IN THE COURT OF APPEAL OF NEW ZEALAND

CA502/2017
[2018] NZCA 42

BETWEEN	MATTHEW THOMAS BARNES Appellant
AND	THE QUEEN Respondent

Hearing:	30 November 2017 (further submissions received 5 December 2017)
Court:	Harrison, Cooper and Gilbert JJ
Counsel:	D J More for Appellant C A Brook and J A Eng for Respondent
Judgment:	9 March 2018 at 2.30 pm

JUDGMENT OF THE COURT

A Leave to appeal is granted under s 253(1) of the Criminal Procedure Act.

B The appeal is allowed.

C The sentence is remitted to the District Court. The District Court is directed to set aside the sentence and impose another sentence that it considers appropriate. We recommend the sentence be reconsidered by the original sentencing Judge if that is possible.

REASONS OF THE COURT

(Given by Cooper J)

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[1] The appellant Matthew Barnes seeks leave to appeal against the judgment of the High Court dismissing an appeal against sentence.[1] Because his appeal is a second appeal, Mr Barnes needs this Court's leave under s 253(1) of the Criminal Procedure Act 2011.

[2] Section 253(3) of the Criminal Procedure Act provides that this Court must not give leave unless the appeal involves a matter of general or public importance or a miscarriage of justice may have occurred or may occur unless the appeal is heard. Because the appeal raises an important issue concerning the effect and application of provisions in s 86C of the Sentencing Act 2002 in relation to stage-2 offending, we are satisfied that it involves a matter of general or public importance and the test set out in s 253(3)(a) of the Criminal Procedure Act is satisfied. We will grant leave accordingly.

[3] The importance of the issues raised by this application has resulted in a reasonably lengthy discussion. We have however endeavoured to summarise our conclusion succinctly at [77]–[79]below.

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1 *Barnes v R* [2017] NZHC 1786.

The sentence

[4] Mr Barnes was one of three defendants sentenced on 10 May 2017 by Judge Crosbie in the District Court at Dunedin. All three faced a charge of aggravated robbery in contravention of s 235 of the Crimes Act 1961. The maximum penalty for that offence is 14 years, and it is in the list of "serious violent offences" as set out in s 86A of the Sentencing Act.

[5] Upon their conviction, Mr Barnes' co-defendants received stage-1 warnings as contemplated by s 86B of the Sentencing Act. Mr Barnes was in a different category, because he had previously been convicted of sexual connection with a young person aged between 12 and 16 years. That is also a defined "serious violent offence" in terms of s 86A of the Sentencing Act. That meant that Judge Crosbie had to treat Mr Barnes as an offender who had committed a stage-2 offence, defined as:

> **stage-2 offence** means an offence that—
>
> (a) is a serious violent offence; and
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> (b) was committed by an offender at a time when the offender had a record of first warning (in relation to 1 or more offences) but did not have a record of final warning

[6] Section 86C of the Sentencing Act provides with respect to stage-2 offences other than murder as follows:

> **86C Stage-2 offence other than murder: offender given final warning and must serve full term of imprisonment**
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> (1) When, on any occasion, a court convicts an offender of 1 or more stage-2 offences other than murder, the court must at the same time—
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> (a) warn the offender of the consequences if the offender is convicted of any serious violent offence committed after that warning (whether or not that further serious violent offence is different in kind from any stage-2 offence for which the offender is being convicted); and
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> (b) record, in relation to each stage-2 offence, that the offender has been warned in accordance with paragraph (a).

[7] Under s 86C(4), with the imposition of a determinate sentence of imprisonment, the Court was required to order that the offender serve the full term of

the sentence, with the consequence in the case of a long-term sentence that the sentence will be served without parole:

> (4) If the sentence imposed on the offender for any stage-2 offences is a determinate sentence of imprisonment, the court must order that the offender serve the full term of the sentence and, accordingly, that the offender,—
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> (a) in the case of a long-term sentence (within the meaning of the Parole Act 2002), serve the sentence without parole; and
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> (b) in the case of a short-term sentence (within the meaning of the Parole Act 2002), not be released before the expiry of the sentence.

[8] On the basis of reasoning we will discuss later, the Judge arrived at a sentence of two years seven months' imprisonment, and in accordance with his obligation under s 86C(4) directed that the sentence be served without parole.

The stage-1 offence

[9] The first offence committed by Mr Barnes was a "serious violent offence" within the meaning of s 86A of the Sentencing Act because it was listed in the definition of serious violent offences. But there was nothing "violent" about the offence, at least in the normal and relevant sense of that word given in The Oxford English Dictionary: "Senses relating to physical force. Of action, behaviour, etc.: characterized by the doing of deliberate harm or damage; carried out or accomplished using physical violence …"[2]

[10] Mr Barnes had been charged with sexual connection with a young person contrary to s 134(1) of the Crimes Act 1961, an offence punishable by a maximum term of imprisonment not exceeding 10 years. That offence may often be associated with actual or inherent violence. However, in this case the general nature of the offending was not of that character. This may be ascertained from the observations of Judge Coyle who sentenced Mr Barnes on 22 September 2014. At sentencing, the Judge said:[3]

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2 *Oxford English Dictionary* (online ed, Oxford University Press).
3 *R v Barnes* DC Dunedin CRI-2014-012-1060, 22 September 2014.

> [3] The facts of the matter are set out in the summary of facts. In essence you and the victim knew each other. At the time of your offending she was 14 and you were 18. You considered that you were in a relationship together but that relationship has now ended. At the start of the relationship you and she met with her parents and talked about the fact that you wanted to be in a relationship together, but her parents had some concerns around that relationship given the age difference, and in particular that their daughter was only 14. So they made it clear to you and her and they did not want there to be any sexual activity.
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> [4] It appears from what is set out there was an agreement by both you and her that your relationship would continue on that basis and that there would be no sexual relationship at all between you. In breach of that, within a number of days after that meeting with her parents had taken place, you and she began a sexual relationship. That sexual relationship occurred on a number of occasions over a period of time.
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> [5] The relationship ended and in the PAC report you said to the report writer that the relationship with her ended when you discovered she had embarked on a relationship with one of your friends. For reasons that are still not clear to me the matter came to the attention of the police and you were questioned by the police. Initially you denied having been in a sexual relationship and initially you denied that you knew how young she was.

