the Friday –

5 **BLANCHARD J:**
So what happened?

MR KING:
He was given a discount somewhere between the Boldt approach and the
10 other. Now it was a fair discount, it was probably a fair result at the end of the day, but it wasn't, the Judge, the learned Judge had to grapple with the concept of just the guilty plea and because of course Hessell talks about the time stopping when a psychiatric report is called for by the Court, the Crown argued well the psychiatric report wasn't called for by the Court, it was
15 defence counsel's one, so that the clock didn't stop. So there were all these – the Judge dealt with it –

BLANCHARD J:
But anything –

20

MR KING:
– in a sort of hybrid type approach.

BLANCHARD J:
25 If we took this case, but didn't proceed with argument on murder, comment about first reasonable opportunity would flow through to the murder case.

MR KING:
It would have a bearing but then one would be left with that basic argument
30 about, well, what discount as opposed it only applied in the so called Boldt approach as the amicus to the period in excess of 10 years and so on which in my submission it wouldn't take much longer. It wouldn't extend the hearing. It would provide immediate benefit. It would not, with respect, be the final word probably because a case which actually grappled with precise and

specific issues might come along which needs refinement but at least it would provide some remedial action in the meantime. Unless the Court has any questions those are –

5 **McGRATH J:**
Was Williams argued in the Court of Appeal?

MR KING:
Yes, yes it was. And in my submission what Hessell does do is mean that
10 Williams is no longer good law for discounts for guilty plea. Something greater is required, we just don't know how much more is required. If it pleases the Court.

ELIAS CJ:
15 Thank you Mr King. Yes Mr Mander?

MR MANDER:
I am perhaps in the Court's hands as to where you would wish me to begin. I can perhaps first deal with the specific issues relating to the Hessell case
20 itself.

ELIAS CJ:
Yes that would be helpful, thank you.

25 **MR MANDER:**
In my submission the Hessell case is not an appropriate vehicle upon which to review the Court of Appeal's guideline relating to discount for guilty pleas. Emphasis is being placed by my learned friends on an issue relating to the amendment of the summary of facts. The Court of Appeal dealt with that
30 issue on the basis that, notwithstanding any amendment to the summary of facts, Mr Hessell presented as a co-offender who was as culpable as the mother in the situation, and that the summary of facts and the amendments to the summary of facts did not have any significant impact upon Mr Hessell's culpability, and did not have any significant impact on the credit that he should

be afforded for his guilty plea. A memorandum was filed by the Crown after the appeal, clarifying the timing of the indication by Mr Hessell as to when he was first willing to enter a guilty plea. He ultimately pleaded guilty on the Friday before a trial that was set to commence on the Monday, and at a telephone conference on the previous Wednesday, had indicated to Heath J that it may be that he might be prepared to plead guilty. Now, prior to that, there hadn't been any discussion relating to the summary of facts, or any controversy or negotiation or discussion relating to the content of the summary of facts. So in my submission, the issue surrounding summaries of facts in negotiation doesn't really properly arise in the circumstances of this particular case.

ELIAS CJ:

But it was the case, was it, that the initial summary of facts was materially changed before sentencing?

MR MANDER:

It was.

ELIAS CJ:

And before the guilty plea?

MR MANDER:

It was. The second factor relating to the Hessell case itself which is relied upon is the issue of remorse. Remorse did not feature in Mr Hessell's case at all. There is no mention of it in the Court of Appeal judgment relating to Mr Hessell directly, and in terms of any credit that he was not afforded because of some separate submission relating to his remorse as opposed to his guilty plea. That is because in a pre-sentence report Mr Hessell was noted as not acknowledging his offending, laying responsibility on the underage girls, and in particular, the mother. So remorse simply was not a factor upon which –

ELIAS CJ:

How was remorse put to the sentencing judge, then? What was put to him as indicating remorse?

5 **MR MANDER:**

His plea.

ELIAS CJ:

Only his plea?

10

MR MANDER:

His plea, and, as I recall, there was also a separate submission. Perhaps, Ma'am, I have the case on appeal, I can refer directly to Heath's J sentencing notes.

15

ELIAS CJ:

Yes.

BLANCHARD J:

20 Well, we should really have a copy of those.

ELIAS CJ:

Yes, we should.

25 **MR MANDER:**

I wouldn't want to mislead the Court –

BLANCHARD J:

I don't know why we haven't been provided with them.

30

MR MANDER:

I can make that available, Sir. I have a copy of the case on appeal.

ELIAS CJ:

Thank you. If you give it to the Registrar, we'll get it copied. Sorry, Mr Mander, I wasn't proposing that we wait for the copy.

5 **MR MANDER:**

I can't immediately see it within the notes.

ELIAS CJ:

That's all right.

