NOTE: THE CONFIDENTIALITY OF THE NAME OR IDENTIFYING PARTICULARS OF THE APPELLANT AND OF THEIR CLAIM OR STATUS MUST BE MAINTAINED PURSUANT TO S 151 OF THE IMMIGRATION ACT 2009. SEE http://www.legislation.govt.nz/act/public/2009/0051/latest/DLM1440836.html

**IN THE HIGH COURT OF NEW ZEALAND
NAPIER REGISTRY**

**I TE KŌTI MATUA O AOTEAROA
AHURIRI ROHE**

**CRI-2022-485-76
[2024] NZHC 189**

UNDER	The Criminal Cases Review Commission Act 2019
IN THE MATTER	Of a referral to the High Court by the Criminal Cases Review Commission of the convictions and sentences of the appellant
BETWEEN	G Appellant
AND	NEW ZEALAND POLICE Respondent

Hearing:	13 November 2023
Counsel:	K H Cook for Appellant S C Baker and Z Zhang for Respondent
Judgment:	16 February 2024

JUDGMENT OF THOMAS J

Table of contents

Introduction [1]
Background [3]
The Commission's reasons for the Referral [8]
The approach [14]
Issues [20]
Was the appellant born on 8 April 1986 rather than 4 April 1984 and therefore a young person at the time of the 2001 offending? [24]
Evidence [24]
(i) Fresh evidence [26]
(ii) Evidence on behalf of the appellant [30]
The aunt [30]
The cousin [46]
(iii) Evidence on behalf of the respondent [49]
The appellant's early interactions with the police [49]
The 2001 offending [55]
Appeal to the High Court [56]
Interaction with other agencies [60]
Findings [69]
What are the consequences for the 2001 convictions and sentence? [81]
Would the appellant have been dealt with differently had his correct date of birth been used by the prosecution? [82]
Do s 205 of the Summary Proceedings Act and s 137 of the Criminal Justice Act preclude this Court from exercising its powers on appeal? [95]
Section 205 of the Summary Proceedings Act 1957 [96]
Section 137 of the Criminal Justice Act [98]
Discussion [104]
Conclusion [114]
Result [116]

Introduction

[1] Te Kāhui Tātari Ture | the Criminal Cases Review Commission (the Commission) has made its first referral pursuant to s 17 of the Criminal Cases Review Commission Act 2019 (CCRC Act) to the High Court in respect of the appellant's nine 2001 District Court convictions and the resulting sentence, totalling 11 months' imprisonment (the 2001 convictions and sentence).

[2] In 2020, the appellant applied to the Commission for review of the 2001 convictions and sentence. The principal ground of the application was that, because various government departments had incorrectly recorded his date of birth, the

appellant was wrongly convicted and sentenced to a term of imprisonment while still a young person, being 15 years of age.[1]

Background

[3] The referral by the Commission (the Referral) was in respect of one charge of male assaults female,[2] one of assault,[3] one of intentional damage,[4] one of resisting a constable acting in the execution of their duty,[5] one of assaulting a constable in the execution of their duty,[6] two of failing to answer bail,[7] one of driving with excess breath alcohol,[8] and one of unlawfully getting into a motor vehicle.[9]

[4] All charges were laid summarily pursuant to the Summary Proceedings Act 1957 (the SPA), which then applied. The charging documents recorded the appellant's date of birth as 4 April 1984, meaning (if that were correct) he was 17 years old at the time of the offending.[10]

[5] The appellant pleaded guilty to all charges apart from that of unlawfully getting into a motor vehicle, in respect of which he was found guilty following a defended hearing on 11 December 2001.

[6] The appellant was sentenced to nine months' imprisonment on the charge of male assaults female and one month's imprisonment to be served concurrently on the charges of assault, assault of a police officer and driving with excess breath alcohol.[11] He was sentenced to two months' imprisonment on the charge of unlawfully getting

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1 Section 2 of the Children, Young Persons, and Their Families Act 1989 (CYPF Act) defined "young person" as "a boy or girl over the age of 14 years but under 17 years; but [did] not include any person who is or has been married". The CYPF Act has since been amended and renamed the Oranga Tamariki Act 1989; this judgment refers to the CYPF Act as it stood at the relevant dates.