[11] In assessing the sentence to be imposed, the Judge stressed the need for deterrence, referring to the immaturity of the complainant and the fact that Mr Barnes was in his "late teens".[4] He thought the offending was aggravated by the number of occasions on which sexual activity had occurred, and by abuse of trust.[5] The trust abused was that of the complainant's parents. There was no suggestion of a breach of the complainant's trust.

[12] Judge Coyle said he was "entirely satisfied" that a sentence of imprisonment would not be appropriate.[6] He described Mr Barnes as a young man of otherwise good character who had made some bad choices. He observed:[7]

> This Court has many people who appear before it who in sentencing the Court has an enormous amount of concern as to whether they will see them back again, particularly in relation to sexual offending. You do not fit in that category at all.

[13] The final sentence imposed was home detention for a period of five months and 200 hours' community work. The home detention was subject to conditions that

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4 At [12]–[13].
5 At [13].
6 At [19].
7 At [21].

Mr Barnes not consume alcohol and that he attend and complete counselling or treatment if directed by the probation officer, including counselling or treatment to address the use of alcohol. The Judge gave a stage-1 warning as required by the statute.

[14] It appears that the sentence of home detention was not able to be completed because of the deterioration of Mr Barnes' relationship with his mother at whose address he was serving the sentence. Judge Crosbie said that "poor physical and mental health" had undermined compliance with the original sentence.[8] The sentence was subsequently cancelled, and a term of eight months' imprisonment substituted. For a first offender, this was a stern outcome.

The stage-2 offence

[15] The stage-2 offence was of a completely different character. Mr Barnes pleaded guilty to a charge of aggravated robbery. The facts were succinctly summarised by Gendall J in the judgment now subject to appeal. The Judge said:[9]

> [4] Some brief background facts relating to the aggravated robbery offending here are useful. At about 11:20 p.m. in the evening on 4 February 2016, the victim was walking home from his work (as a security guard) on Princes Street in Dunedin. He was confronted by the appellant, who it seems was highly intoxicated, and three associates: Messrs Robinson, Aitkenhead and HL.
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> [5] Mr Aitkenhead asked the victim if he had any cigarettes to which the victim replied he did not. The victim tried to move on, but Mr Aitkenhead blocked his path. All four offenders then surrounded the victim and demanded that he empty his pockets. The victim initially refused, but was shoved by one of the offenders. He eventually dropped his phone and other items he had with him. Mr Aitkenhead told the victim he had five seconds to run away and the victim fled.
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> [6] The appellant, Mr Aitkenhead and HL pursued the victim. He was pulled to the ground and once on the ground he was repeatedly kicked and punched by the appellant and HL. The assault ceased when Mr Aitkenhead told them to stop and stepped between them and the victim. Then, for a second time, the victim was told in a bullying and menacing way that he had five seconds to run away. Mr Aitkenhead started counting down from five and the victim ran from the scene to escape.

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8 *R v Aitkenhead* [2017] NZDC 9803, at [24].

9 *Barnes v R*, above n 1.

> [7] As a result of the offending, the victim was taken to hospital suffering from swelling and bruising to his face, neck and back. He has however also suffered emotionally and psychologically from the offending and feels anxious at night or when he is alone. He finds it difficult to trust people and experiences heightened anxiety.

The District Court sentence

[16] One of the four offenders was dealt with in the Youth Court. Mr Barnes was sentenced with the two other defendants.[10] Mr Barnes and Mr Robinson pleaded guilty not long before the scheduled commencement of the trial. The third defendant, Mr Aitkenhead, pleaded guilty on the morning of the hearing.

[17] The Judge took a starting point for the offending of two years and four months in the case of both Mr Aitkenhead and Mr Robinson. He allowed Mr Aitkenhead a discount of five per cent in respect of the guilty plea, and five per cent for remorse and an offer to participate in restorative justice. These discounts totalling 10 per cent resulted in an end sentence of two years one month's imprisonment.

[18] In the case of Mr Robinson, the same starting point was taken for the robbery. However, the defendant had been on bail at the time he committed other offences for which he was also being sentenced (possession of an offensive weapon and disorderly behaviour likely to cause violence). He also had previous convictions that justified an uplift. The Judge thought that a sentence of two years and 10 months would be justified before taking into account mitigating considerations. He considered that there should be a discount for the guilty plea and remorse of 15 per cent, which he rounded to five months to arrive at a final sentence of two years and five months' imprisonment. That sentence, imposed on the aggravated robbery, was to be served concurrently with a sentence of four months' imprisonment in respect of the charge of possession of an offensive weapon.

[19] In sentencing Mr Barnes, the Judge noted the Crown's submission that in his case the offending was aggravated by the fact that he had repeatedly kicked and punched the victim as he lay on the ground. He considered a sentence of three years would be appropriate before taking into account mitigating circumstances. He decided

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10 *R v Aitkenhead*, above n 8.

not to give an uplift for previous convictions, on the basis that the entire sentence (without parole) would have to be served because this was a stage-2 offence.[11] He then allowed a 10 per cent reduction for the late plea of guilty and five per cent for remorse and the offer to participate in restorative justice. With some rounding of the figures, this resulted in a final sentence of two years and six months' imprisonment, to be served without parole.[12]

[20] The consequence of this was that the defendants Aitkenhead and Robinson would respectively be eligible for parole after approximately eight and 10 months, whereas Mr Barnes would serve the full term of two years seven months. Although his conduct in the assault was worse than that of his co-defendants, the array of the sentences shows clearly the effect of the Judge's application of the "three strikes" legislation, the unevenness of the effect of the sentences (assuming the other defendants were paroled) being largely attributable to Mr Barnes' stage-1 offence. Leaving s 86C on one side, the stage-1 offence would not have been considered a relevant aggravating factor to be taken into account at sentencing for the later offence, because of its very different nature. It said nothing relevant about the defendant's character or predilection to commit a particular kind of offence.[13] For this reason, the sentence could not appropriately have been uplifted to reflect the first conviction and the fact the Judge did not do so did not mitigate the effect of s 86C, as the Judge seemed to imply.