10

MR MANDER:

So in my submission, the issue of remorse simply did not arise in the circumstances of this case. A further submission has been made by my learned friend Mr King, which is, as I understood it, was to the effect that –

15

ELIAS CJ:

Would that not be a matter, however, that if leave were granted, might well prevail, but in considering whether to give leave, aren't we more concerned with the fact that remorse was put in issue, and that the Court of Appeal had

20 the background of its indication that remorse is picked up in the guilty discount? In other words, isn't there enough there for us to accept the case and look into the question of whether the issue of remorse was dealt with as the legislation requires?

25 **MR MANDER:**

Well, I would have to acknowledge that it perhaps arises in the reverse, that this is an example of a case where there is no further remorse beyond that contained within the plea, and here is an example of it.

30 **ELIAS CJ:**

But that's a submission going to the merits, isn't it?

MR MANDER:

It is. The application for leave, in my submission, must be based or founded upon some hook.

5

ELIAS CJ:

If we were satisfied that there was no error because there was no live issue about remorse as a separate issue, that might be right. But you'd have to go that far, wouldn't you?

10

MR MANDER:

Well, I would. The only difficulty, in my submission, with that is that the applicant couldn't argue that this was a case where it was illustrative of the guideline failing to discreetly provide for credit, for remorse separately from

15 plea.

BLANCHARD J:

Are you saying that he didn't ever indicate remorse?

20 **MR MANDER:**

That certainly didn't feature.

BLANCHARD J:

Well, when you say "didn't feature", did it get a mention at all?

25

MR MANDER:

I can't – certainly not in the Court of Appeal, it was not argued. My learned friend has pointed out paragraph 91 of the Hessell judgment. "Mr Hessell's remorse should have been greater." But that was in the context of the guilty

30 plea.

ELIAS CJ:

Well, that's the problem, isn't it? That it's dealt with only in the context of the guilty plea.

MR MANDER:

It is. I acknowledge that. But in terms of the appeal being made by the applicant to this Court, he certainly hasn't got – this applicant does not have
5 an argument that there was a failure by the Court of Appeal or by the sentencing Court in that they failed to adequately take into account his remorse. It just doesn't arise on the facts of this case.

ELIAS CJ:

10 Well, that would have to be because there was no indication of remorse, because the Court of Appeal is certainly treating remorse in the context of the discount for guilty plea.

MR MANDER:

15 It is, Ma'am.

BLANCHARD J:

Although if one works from their statement of Mr Boylan's submissions, Mr Boylan does appear to have argued that there was remorse. This is what's
20 puzzling me at the moment, whether, in fact, there was ever an indication of remorse.

MR MANDER:

Well, I would need to check the original sentencing notes as to what's
25 recorded by the sentencing judge. But beyond that bland submission, there was nothing more that could be pointed to by the applicant, apart from his plea. Indeed, all the indicators were to the contrary. There's no letter, there was no – there was nothing of that type put before the Court. What was put before the Court was material contained in the pre-sentence report, which
30 exhibited the applicant's lack of insight, and really a lack of taking responsibility for his actions. The submission made by my learned friend Mr King, as I understood it, was to the effect that Mr Hessell would have got the benefit of the guidelines, or would have got – would have been in a better position, had the guidelines applied. Now, in my submission, with respect to

my learned friend, my submission is that that is not the case. That the ten percent that he was afforded in entering a plea on the last working day before trial was all that he could be expected to get.

BLANCHARD J:

I think the argument was more subtle than that. It was that if the guidelines had been appropriately framed, they would have afforded him a greater discount.

MR MANDER:

Well, in my submission, again, I would argue against that proposition. I don't understand it to be argued by my learned friend that an accused that pleads guilty the day before a trial would be entitled to anything more than, at the most, 10 percent discount.

ELIAS CJ:

But that's the issue, really, isn't it. Whether it is as rigid as that.

MR MANDER:

Well, the range is zero to ten percent. Are we – the question arises as to whether or not there is any realistic basis of arguing that more than zero to 10 percent for the utilitarian plea incorporating benefit to the system, benefit to the victim and witnesses and, presumably, remorse, as matters presently stand, could there be any argument that any Court would entertain more than ten percent as a deduction. In my submission, there is no realistic argument for that proposition. The victim has got very little credit – very little benefit from the plea at that stage. The system certainly has got almost nothing.

BLANCHARD J:

Well, the victim does get the advantage of not having to give evidence.

MR MANDER:

Indeed.

ELIAS CJ:
And what about the interests of the public in appropriate, proportionate and decent sentences?

5

MR MANDER:
Sorry, Ma'am. In terms of "decent" sentences?

ELIAS CJ:
10 Well, it's probably not an appropriate word to use. But there is an interest – the Sentencing Act looks to appropriate sentences. Isn't the argument against you that rigid categories impede getting to that result?

MR MANDER:
15 I would agree with that proposition, Ma'am, and indeed, the Crown's approach in the Court of Appeal was that there was a need for flexibility in sentencing.

ELIAS CJ:
Yes, yes. So are you disappointed with the outcome, or do you think it is
20 sufficiently flexible?

MR MANDER:
My stance on the leave application is that the Court of Appeal judgment is sufficiently flexible, that there is enough discretion.

25

ELIAS CJ:
Is it what you submitted for in the Court of Appeal? What the Crown submitted for?

30 **MR MANDER:**
What the Crown submitted for was that credit for plea primarily is made up of the utilitarian benefit to the system, which is reflected in the sliding scale. Also, that utilitarian benefit relevant to the sliding scale incorporates benefit to

witnesses and victims. The Crown submitted that the issue of remorse is something that relates or arises out of a factor individual to the offender.

5

BLANCHARD J:

While you're on remorse. The sentencing notes do say that counsel advise the judge that Mr Hessell was remorseful, and extended apologies to the
10 victims. So it was in there as an issue.

MR MANDER:

I acknowledge that. So the Crown's submission that was made was that remorse was something that would vary from one case to the next, that it was
15 not amenable to a standard –

ELIAS CJ:

It wasn't subsumed in the discount for guilty plea for what you've termed utilitarian benefit.

20

MR MANDER:

That's correct, Ma'am. It was acknowledged that a plea, as has been said many times by Courts, is perhaps one of the best, if not the best, pieces of evidence of remorse. However, what the Crown did submit coupled with that
25 acknowledgement was that if one was granting 33 percent for first reasonable opportunity entry of plea, and on top of that, one was also getting a credit for remorse, then an issue arises as to how much credit does an individual get, and what effect is that ultimately going to have on the appropriateness of the sentence ultimately imposed.

30

ELIAS CJ:

Well, ultimately the overall sentence must be appropriate, surely, within the legislation, and, indeed, one can, I would have thought, take the view that a rigid 33 percent discount, even at first available opportunity, may not be in

accordance with the principles of sentencing in the legislation. I mean, where in the legislation – there probably is reference that one can put, use as a hook for utilitarian benefit and the use of a sliding scale to achieve it, if that simply meant saving Court resources and matters of that sort. Is there any explicit
5 statutory acknowledgement?

MR MANDER:

Not beyond, to my knowledge, not beyond the mitigating factor of guilty plea, which is expressly stipulated as a mitigating factor.

10

ELIAS CJ:

It's a huge, you know, weight to put onto concepts that are not explicitly acknowledged in the legislation.

15 **MR MANDER:**

I acknowledge that, Ma'am. I think one had to be candid, that credit for guilty plea has, for a long time, been seen as an incentive, as providing an incentive to accused, to defendants, if they are going to plead, plead early, because the resource, time and expense that is taken up by late pleas, the waste to the
20 system as a whole is such that, from a utilitarian point of view, these pleas should be being entered early.

ELIAS CJ:

It may be perfectly sensible, but one would like to see some legislative basis
25 for it, not simply judicially dredged up.

MR MANDER:

That reason for the credit has been long recognised, both in this country, Australia and England as one of the three reasons why –

30

ELIAS CJ:

But in England, there's a legislative mechanism.

MR MANDER:

Surrounding that submission relating to the letter of remorse, the Crown has included in the bundle a reference to the judgment Thomson, the judgment of the New South Wales Criminal Court of Appeal, and the New South Wales
5 Court there certainly delineated between the utilitarian benefit and the benefits to the victim and the aspect of remorse. And it provided for a lesser discount, ranging between ten and 25 percent for the utilitarian benefit. In one of the submissions, or one of the possibilities put forward to the Court of Appeal was that perhaps there could be a recalibration of the existing 33 percent for first
10 reasonable opportunity to, perhaps, something lower, which is then combined with an assessment of remorse, which will vary so much. There is a risk of getting into the merits, somewhat, of the argument. But, of course, the other difficulty with separating out remorse, as, indeed, is done in the English guideline, is that then one, perhaps, also, has to factor in such things as the
15 strength of the Crown case, as is done in England. And it would appear that the Court of Appeal took the view that it all gets very complicated. One loses predictability and certainty, and hence the reason why they've included remorse in the one credit for plea. Perhaps if I can move on to the individual aspects of the application for leave. Perhaps before I do that, if I can just
20 make one general submission. It does relate to some of the discussion that has taken place. That is the submission that guideline judgments are delivered in something of a factual vacuum. There is an attempt made for principles and tariffs, ranges of sentences according to particular circumstances to then be able to be placed over factual situations, cases to
25 come, like some template, and this guideline judgment is no different. What, in my submission, has to be acknowledged is that over time, the fit for the template can only be, will become better on a case-by-case basis. That may mean that there may need to be further appeals in given instances back to the Court of Appeal. And modification, amplification, and amendment may be
30 required as different cases illustrate, perhaps, where a guideline judgment may have been vague, or may have not fully appreciated a certain issue. The other alternative is, of course, is, as this application shows, is to come to this Court and ask this Court to re-address those arguments and, perhaps, issue a further guideline judgment. The issue that I raise is whether once this Court

has delivered that guideline judgment, it's a long way back from the District Court if there is a requirement for any modification or change, and I raise the issue as to whether or not that type of –

5 **ELIAS CJ:**

Distance.