[21] Judge Crosbie was clearly of the view that the effect of the resulting sentence would be severe. He said:[14]

> [37] I want to mention something about that second strike warning. The lawyers have spoken to me today about a High Court decision in *Palalagi v Police* that refers to another decision of *R v Wereta.* In my view both those decisions instruct me that I cannot discount your sentence for reason that you have had a second strike warning. That is because the strike warning is about how your sentence will function and be carried out. That unfortunately for you as a young man, will send to you and others a really additional and harsh

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11 The Judge referred to previous "convictions", but there was only one, for the stage-1 offence.

12 The sentence originally imposed was two years seven months' imprisonment. In a minute issued on 18 May 2017 Judge Crosbie explained an error that he had made in calculating the end sentence and corrected the sentence to two years six months' imprisonment: *R v Aitkenhead* [2017] NZDC 10342.

13 *Beckham v R* [2012] NZCA 290 at [84]; *R v Ward* [1976] 1 NZLR 588 (CA) at 590–591; and *R v Casey* [1931] NZLR 594 at 597 (CA).

14 *R v Aitkenhead*, above n 8 (footnotes omitted).

> message about what these strike warnings are all about and the real consequences that they can have. All I can say in relation to that is you are perhaps fortunate that the starting points that have been adopted today are not higher and the offending was not worse because at the end of the day you will still leave prison relatively young man, so you need to hold onto that.

[22] As to the last sentence, in that passage it may be noted that the starting points were not adopted on any basis other than their appropriateness for the actual offending, and it is unclear what was intended by the observation that Mr Barnes was lucky the offending was not worse. In following remarks the Judge urged Mr Barnes to take advantage of programmes that would be available in prison to enhance his skills, and said he should not let the fact of serving his whole sentence lead him into some sort of despair.[15]

[23] We think it clear the Judge had misgivings about the effect of the sentence he felt obliged to impose, given Mr Barnes' particular circumstances.

The High Court appeal

[24] Mr Barnes appealed to the High Court contending that the sentencing Judge should have taken into account the fact the sentence was to be served without parole in fixing the end sentence, and had not done so. The application of s 86C to Mr Barnes in this case was a particular circumstance relating to him, and in the circumstances of this case meant the sentence was disproportionately severe. Gendall J described the sole issue before him as whether the sentence should have been adjusted to reflect the fact that he was a stage-2 offender required to serve the full term of the sentence under s 86C.

[25] The Judge referred to various High Court authorities, including those to which Judge Crosbie had referred. He expressed his agreement with the view taken by Moore J in *Palalagi v Police*[16] that parole eligibility is a factor which judges should not take into account in determining sentence length.[17] The Judge expressed the view that in light of the authorities to which he had referred, Judge Crosbie had not erred in

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15 At [38].
16 *Palalagi v Police* [2015] NZHC 1832.
17 At [57]. Other cases discussed included *R v Wereta* [2015] NZHC 2683; and *Sheers v R* [2016] NZHC 2353.

refusing to discount Mr Barnes' sentence because of the consequences of a stage-2 offence. He continued:[18]

> In response to the appellant's submissions, I find that "normal sentencing" as mentioned by the Hon Judith Collins … meant sentencing that does not take into account the consequences of the three strike regime. It also seems to me that if there is an inconsistency between s 8(g) and (h) of the Act on the one hand, and s 86C on the other, to that extent, the three strikes regime prevails as s 86I specifically requires.[19]

[26] The Judge rejected the submission that the Court could consider parole eligibility at the time of sentencing. He considered that it was Parliament's clear intention in enacting the three strikes legislation to separate the judicial function of sentencing from the statutory consequences of the new legislation.

[27] The Judge referred to other observations that had been made by the Minister at the second reading of the Sentencing and Parole Reform Bill defining the main purposes of the legislation as being to deny parole to repeat serious violent offenders and to offenders guilty of committing the worst murders, and to impose the maximum terms of imprisonment on "persistent repeat offenders who continue to commit serious and violent offences."[20] The Judge expressed the view that it was "difficult to conclude" after reviewing Mr Barnes' criminal history, that his record was one "even approaching the worst of its kind".[21] He referred to the "spectrum of severity and culpability that the State needs to consider before deeming a particular individual unworthy of being considered for parole."[22] He questioned whether in this case it could truly be said that Mr Barnes fell into a category of "persistent repeat offenders who continue to commit serious and violent offences".[23] He recorded his view that it was possible that "what might be seen as a straight-jacket approach in the three strike regime" could on occasions such as this "cause unintended consequences".[24]

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18 *Barnes v R*, above n 1, at [26].

19 The reference to the Hon Judith Collins was because of what she had said at the third reading of the Sentencing and Parole Reform Bill, observations which Gendall J had earlier quoted, and which had been quoted by Moore J in *Palalagi v Police*, above n 16.

20 *Barnes v R*, above n 1, at [28].

21 At [29].

22 At [30].

23 At [30].

24 At [30].

[28] We think it clear that, as with Judge Crosbie, Gendall J was concerned that the sentence he considered he was obliged to uphold would be contrary to some of the fundamental principles of sentencing which Parliament has itself enacted.

The appeal to this Court

[29] The sole issue sought to be advanced on the appeal is whether the sentencing court had jurisdiction to reduce what otherwise would have been an appropriate term of imprisonment for the reason that Mr Barnes was required to serve the full term of the sentence without parole.

Appellant's submissions

[30] Mr More submits that if the sentencing court was entitled to reduce the sentence because Mr Barnes was a stage-2 offender, then in the particular circumstances of this case it should have done so.

[31] In elaborating the argument Mr More noted that s 86C of the Sentencing Act does not "mandate" a term of imprisonment for a stage-2 offence. Nor does it offer any guidance or instruction to the sentencing judge as to the length of the term of imprisonment if a term of imprisonment is imposed. Because the three strike regime has been included in the Sentencing Act, the provisions are part of the ordinary sentencing process. Section 86C in particular does not provide that it prevails over any other provisions of the Act. Relevant provisions include the purposes and principles of sentencing set out in ss 7, 8 and 9. Mr More relied in particular on s 8(h) which provides that in sentencing or otherwise dealing with an offender the Court must take into account:

> … any particular circumstances of the offender that mean that a sentence or other means of dealing with the offender that would otherwise be appropriate would, in the particular instance, be disproportionately severe.