MR MANDER:

Becomes too great.

10

ELIAS CJ:

Yes, yes. It's a good point, Mr Mander, and it may be that in cases of this type, the proper outcome, should we grant leave and be minded to affect the Court of Appeal's guideline judgment, is to send it back.

15

McGRATH J:

When you say, Mr Mander, that there is always a "vacuum of fact" in a guideline judgment and it's no different here, this guideline judgment covers much more extensive ground, does it not, than any other than the Court of

20 Appeal has delivered, in that it's not looking at a particular type of offending, it's looking at offending across the board?

MR MANDER:

Indeed. It is different in that regard, I acknowledge that. That it's not relating

25 to the setting of a tariff.

McGRATH J:

That, I suppose, leaves me still a bit uneasy in a way that the earlier guideline judgments did not.

30

MR MANDER:

I agree. It applies to summary offences, it applies to summary jurisdictions in the District Court, indictable jurisdiction. It is attempting to provide guidance across a very wide range –

McGRATH J:

All sentencing, pretty well isn't it?

5 **MR MANDER:**

All sentencing indeed.

McGRATH J:

And it's not just imprisonment, it's home detention, it's community sentences,
10 it's monetary penalties, fines?

MR MANDER:

Indeed. Not just, as Your Honour points out, not just in terms of the length of the sentence but whether or not perhaps the credit means that a person that
15 otherwise might have earned a custodial sentence should get a community sentence. There is certainly a wide application and hence, in my submission, perhaps a broadness about the Court of Appeal's judgment. It is only attempting to provide guidance and hence the submission that I previously made that there will need to be further individual cases –
20

McGRATH J:

Yes.

MR MANDER:

25 – which will provide more detailed assistance, in my submission, to particular -

McGRATH J:

You're really suggesting that there is not the urgency that Mr Lithgow was pressing on us, that of the thousands of cases that are being affected here,
30 indirectly as well as directly in the District Court and High Court?

MR MANDER:

No, in my submission there is not that urgency. I acknowledge fully that the District Court is having to grapple with Hessell in the same way it's having to

grapple with the new committal procedures which have changed the length of time between first call and committal from months to weeks.

McGRATH J:

5 I think a pipeline –

MR MANDER:

Indeed and it's a fast flowing pipeline. The police are required to file their 10 evidence within 42 days of first appearance. A person is automatically committed, as my learned friend has pointed out, for trial after the expiration of 56 days, potentially. And District Courts are having to apply Hessell over the top of that and as my learned friend has alluded to in the Wellington District Court that has brought about a slight variation on the District Court 15 Judge, Chief District Court Judge's practice note and providing a third opportunity to defendants a week before they would otherwise be committed to come to Court and potentially to plead at that time at which time they will get a 33 percent discount.

20 **BLANCHARD J:**

So the District Court is already having to depart from what the Court of Appeal actually said?

MR MANDER:

25 Indeed and departing of course from the Chief District Court Judge's practice notes somewhat as well.

COURT ADJOURNS: 11.33 AM

COURT RESUMES: 11.47 AM

30

MR MANDER:

Just continuing I was making submissions in relation to the issue of first reasonable opportunity. A theme of the opposition to leave is that there is sufficient flexibility in the Court of Appeal's judgment and in relation to this first reasonable opportunity issue I refer the Court specifically to paragraph 29 of
5 the judgment which deals with this issue of second appearance within the context of the Chief District Court Judge's practice note relating to the need for there to have been initial disclosure and perhaps rather blandly the statement the offender should have arranged legal representation by that time. The Court of Appeal then went on to say, "If either of those steps has
10 not taken place, the judge may be justified in considering a later time as the first reasonable opportunity to plead guilty."

And also at paragraph 6 where there is the more general reference in the round to guideline judgments the last sentence, "As this Court said in another
15 guideline case, *R v Taueki* [2005] 3 NZLR 372 at [10], this guideline is not intended to override the discretion of sentencing Judges, but rather provides guidance in the manner of the exercise of that discretion." So in my submission there is a sufficient degree of flexibility for the sentencing Court in any particular instant case to weigh up the submissions that are made to him
20 or her as to when was the first, realistically the first reasonable opportunity. Now that is always going to vary greatly from, for example, a disqualified driving case compared to a defendant that faces complicated charges arising out of an electronic drug interception case. Clearly the position at when, when a defendant is – sorry the time when a defendant is going to be in a position
25 to enter a plea is going to vary markedly but as a general rule the Court of Appeal attempted to give some guide as to when it might be thought that a defendant ought to be in the first, ought to be able to enter a plea in the ordinary run of the cases, mindful that no one case can ever be the same.

30 **ELIAS CJ:**
It's very difficult, isn't it, to separate that sort of flexibility against quite clear guidelines from the question of supervision on appeal and the right of appeal under the Bill of Rights Act, although I suppose it's not a right in sentencing. Is it? I can't remember. But it does bother me, particularly given the

emphasis in the Court of Appeal judgment, on the discretion of the sentencing Judge which is an entirely proper acknowledgement that if against the categories established by the Court of Appeal, nobody every supervises to see whether the sentencing Judge has addressed the particular case, because it's within the parameters of what was available. I mean the whole system becomes implicated once one sets up this sort of structure.

MR MANDER:

Well the only, the only means of review, of course, is by way of appeal in terms of the sentence being manifestly excessive.

ELIAS CJ:

Yes.

MR MANDER:

And whether or not the difference in the percentage that has been afforded to the defendant is going to be a, is going to be such a great difference that it will trigger a basis for that sort of appeal perhaps remains to be seen. But I would have thought a defendant who expressly submits to a sentencing Court that this person has entered the plea at the first reasonable opportunity because of these, A, B, C and D, and it's squarely put to the sentencing Court that they are entitled to 33 percent, should the sentencing Court reject that submission and impose, for instance, 25 percent which clearly is further down the sliding scale then I would have thought they would have a good ground to go to an Appeal Court and say that this sentence is manifestly excessive particularly given that type of case ordinarily would attract fairly lengthy sentences in which the percentage would make some considerable difference. But beyond making those observations I'm not sure if I can assist the Court any further on that issue of first reasonable opportunity.

The second express ground is that of remorse which I have already addressed the Court upon. The only further matter I'd seek to emphasise is again that the Court of Appeal at paragraph 28 of its judgment expressly

states that notwithstanding the plea, the last sentence in paragraph 28, the Court of Appeal acknowledges, “That exceptional remorse demonstrated in a practical and material way can attract its own reward. So the Court of Appeal have allowed for those cases where a defendant presents to a sentencing
5 Court as demonstrating clear remorse.

ELIAS CJ:
10 Well it’s not just exceptional remorse though is it? Material way, looks like money?

MR MANDER:
It may be. Well I’m not sure –
15

ELIAS CJ:
Though it’s not confined to that but –

MR MANDER:
20 In my submission it would cover the situation where a person who’s been, it has been alleged has interfered with children. The first interview with a police officer acknowledges, yes it’s true, I did do it and enters a plea at an early stage. Now continuing to acknowledge what they’ve done is wrong, that, in my submission, would be a situation of exceptional remorse. Well it certainly
25 would be, I would have thought, would’ve been able to have been argued as –

McGRATH J:
But that’s within the guilty plea, early guilty plea concept isn't it? Isn’t the Court of Appeal looking at something beyond that here?
30

MR MANDER:
Well it would obviously depend upon the interpretation of exceptional remorse. What is exceptional remorse? If one starts on the premise that a guilty plea implicitly involves, if only for the fact that a person has acknowledged their

guilt, does include some element of remorse at one end of the spectrum. At the other end there will be people who fully acknowledge what they've done is wrong. Fully acknowledge that they're sorry for what they've done and can do so rather than just the platitudes that sentencing Courts so often face.

5

McGRATH J:

10 I accept that but I think what, it's quite hard, isn't it, to think of a particular example and the particular example you've come up with is that, if you like, a very early guilty plea, very early acknowledgement of responsibility.

MR MANDER:

15 In terms of the confession to the police?

McGRATH J:

Yes but it's still within the basic rule that the Court of Appeal is articulating. I'm wondering, in this judgment there are occasionally sort of
20 acknowledgements that there will be exceptional situations but it's not always easy to see what the Court of Appeal has got in mind. It's part of the problem with the rigidity I suspect.

ELIAS CJ:

25 It looks a bit utilitarian again, "practical and material way." You could have an entirely inadequate person who has committed a crime and who is devastated by the knowledge of what he's done but really isn't capable of any practical or material redress which is what this seems to be directed at. It's just a little bit too, too airy.

30

MR MANDER:

In my submission it goes back to where one starts with sentencing which is that each case has to turn on its facts and its individual circumstances and there is going to be a requirement of flexibility afforded to the sentencing

Judge discretion, sentencing discretion. As I understand it the objection to the way in which the Court of Appeal have approached the issue is they haven't provided flexibility. They have placed a governor on the discretion and in my submission, if one looks at the judgment, there is sufficient acknowledgement
5 that the sentencing discretion remains intact.