[32] Mr More submitted that in the absence of a stage-2 warning, Mr Barnes would be eligible to be considered for parole after he had served one third of the sentence. Having regard to his age, the absence of any previous violent offending, and assuming an incident-free period of imprisonment, it is likely he would have been released on parole after serving one half of his sentence. The fact that he has to serve his sentence

without parole is a particular circumstance relating to Mr Barnes that means a sentence of two years and six months' imprisonment was disproportionately severe. He argued that there was nothing in the Sentencing Act that would have prohibited the District Court from adjusting the sentencing by application of s 8(h) because the full sentence must be served without parole.

[33] In the present case, the Court should have imposed a sentence of two years or less because that would have enabled the Court to impose post release conditions in accordance with s 93(2) of the Sentencing Act with the consequence that standard conditions of release would apply until the sentence expiry date, or (in terms of s 93(2A)(c)) a specified date up to six months after the sentence expiry date. The Court could at the same time impose any special condition which again could expire on the sentence expiry date or up to six months thereafter. In the latter category, Mr More referred in particular to the special conditions provided for in s 15 of the Parole Act 2002 which includes, under s 15(3)(b), "conditions requiring the offender to participate in a programme … to reduce the risk of further offending by the offender through the rehabilitation and reintegration of the offender".

Respondent's submissions

[34] For the respondent, Ms Brook submitted that Gendall J was right to affirm the approach taken in *Palalagi v Police*[25] and *Sheers v R*,[26] which was consistent with other High Court judgments to which she referred.[27] She submitted that it was clear from the Parliamentary debates on the three strike legislation that disproportionately high sentences were anticipated and intended. The Minister responsible for the Bill referred in Parliament to an escalating regime of penalties for repeat violent offenders. Ms Brook submitted that one step in the escalating regime of penalties is serving the appropriate sentence, without the possibility of parole. Mr Barnes' reliance on s 8(h) of the Act should be seen as an attempt to avoid the escalated outcome intended by Parliament. She contended that there could be no clearer inconsistency with s 86C than the application of s 8(h) as contended for by Mr More. In those circumstances, s 86C must prevail because of s 86I, which provides:

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25 *Palalagi v Police*, above n 16.
26 *Sheers v R*, above n 17.
27 *R v Wereta*, above n 17; and *R v Ratima* [2017] NZHC 252.

> A provision contained in sections 86B to 86E that is inconsistent with another provision of this Act or the Parole Act 2002 prevails over the other provision, to the extent of the inconsistency.

[35] Ms Brook's argument relied on observations made by Moore J in *Palalagi v Police*. She submitted that Moore J was right to observe:[28]

> The courts should be cautious to not artificially create a sphere of judicial discretion where one does not actually exist. Parliament clearly envisaged room for the exercise of judicial discretion under ss 86D and 86E. These sections recognise a "manifestly unjust" exception. However, this exception arises only at stage-3. To that extent, Parliament's intention is clear. There is no discretion available in s 86C.

[36] Ms Brook supplemented these submissions by arguing that there is nothing in the Act to suggest that non-eligibility for parole under s 86C was intended to affect the calculation and determination of sentence length. In reliance on this Court's decision in *R v Stockdale* she submitted that in general parole eligibility should have no bearing on a sentencing court's determination of the appropriate sentence.[29] She claimed it would be wholly inappropriate for courts to engage in a speculative exercise about parole at the time of sentencing a stage-2 offender.

[37] The logic of the respondent's stance led Ms Brook to the position that although she accepted Gendall J was correct to refer to the harsh consequences of the statutory regime, those consequences were "completely irrelevant". Parliament had not provided a "manifestly unjust" exception to apply at stage-2, such as had been provided at stage-3. This meant that the stage-2 sentence was notionally just, by virtue of the statute. The Court was powerless to reach its own view of a just sentencing outcome because of the clarity of the legislation. In fact, if the Court formed the view a sentence was unjust it was nevertheless bound to impose it.

[38] Very clear words would be needed for the Court to accept that Parliament intended the legislation to be read in that way.

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28 *Palalagi v Police*, above n 16, at [62].
29 *R v Stockdale* [1981] 2 NZLR 189 (CA).

Analysis

The meaning of s 86C(4)

[39] We have not been persuaded by the respondent's argument. The issue presented is one of statutory construction. The Court's task is to ascertain the meaning of s 86C(4), which we have earlier set out. On an orthodox approach that involves considering the meaning of the words used, their context in the statute and the purpose of the legislation. The primary reference point must be the statute itself. Words used in Parliament by the Minister responsible for a Bill may be of assistance, but they ought not to have the effect that words in the statute are given a meaning that they cannot properly bear. The focus here must be not only on the Sentencing and Parole Reform Act 2010 but also on the Sentencing Act itself. The former statute does not stand alone; pt 1 was conceived and drafted to be part of the Sentencing Act.

[40] It is clear that when Parliament passed the Sentencing and Parole Reform Act the intention was that there should indeed be an escalating scale of consequences for repeat criminal offending involving serious violence.[30] That is consistent with the stated purpose of the Act set out in s 3:

> The purpose of this Act is to–
>
> (a) deny parole to certain repeat offenders and to offenders guilty of the worst murders:
>
> (b) impose maximum terms of imprisonment on persistent repeat offenders who continue to commit serious violent offences.

[41] The main elements of the new three strike regime were summarised in Parliament by the Honourable Judith Collins, as the Minister responsible for the Bill, in the following terms:[31]

> For the benefit of the House, I will recap the main elements of the regime. When convicted of a serious violent offence for the first time, an offender will be sentenced as normal but will be very clearly warned that he or she will now be subject to the three-stage regime, and warned what will happen if he or she is convicted of a further serious violent offence. If the offender is convicted of a second serious violent offence, the implications are more serious. He or

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30 The background scheme of the Sentencing and Parole Reform Act 2010 has been discussed by this Court in *R v Harrison* [2016] NZCA 381, [2016] 3 NZLR 602.

31 (25 May 2010) 663 NZPD 11227.

> she will be sentenced as normal but any jail sentence will be served in full without parole. The offender will be warned again, both verbally and in writing, of the consequences of a third conviction for a serious violent offence. If the offender fails to heed the previous warnings and is convicted of a third serious violent offence, he or she will be sentenced to the maximum penalty for that offence, to be served without parole.

[42] This evinces a legislative intent to ensure that at each stage of the process appropriate sentences are imposed, but the consequences of the sentences differ according to the "stage" at which the sentencing occurs. A stage-2 offence will have the consequence that the sentence imposed, arrived at in the normal way, will be served without parole. What the Minister said in Parliament is reflected by the words used in s 86C(4), relevantly:

> … the court must order that the offender serve the full term of the sentence and, accordingly, that the offender,—
>
> (a) in the case of a long-term sentence … serve the sentence without parole; and
>
> (b) in the case of a short-term sentence … not be released before the expiry of the sentence.

[43] As we have seen, Gendall J decided that it was appropriate to construe the Minister's reference to the offender being "sentenced as normal" as meaning sentencing on a basis that does not take into account the consequences of the three strikes regime. However, the task here is not to construe what the Minister meant by that phrase. We have to consider s 86C(4) in the context of the Sentencing Act as a whole and having regard to the central importance of the role of judges in the sentencing process.

[44] Section 86C and other provisions inserted by the Sentencing and Parole Reform Act are part of a comprehensive statute, the Sentencing Act, which for the first time set out to delineate in statutory form a set of principles Parliament expected to be applied in the sentencing process. In substance, the Sentencing Act distilled sentencing practices that had been developed over time. The statutory delineation starts with s 3, which states the purposes of the Act in four objectives. The first is to set out the purposes for which offenders may be sentenced or otherwise dealt with, the second is to promote those purposes by providing principles and guidelines to be applied by the courts, the third is to provide a sufficient range of sentences and other

means of dealing with offenders, and the fourth is to provide for the interests of the victims of crime.

[45] Consistent with the statement of the purposes of the Act in s 3, s 7 sets out purposes of sentencing for which a Court may sentence or otherwise deal with an offender. The list is well known and need not be fully recited here. It includes holding the offender accountable for harm done to the victim and the community, promoting a sense of responsibility in the offender, providing for the interests of the victim, providing for reparation for harm, protecting the community from the offender and assisting in the offender's rehabilitation and reintegration.

[46] Section 8 then follows, setting out principles of sentencing or otherwise dealing with offenders. The statutory language obliges the Court to take the various matters set forth into account. Section 8(a) provides that in sentencing or otherwise dealing with an offender the court must take into account the gravity of the offending in the particular case. Under s 8(b) the court must take into account the seriousness of the type of offence, and there are duties under s 8(c)–(d) to impose the maximum penalty or a penalty near the maximum prescribed for offences if the offending is of that nature. There is a requirement to take into account the general desirability of consistency, and under s 8(g) the court:

> … must impose the least restrictive outcome that is appropriate in the circumstances, in accordance with the hierarchy of sentences and orders set out in section 10A …

[47] Section 8(h) obliges the Court to:

> … take into account any particular circumstances of the offender that mean that a sentence or other means of dealing with the offender that would otherwise be appropriate would, in the particular instance, be disproportionately severe …

[48] Section 8(i) requires the Court to take into account "the offender's personal, family, whanau, community, and cultural background in imposing a sentence or other means of dealing with the offender with a partly or wholly rehabilitative purpose." Finally, s 8(j) obliges the Court to take into account any outcomes of restorative justice processes in relation to the particular case.

[49] Section 9(1)–(2) then sets out detailed obligations to take into account aggravating and mitigating factors respectively. The language used is again mandatory. For example, under s 9(1)(a) the Court must take into account that the offence involved actual or threatened violence or the actual or threatened use of a weapon. Similarly, under s 9(2)(a) the Court must take into account the age of the offender. The Sentencing Act continues by setting out a hierarchy of sentences and orders (s 10A) and describes the circumstances in which it will be appropriate to adopt the various options (ss 11–20). It is clear from the structure of the Sentencing Act and the detail of the directions given by Parliament that the courts are required to consider in each case a wide spectrum of matters designed to ensure that the sentence imposed is appropriate. Despite the detail of the prescription, however, it is necessarily the case that the sentencing court must decide what weight to give the various statutory considerations and what the appropriate sentence is in each particular case. That is the essence of sentencing, and must be what the Minister intended by her reference in Parliament to sentencing stage-2 offenders in the normal way.

[50] Consequently, we consider s 86C(4) applies after the sentence has been evaluated in the normal way and imposed.

[51] This conclusion is consistent with what was said by the Supreme Court about the sentencing process in *Hessell v R*. Writing for the Court, McGrath J said:[32]

> [42] Accordingly, in articulating the purposes and principles of sentencing, and circumstances which will aggravate or mitigate offending, Parliament has both clarified the factors to be addressed and given legislative force to the duty to take them into account. It has done so both for the benefit of judges and to foster greater awareness of the public concerning the complexity of what has to be considered in the sentencing task. That complexity, as the legislation makes apparent, arises both from the large number of principles and purposes of sentencing and the infinite variety of circumstances of criminal offending that will be relevant to the appropriate sentence. The impact of these various considerations, applicable in any case, may tend to aggravate or mitigate the offending. Often they will pull in different ways.
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> [43] In this context the proper application of punishment for offending remains, as it was prior to the 2002 legislation, an evaluative task for sentencing judges and those judges who determine sentencing appeals. The

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[32] *Hessell v R* [2010] NZSC 135, [2011] 1 NZLR 607. See also the observations of Richardson J in *Fisheries Inspector v Turner* [1978] 2 NZLR 233 (CA) at 237 about the traditional division between the functions of the legislative and judicial branches of government in the sentencing field.

> task reflects the amalgam of sentencing discretion, on the one hand, which ensures the gravity of individual offending and circumstances of the offender are duly assessed, and sentencing consistency, on the other, which tempers sentencing judgment to ensure that sentencing outcomes reflect a policy of like treatment for similar circumstances.