BLANCHARD J:

10 But doesn't it raise a question of principle? I mean we're not here to decide today whether the Court of Appeal got it right or not. We're looking at whether leave should be granted because there is a question of principle.

MR MANDER:

15 And my submission has to be limited to on its face the judgment clearly has left sentencing discretion flexibility intact and I can't put it any further than that. Any higher than that.

In terms of the issue relating to murder, in my submission the Court of Appeal
20 have left the, I know my friend has attempted to say that the Court of Appeal added or modified the situation but in my submission for all intents and purposes the Court of Appeal have left the approach to credit for plea in respect of a murder case intact. That the judgment as to the extent in which a credit will be afforded to a person who pleads guilty to a charge of murder, will
25 remain a matter of discretion for the sentencing Judge, dependent upon the particular circumstances of that case. So in my submission that does remain an issue which is right in the appropriate case and in my submission it would be a murder case, to re-examine. The Court of Appeal adopted the same approach as the draft guideline from the Law Commission, the sentencing
30 establishment unit, that notwithstanding the various proposals the best course was to retain the discretion available to the sentencing Judge in those cases because of the difficulties that arise in respect of the near mandatory sentence of life imprisonment and the stipulated minimum non-parole periods that apply. And in my submission this case, Hessell, is not an appropriate vehicle

upon which to examine that issue which was fundamentally left untouched by the Court of Appeal except to reiterate that it is appropriate for a sentencing Court to take account of the fact that a defendant has entered a plea. And in my submission there is no requirement, at this stage, for this Court to examine
5 that issue.

And finally there it seems to be a general ground relied upon which I have described as flexibility of guidelines in general. There was no specific argument on this point in the Court of Appeal. The argument in the Court of
10 Appeal proceeded on the basis that the guideline judgments were firmly embedded as part of New Zealand Sentencing Jurisprudence and in my submission this case does not highlight or identify or place any focus on why there should be any fundamental change in the approach that has been taken today. The Court of Appeal in more general terms in the very recent case of
15 *R v AM* which my learned friends have referred to which is set out or is contained in the respondent's bundle at tab 4 includes, commencing at paragraph 6 of the Court of Appeal's judgment, under the heading "The role of this Court in setting tariffs" it outlines the, in fairly broad terms, the development of guideline judgments in this country. Picking up from an
20 English development and the fact that guideline judgments are characterised by assumption that consistency is a good thing.

ELIAS CJ:
Sorry which paragraph?

25

McGRATH J:
Para 7.

ELIAS CJ:
30 Sorry 7.

MR MANDER:
Paragraph 6 commences.

ELIAS CJ:
Yes.

MR MANDER:
5 Why we have guideline judgments. The various reasons as to why particular guideline judgments have been delivered and it fundamentally is accepted that now in our structured approach to sentencing the needs for, the need for consistency and transparency –

10 **ELIAS CJ:**
What does that mean, a structured approach to sentencing? Is that a, I know the Court of Appeal uses that term. I'm just trying to understand exactly what's meant by it. Does that mean a systematic approach?

15 **MR MANDER:**
An approach based upon a sentencing Court identifying a starting point –

ELIAS CJ:
Ah, right.

20

MR MANDER:
– that would ordinarily apply to a particular case, having regard to the factors that go to the offending itself. The aggravating and mitigating factors of the offending itself.

25

McGRATH J:
But the structured approach also, isn't it, a general indication of the reduction of the role of discretion in sentencing. That discretion is still there but within the structure.

30

MR MANDER:
Yes that's the criticism that it places too great a fetter on the individual sentencing discretion of a sentencing Judge and my learned friends have

included in their bundle a reference to the Australian, to the High Court of Australia's judgment *Markarian* where there is, exists competing –

McGRATH J:

5 The Court of Appeal at the beginning of the judgment acknowledges it with, not critically perhaps, but saying it's really just become part of the modern feature of sentencing because of the desirability of consistency and so forth.

10 **MR MANDER:**

Indeed which has been fortified by the Sentencing Act that requires certain principles, certain purposes to be looked at by the sentencing Court and given effect to and before taking into account aggravating and mitigating features. And further there is, more particularly in the Court of Appeal's judgment in
15 Hessell itself, commencing at paragraph 2 in terms of the approach to credit for guilty pleas, paragraph 3, "From about 2005 this Court has edged towards more definitive guidelines as how a sentencing Judge should recognise guilty pleas." So that's in the context of guilty, of credit for guilty pleas itself but if I can ask the Court to refer to, if I can draw the Court's attention to paragraph 5,
20 which perhaps outlines the Court of Appeal's approach to guideline judgments in the wake of the Government's decision not to pursue the format of a Sentencing Council with specific guidelines. In my submission that approach by the Court of Appeal is a well entrenched one and I don't understand there to be any need or cause to revert back to what the Australians described as
25 the, this instinctive synthesis approach whereby all matters are discussed and then ultimately at the end of all that one arrives at an appropriate sentence.