Justice and proportionality

[52] Under s 86D of the Sentencing Act, when the court sentences an offender for a stage-3 offence other than murder, it must sentence the offender to the maximum term of imprisonment prescribed for each offence[33] and order that the offender serve the sentence without parole "unless the Court is satisfied that, given the circumstances of the offence and the offender, it would be manifestly unjust to make the order".[34] Similarly, where murder is a stage-2 or stage-3 offence, the statute contemplates that a sentence of life imprisonment will be imposed,[35] and that there will be an order that the sentence be served without parole "unless the court is satisfied that, given the circumstances of the offence and the offender, it would be manifestly unjust to do so".[36] This approach is repeated where murder is a stage-3 offence and the Court has not sentenced the offender to life imprisonment without parole. In those cases, the Court must impose a minimum period of imprisonment of not less than 20 years subject to the manifestly unjust exception.[37] These provisions were discussed by this Court in *R v Harrison*.[38]

[53] We are not persuaded that the particular provisions enabling manifest injustice to be taken into account at stage three (and where murder is a stage-2 offence) mean that the Court ought not to be concerned about manifest injustice when sentencing stage-2 offenders. Not only is there no statutory provision which directly provides for that effect but, in addition, such a conclusion would be contrary to the comprehensive approach to sentencing required by the detailed provisions of the Act. As has been seen, that approach involves consideration not only of the position of victims but of the individual circumstances of the offender. Further, the express references to manifest injustice in ss 86D and 86E are in contexts where the Court has been required

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33 Section 86D(2).
34 Section 86D(3).
35 Section 86E(2)(a).
36 Section 86E(2)(b).
37 Section 86E(4)(a).
38 *R v Harrison*, above n 30.

by the statute to impose the maximum penalty for the offence. In the other class of cases, such as stage-2 offences other than murder, the normal sentencing approach applies. This necessarily involves the Court avoiding manifest injustice. This did not need to be spelled out.

[54] In fact, we consider the references to manifest injustice in ss 86D and 86E demonstrate a parliamentary intent that the Sentencing and Parole Reform Act as a whole should not be applied so as to result in such injustice. We think it inherently unlikely the legislature would have contemplated sentences of that kind at stage-2. It follows that an approach that avoids manifestly unjust outcomes will be in accordance with the legislative intent.

[55] In *R v Harrison* this Court pointed out that there was a potential tension between the provisions of s 86E of the Sentencing Act and s 9 of the New Zealand Bill of Rights Act 1990 which affirms the right not to be subjected to amongst other things "disproportionately severe treatment or punishment". The Court inferred that Parliament intended that any sentence imposed on an offender under s 86E should not be grossly disproportionate to the circumstances of the offending and the offender. The Court said:[39]

> We assume that Parliament, in introducing the new sentencing regime for repeated serious violent offending, intended that any sentence imposed on an offender should not be grossly disproportionate to the circumstances of the offending and the offender contrary to s 9 of the Bill of Rights Act and the principles enunciated in *Taunoa*. The fact the Attorney-General in his report under s 7 of the Bill of Rights Act did not indicate any inconsistency between s 86E and the Bill of Rights Act is relevant here. No doubt this is why Parliament provided that the mandatory sentence of life imprisonment without parole need not be applied where, in the judge's discretion, such a sentence would be manifestly unjust. As we have noted, the phrase is not defined for the purposes of the new regime and therefore requires judicial interpretation.

[56] For similar reasons, we conclude that in stage-2 cases not involving murder Parliament must have intended that sentencing judges would not impose sentences that are disproportionately severe or manifestly unjust. We say that despite the absence of a provision making an exception for manifest injustice in s 86C itself, for reasons

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[39] *R v Harrison*, above n 30, at [83] (footnotes omitted). Compare *Lloyd v R* 2016 SCC 13, [2016] 1 SCR 130 at [3] referring to the constitutional vulnerability in Canada of statutory provisions imposing mandatory minimum sentences.

already addressed. That conclusion is in accordance with the right affirmed in s 9 of the New Zealand Bill of Rights Act. This is a further consideration supporting our view that Parliament intended s 8(h) of the Sentencing Act to apply in the stage-2 sentencing evaluation.

[57] By enacting s 8(h) Parliament has obliged the sentencing Judge to take into account any particular circumstances of the offender that mean a sentence or other means of dealing with the offender that would otherwise be appropriate would, in the particular instance, be disproportionately severe. Applied in the circumstances of this case, it meant that the sentencing Judge was obliged to take into account the facts that having committed a stage-1 offence, Mr Barnes would serve any sentence imposed without parole. The Judge could have concluded that would be a disproportionately severe outcome having regard to the fact that the non-parole provision would only apply because it was a stage-2 offence, yet the stage-1 offence was for conduct involving consensual sexual relations between an 18-year-old and a 14-year-old, devoid of any suggestion of violence. The respondent says, however, that those are circumstances which could not be taken into account. In our view, there is nothing in s 86C(4) which has that effect. It will be noted that the provision applies once the sentence to be imposed has been ascertained. It is the sentence that must be served without parole. We do not think that excludes in a case such as the present consideration of the matters particular to Mr Barnes which we have just outlined.

[58] The risk of a disproportionately severe sentence is starkly illustrated in a case like this. The qualifying offence was only a serious violent offence because Parliament deemed it so. The circumstances of Mr Barnes' previous offending did not place him near the category of persistent repeat offenders identified in s 3 of the Sentencing and Parole Reform Act whom Parliament intended to deny parole. Serving the full sentence of two years and six months without eligibility for parole is disproportionately severe having regard to Mr Barnes' personal circumstances and the circumstances of his offending. Its disproportionality is compounded when compared to the availability of parole to his co-offenders, with the result that he could serve more than double the time that they serve.

[59] It is not simply a question of proportionality, however. In our view, in the absence of clear language to the contrary, the legislative intent must be taken to be that all the other relevant purposes and principles of sentencing set out in pt 1 of the Sentencing Act should apply in evaluating the sentence to be imposed on the stage-2 offender. This brings into account rehabilitative purposes (ss 7(1)(h) and 8(i)), and where appropriate s 8(g) (the duty to impose the least restrictive outcome appropriate in the circumstances), as well as those other provisions that would tend to increase a sentence to mark the gravity of the offending.