ELIAS CJ:

It doesn't have immediate appeal, that approach, because it does seem to
30 vary the reasoning of the Judge unacceptably.

MR MANDER:

No –

ELIAS CJ:

The English approach is not followed in Canada, is it? It's, they have guidelines but less prescriptive? Did I read that somewhere?

5 **MR MANDER:**

I'm not sure what the situation is in Canada Ma'am.

ELIAS CJ:

I don't think they have a sliding scale approach. I might be wrong about that.

10

MR MANDER:

Unless there are any other further matters that the Court wish to hear in reply, those are my submissions.

15 **ELIAS CJ:**

Thank you Mr Mander. Mr Lithgow do you wish to be heard in reply?

MR LITHGOW QC:

Thank you. Now the first thing that's perhaps just glossed over is that the
20 legislative provisions related to guideline judgments, although they have been passed, the starting date is at large so it will never be, have a starting date now, so they sit there but if you understand how to work the computer you will see that they're not actually in place. In terms of this particular appeal as to, now that we've received the case on appeal on page 4, which is the appeal
25 itself in Mr Hessell's own handwriting, "It was not until the next day they asked me, to my horror, to guess the girl's age. This whole scenario nearly three –" et cetera. "Not a day goes by without me hanging my head in shame." And then page 13, in the pre-sentence report he was irresponsible for not stopping it. He doesn't blame the girls. He does of course blame their mother which,
30 remorse or no remorse, might be an available opposition. Page 14, "I had a huge cloud of feeling bad. I'm usually very protective of girls." And at page 24 he wrote a letter to the Court. In his own words, "I am deeply ashamed and disappointed – " et cetera. So there's material there from which a more generous interpretation of his remorse can be judged.

BLANCHARD J:

So that was a letter that was before the sentencing Judge?

5 **MR LITHGOW QC:**

That's page 24, that's the last one.

BLANCHARD J:

Mmm.

10

MR LITHGOW QC:

I presume so because it's not dated that it appears to be part of the High Court material but – and it's consistent with the things which he's quoted as saying by the report writer for the pre-sentence report. The third thing is

15 the question of the *R v AM* judgment. The Court of Appeal obviously have a justification of their own process and there is a huge amount of material in the Sentencing Council archives that it seems a shame to waste. The question is what's the sort of –

20 **ELIAS CJ:**

Who put the material before the Court of Appeal?

MR LITHGOW QC:

Well in the case of *R v AM* the Judge appointed Ms Aikman on the basis that

25 she was an ex-Commissioner and that she could have access to that material and she placed it before the Court at their request. That was part of her terms of reference. In this case it's rather more problematic and it appeared to, again, be driven by an individual Judge but there was no wider attempt to get material from criminal bar sources or defence bar –

30

ELIAS CJ:

How did the material come before the Court?

MR LITHGOW QC:

In Hessell?

ELIAS CJ:

5 Yes.

MR LITHGOW QC:

I don't know who physically put it there. The Court obtained it from the –

10

ELIAS CJ:

I see.

MR LITHGOW QC:

15 From the Law Commission who simply hold it but it's still the material of the defunct Sentencing Council. It's set out in paragraph 8 of this case how they got it.

ELIAS CJ:

20 Thank you.

MR LITHGOW QC:

And as I said before, I don't know if the Court's actually seen it, but its detail and its thoughtfulness and all that kind of thing, it's awfully tempting to try and 25 not waste it. I can see why people would want to have a look at it but whether that's quite appropriate, bearing in mind the Judge – what Parliament did. The next thing then is whether –

ELIAS CJ:

30 Does the guideline judgment adopt the Law Commission –

MR LITHGOW QC:

Not really, no.

ELIAS CJ:
No.

MR LITHGOW QC:
5 And one of the main things that the Law Commission – it's not that we've got to stop calling it the Law Commission material, because it wasn't them, they happen to have it at the moment, but it was the Sentencing Council project.

McGRATH J:
10 The establishment.