Inconsistency

[60] The respondent relies on s 86I. For ease of reference, we set it out:

> A provision contained in sections 86B to 86E that is inconsistent with another provision of this Act or the Parole Act 2002 prevails over the other provision, to the extent of the inconsistency.

[61] Again, we do not consider that there is any inconsistency between s 86C(4) and the general provisions of ss 7 and 8 of the Sentencing Act. The latter can be applied in the course of ascertaining the sentence it is appropriate to impose. Section 86C(4) then comes into effect and says that sentence, the sentence so formulated, is to be served without parole. There is no inconsistency.

[62] Parliament could have taken a different approach had it wished to write a statute with the effect for which the Crown contends. That could have been achieved had s 86I been worded so as to contain a clear instruction that the sentencing court must not consider parole eligibility in evaluating the sentence. That is not the course that has been taken. On the contrary, the new provisions have been placed into the statute in a way that relies on the general provisions of the Sentencing Act rather than excluding them. Sentencing takes place "in the normal way".

[63] Nor do we accept, as Moore J held in *Palalagi*, that there is an inconsistency between s 86C(4) and s 8(g), with its requirement that the sentencing Judge must impose the least restrictive outcome that is appropriate in the circumstances.[40] Once

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[40] *Palalagi v Police*, above n 16, at [65].

again, s 8(g) applies at the time the sentence is being evaluated; s 86C(4) applies after that event.

[64] We do not consider our approach involves creating a sphere of judicial discretion where one does not exist. We think it more accurate to characterise the approach urged on us by the Crown as one which seeks to remove judicial discretion which Parliament has conferred in pt 1 of the Sentencing Act.

Taking parole eligibility into account

[65] We agree, as Ms Brook submitted, that as a general rule a sentencing court will not take into account considerations based upon parole eligibility. The general position was discussed and explained by this Court in *R v Stockdale*.[41] In that case, Mr Stockdale had been sentenced in the High Court to imprisonment for four and a half years on a charge of aggravated robbery to which he had pleaded guilty. He subsequently sought leave to appeal against the sentence for the unusual purpose of obtaining an increase in his sentence as opposed to a reduction. If the sentence were increased to one of five years' imprisonment, he would become eligible for parole at an earlier time than if his sentence remained at four and a half years. This Court refused leave to appeal on the basis that the sentence imposed was within the range available to the Judge. Under s 33A(2)(e) of the Criminal Justice Act 1954 then in force, the offender would have been eligible for parole after he had served two and a half years. But under the sentence of four and a half years, he had no automatic right to have his sentence considered by the Parole Board after serving a specified portion of the sentence. He argued that he risked serving a longer period of imprisonment under the sentence of four and a half years than if it were increased to five years.

[66] In its reasons for refusing leave the Court said:[42]

> The duration of any custodial sentence is generally best determined without reference to an offender's eligibility for parole. There are good reasons for taking such a view. Sentences imposed by the Courts reflect the balancing of a number of factors, including the nature and circumstances of the offence, the character of the offender, the need for the imposition of a deterrent penalty, and the presence of mitigating factors. … The balancing of these factors will

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41 *R v Stockdale*, above n 29.
42 At 190.

> not be better effected if the sentencing Court is obliged to take into account, in imposing a sentence of imprisonment, an offender's eligibility for parole by reference to the length of sentence imposed.

[67] The Court observed that one result of the consideration of parole might be that the offender should not be released, and continue to serve the sentence.[43] While that aspect of the Court's reasoning remains valid, it should be noted that the Court was not purporting to lay down an inflexible rule but rather to address the position that applied "generally". And importantly what was expressly rejected was any *requirement* to consider parole. This was not to say that in an appropriate case it might not be appropriate for the Court to have regard to parole eligibility in determining a sentence.

[68] In *R v Accused (CA265/88)* parole eligibility was clearly taken into account.[44] The appellant had been sentenced to two years nine months' imprisonment following his plea of guilty to a charge that he had sexually violated the complainant. When the offending commenced, the defendant was aged 18 years, the complainant 10. The appeal was advanced on the basis that a non-custodial sentence would have been more appropriate than the sentence imposed: counsel relied on research material concerning youthful sex offenders and their prospects for rehabilitation. For present purposes, the case is relevant for what was said by Bisson J, writing for a unanimous Court of five, in relation to psychological counselling and parole.

[69] The Court considered that there were reasons to consider that if the offender had paedophiliac tendencies there was good reason to think they might be curable.[45] It concluded there was justification for the sentence of imprisonment to be reduced to two years so that an order could be made under s 77A of the Criminal Justice Act 1985 for the accused to receive counselling if released on parole.[46] At the time the appeal was decided it was not possible to impose special release conditions on a sentence of more than two years' imprisonment. This Court accordingly granted leave to appeal,

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43 At 191.

44 *R v Accused (CA265/88)* [1989] 1 NZLR 643.

45 At 655.

46 Section 77A of the Criminal Justice Act empowered the Court to impose special conditions to which the offender would be subject if released on parole in accordance with the Act.

allowed the appeal and quashed the sentence of two years nine months' imprisonment. In lieu it sentenced the appellant to two years' imprisonment, recommended that he receive counselling whilst serving his sentence and ordered that, if he were to be released on parole, he be subject for the period of his parole to the special condition that he undergo a programme of psychological counselling on such terms as specified by the District Prisons Board.[47]

[70] A similar approach was taken by this Court in *R v Hape*.[48] In that case, Mr Hape pleaded guilty at trial after the conclusion of the Crown case to counts of manslaughter by carelessly driving a motor vehicle and of failing to stop and ascertain whether anyone was injured arising from an accident with a motor vehicle. He subsequently also appeared for sentence on a charge of driving while disqualified arising from the same incident to which he had earlier pleaded guilty in the District Court and been committed to the High Court for sentence. He was sentenced to three years' imprisonment on each charge. On appeal, he did not seek to disturb the totality of his sentence for three years or the sentences on the charges other than that of manslaughter.

[71] It was submitted for Mr Hape that the sentence imposed on the manslaughter charge had resulted in an injustice because of the provisions of s 93 of the Criminal Justice Act prohibiting consideration for parole of persons sentenced to more than two years' imprisonment for manslaughter. The Court was aware of its previous decision in *Stockdale*, and indeed quoted from it.[49] It then observed that the principle in that case had often been applied to ensure that a sentence was not increased because of legislative provisions about parole.[50] The Court continued:[51]

> However, the statutory provisions relating to parole have become more complex than was the situation in 1981. In *R v Accused (CA265/88)* … a five Judge Court of Appeal held that there was justification in that case for a sentence of imprisonment to be reduced to two years so that an order could be made for the appellant to receive counselling if released on parole under s 77A of the Criminal Justice Act 1985. Such an order could not be made if the sentence were longer than two years. That decision has been subsequently applied on occasions where it was in the public interest as well as the

47 *R v Accused (CA265/88)*, above n 44, at 656.
48 *R v Hape* [1994] 1 NZLR 167 (CA).
49 At 170–171.
50 At 171.
51 At 171 (footnotes omitted).

> offender's interest that release on parole with conditions should apply following a prison sentence.
>
> We likewise think it right to have regard to the consequences of the provisions of s 93 of the Act when considering this sentence of three years' imprisonment on the charge of manslaughter even though we are satisfied that a term of three years' imprisonment was fully justified for the total offending.

[72] On the basis of this reasoning, the Court allowed the appeal and substituted a sentence of two years' imprisonment on the manslaughter charge. Ms Brook doubted the correctness of the Court's observation in *R v Hape* that the decision in *R v Accused (CA265/88)* had been subsequently applied in the circumstances referred to. However, we did not understand Ms Brook to argue that these decisions were in any way unlawful and we are not prepared to accept her submission that the experienced Judges who decided that case were unaware of the way in which *R v Accused (CA265/88)* had been applied in the years since that judgment.

[73] There are therefore two judgments of this Court, one involving a Court of five, in which a sentence has plainly been reduced for purposes related to statutory provisions concerning parole. In one the sentence was reduced for the express purpose of enabling a particular order in relation to counselling to be imposed, and in the other to avoid the prohibition of consideration for parole of persons sentenced to more than two years' imprisonment for manslaughter.

[74] In a third case, *R v Mwai*, although it did not allow the sentence appeal, this Court referred to the general rule concerning parole eligibility set out in *R v Stockdale*, but then specifically observed that:[52]

> There is no inflexible rule, and in an appropriate case it is permissible to have regard to the realities of the case in order to ensure a just sentence; see for example *R v Hape* …

[75] Quite apart from these authorities, it is the experience of the members of this Court that sentencing regularly takes place on a basis which at least implicitly takes into account the likely impact of the parole regime. Whilst it may not be done as a matter of general course, for the reasons addressed in *R v Stockdale*, it is clearly a

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[52] *R v Mwai* [1995] 3 NZLR 149 (CA) at 157.

lawful approach if carried out for a legitimate purpose in evaluating the appropriate sentence.

[76] We think it fair to infer the Minister would have been aware of the approach taken in these cases when she referred in Parliament to sentencing at stage-2 being carried out in the normal way.

The appropriate approach

[77] In most cases sentencing will take place without consideration of parole eligibility. However, if a court forms the view that a sentence emphasising rehabilitation is appropriate and rehabilitation might be better achieved by earlier eligibility for parole than would otherwise be the case, we consider it will be legitimate to sentence on that basis having regard to the relevant principles set out in s 8(g), (h) and (i) of the Act, notwithstanding s 84C(4). In an appropriate case, the result could be imposition of a sentence of imprisonment of two years or less, thereby enabling imposition of the standard and any relevant special conditions of release.

[78] We emphasise that course could only be taken for a genuine purpose under the Sentencing Act; it would be quite wrong simply to adopt that approach for the purpose of avoiding the effect of s 86C. But taking parole eligibility into account in this way might be particularly appropriate to avoid manifest injustice in a case such as the present where the stage-1 offence was only a "serious violent offence" by virtue of the definition in the statute and in reality was not violent offending at all. The same reasoning would apply if the stage-2 offending fell outside the intended target of the legislation.

[79] We anticipate that it will only be in exceptional cases that sentencing judges will be able to take this approach while ensuring that the purposes of both the Sentencing Act and the Sentencing and Parole Reform Act are served. An example might be where the stage-1 offence has been overcharged and only falls within the three strikes regime as a consequence. In this case, our reasoning turns on the fact that Mr Barnes is a young man whose stage-1 offence did not in fact involve serious violence, although it was within the statutory definition.

Disposition

[80] In this case we think it is clear that the sentencing Judge was concerned about the impact of the sentence that he felt constrained by s 86C(4) of the Sentencing Act and High Court authority to impose. We infer from the language he used in sentencing that, had he not felt so constrained, he would not have imposed the sentence that he did, and might instead have imposed a sentence of two years for the purpose of emphasising rehabilitation.

[81] Mr More in fact invited this Court to substitute a sentence of two years' imprisonment with standard and appropriate special conditions of release. However, we are not sure that we have all the information to be confident as to the appropriate sentencing outcome whether as to the length of the sentence or what release conditions might appropriately be imposed.

[82] For the reasons we have stated, we are nevertheless satisfied for the purposes of s 256(2) of the Criminal Procedure Act that there has been a relevant error in the sentence imposed and that a different sentence should be imposed. The appeal should be allowed accordingly. Under s 257(2) this Court has all the powers that the High Court could have exercised if it had allowed the appeal. That includes the power (under s 251(2)(c)) to remit the sentence to the District Court and direct that Court to set aside the sentence and impose another sentence that it considers appropriate.

Result

[83] Leave to appeal is granted under s 253(1) of the Criminal Procedure Act.

[84] The appeal is allowed.

[85] The sentence is remitted to the District Court. The District Court is directed to set aside the sentence and impose another sentence that it considers appropriate. We recommend the sentence be reconsidered by the original sentencing Judge if that is possible.

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