MR LITHGOW QC:
Yes the establishment. That's not to say there wasn't an overlap of personnel but it doesn't belong to the Law Commission. They set out a system for all 15 kinds of propositions giving bands and examples within bands and examples of the application of any particular proposition and the thing that's missing out of both these cases is the roadbook which the Sentencing Council had for each variation on how to depart from any particular proposition and that's one of the very things which has created problems with New Zealand guideline 20 judgments of which *Terewi* would be the greatest example is that when any – it was said that it wasn't rigid but when any Judge attempted to shift, and I think Your Honour was one of those, they promptly got put back and told not to do that and yet extra judicially the Judges were saying, well if the Judges rationalise it and reason it, but they didn't want any sub-categories created so 25 – and then the next step in the New Zealand model is to, has happened with *Taueki* as well, you apply principles for one set of offending and you say, well that's very coherent. We'll just shift them onto a similar set of offending and that's what happened with *Terewi* and what happened with *Taueki*. And whether it's good or bad is to be examined but the lawyers and Judges of 30 New Zealand love their lists and it makes it a lot simpler, apparently simpler, but overlooks other principles, in particular the Sentencing Act in this case. But the question is whether the Court wishes us to attempt to have *R v AMF* before you as well, whether that would assist, or whether it simply sits there

as a set of principles which you can refer to, to the extent that you wish on a normal –

ELIAS CJ:

5 Well we certainly –

MR LITHGOW QC:

– non-binding, precedent basis.

10 **ELIAS CJ:**

– wouldn't be considering. Were you suggesting that we would consider –

MR LITHGOW QC:

Well they could, from a –

15

ELIAS CJ:

There's no appeal.

MR LITHGOW QC:

20 Well there's not at the moment, that's why I'm asking you if there would be any use in –

ELIAS CJ:

Well we're not going to –

25

MR LITHGOW QC:

–having them together.

ELIAS CJ:

30 We're not going to invite an appeal Mr Lithgow.

MR LITHGOW QC:

Well it would give a big picture analysis which might help but I'm not – I'm just asking you now that we're here, if you don't wish to express an opinion that's –

5 **ELIAS CJ:**
No.

MR LITHGOW QC:
– fine.

10

ELIAS CJ:
Thank you.

MR LITHGOW QC:
15 Do you have a copy of the practice note of June 2009 that's referred to – because it's not on some of the Justice websites but it is on others and it doesn't appear in Adams as far as I can see.

ELIAS CJ:
20 We can get it but why do we –

BLANCHARD J:
Well it would be helpful if we were provided with it.

25 **MR LITHGOW QC:**
Here's a clean copy. It appears to be given as a technical reference that gives some further explanation but one can see very quickly that it's simply a reference to the timing of things in the District Court and in particular the 21 day reference is the day by which disclosure is meant to have been
30 provided. It doesn't provide any provision for anybody actually reading it or seeing their client and discussing it, and it really doesn't. Once you've seen the limitations of what the practice note is trying to achieve, any suggestion that there's somehow a dovetailed system being created might evaporate.

The Crown's proposition in answer to Your Honour's questions that there is an inherent flexibility built in by the Court of Appeal, with respect, cannot be correct. What could be correct is that there is an inherent inflexibility built in by the Court of Appeal and that's contained at paragraph 32 because the preceding paragraphs deal with reasons that lawyers are going to come up with as to why there should be a looseness in determining when this first reasonable opportunity arises and at 32 they say, "We are aware that all these factors have been advanced as reasons why what has been on its face a late plea should nonetheless be treated as a plea made at the first reasonable opportunity. First reasonable opportunity means what it says. The maximum discount is appropriate only for those who are prepared to acknowledge their guilt at the outset. Those would prefer to wait until they have full disclosure or have tested the admissibility of Crown evidence are fully entitled to stand on their rights. But they cannot expect the maximum discount – " so that includes the obtaining of drug and alcohol reports, disputing of facts, and that's a strange thing because of all the things Courts would traditionally, the one thing we've held to over the centuries, is that we were interested in trying to get to the truth of the matter. Admissibility is what they call it. Of course the defence call it seeking to have evidence excluded because the police have acted unlawfully and then that's examined under section 30 in the Shaheed analysis whereby the public good argument is used in aid of the police to say that notwithstanding their illegality and so you could see what a powerful tool that is in the hands of prosecution agencies. If the disputing of police behaviour puts you in jail for longer, there's real problems with that.

Sentence indications, which are a basic model analysis, the one thing the public want is, the one thing that adults want and drug treatment. So they're all excluded under 32 effectively. And of course what's also, I don't think – I don't think it's referred to in the decision is that because of section 153(a) of the Summary Proceedings Act which, in itself, was a modern innovation, and it's now section 160, there was a time when you weren't even allowed to plead guilty to serious criminal offences until a case had been established and that is still the case in civil law countries.

So there is lots to work with and just looking again at the Supreme Court Act, appellants don't even get a mention I notice. Their needs there, the minutiae of their cases. General importance, public importance, both covered, and so in our submission there should be leave granted on all the grounds and time
5 permitted to develop them fully.

ELIAS CJ:
Thank you Mr Lithgow. We will take time to consider our decision in this matter.

10 **COURT ADJOURNS: 12.22 PM**