2 Crimes Act 1961, s 194(b).

3 Summary Offences Act 1981, s 9.

4 Section 11(1)(a).

5 Section 23(a).

6 Section 10.

7 Bail Act 2000, s 37.

8 Land Transport Act 1998, s 56(1).

9 Crimes Act, s 228(2).

10 Had the appellant been charged in the Youth Court, information about his convictions would be subject to strict publication restrictions, see CYPF, s 438. Given the context of this appeal as a referral by the Criminal Cases Review Commission, and the fact that the appellant's name has been anonymised pursuant to the Immigration Act 2009, I consider it is appropriate to include the specific charges faced by the appellant, to the extent necessary for this judgment.

11 *[G] v Police* HC Napier AP1/2002, 5 February 2002 [appeal judgment] at [1].

into a motor vehicle, to be served cumulatively, and convicted and discharged on the other charges. Leave to apply to substitute a sentence of home detention was declined.

[7] The appellant appealed against his sentence on the basis it was manifestly excessive and that personal mitigating features, including potential discounts for youth, were not taken into account. The appeal proceeded on the basis the appellant was 17 years old at the time of conviction and sentence. The appeal was dismissed in February 2002.[12]

The Commission's reasons for the Referral

[8] In its reasons for the Referral, the Commission raised two issues in relation to the 2001 convictions and sentence which had not been addressed either in the District Court or on appeal to the High Court:

(a) that, by virtue of his age at the time of the offending (15), the appellant should have been dealt with in the Youth Court pursuant to pt 4 of the Children, Young Persons and their Families Act 1989 (the CYPF Act); and

(b) that, despite his age at the time of conviction, the appellant was sentenced to a term of imprisonment contrary to the prohibition contained in s 8 of the Criminal Justice Act 1985 (CJA), which was then in force, whereby those aged under 16 years at the time of conviction were not to be sentenced to imprisonment except for a purely indictable offence which none of the appellant's offences were.

[9] The Commission expressed the view that, had the proceedings been commenced in the Youth Court, it was unlikely they would have been transferred to the District Court for sentencing and, even had they been, a sentence of imprisonment was not an available sentencing option.

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12 At [7].

[10] Amongst other matters, the Commission referred to what it described as the appellant's "unique vulnerabilities". It said, not only was the appellant a young person, but he was also a refugee who had been in the country for eight years only at the time of the proceedings and had left formal education "at the age of 13 with limited capacity to read, write and comprehend the English language".

[11] The Commission acknowledged that the 2001 convictions and sentence might not be invalid due to the mistake in the appellant's age but considered the procedural errors produced an unjust and unlawful outcome resulting in a miscarriage of justice.[13]

[12] The Commission considered it in the interests of justice to refer the 2001 convictions and sentence to the High Court. It acknowledged that the appellant has not exercised his right of appeal against conviction as he does not deny the offending.[14]

[13] In an earlier decision, I confirmed the Referral was correctly made to the High Court.[15]

The approach

[14] The CCRC Act provides that the appellate court to which a referral has been made must hear and determine it as if it were a "first appeal".[16]

[15] In my decision of 23 August 2023, I concluded that the Referral should be determined pursuant to the SPA.[17]

[16] Part 4 of the SPA set out the provisions for appeals. Section 115 provided for a defendant's general right of appeal to the High Court from a conviction and/or

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13 Two sections that were in force at the time operate such that the 2001 convictions and sentence may not be invalid: Summary Proceedings Act 1957, s 205; and Criminal Justice Act 1985, s 137. These sections are addressed below, beginning at [95].

14 Mr Cook noted that the appellant appeals his convictions on the basis that, had the proceedings taken place in the Youth Court, then there were a number of disposal options available which would not have resulted in a conviction.

15 *G v Police* [2023] NZHC 1457.

16 Criminal Cases Review Commission Act 2019 (CCRC Act), s 20.

17 *G v Police* [2023] NZHC 2294 at [16].

sentence imposed in the District Court. Appeals against conviction and sentence were general appeals and were by way of rehearing.[18]

[17] The Supreme Court summarised the approach that was taken to appeals under the SPA in its 2019 decision *Sena v Police*.[19] The Court said:[20]

> [9] The nature of the appeal "by way of rehearing" provided for by s 119(1) was addressed in many judgments. The cases soon established that a de novo hearing on the merits was not required, with the approach adopted in respect of civil appeals being treated as applicable to s 119. This meant that the appellate court was required to form, and act on, its own assessment of the evidence, albeit that:
>
> > (a) the onus was on the appellant to establish an error on the part of the trial judge; and
> >
> > (b) this would be difficult to do in cases where the complaint was directed at the facts as found by the trial judge (as distinct from the inferences to be drawn from, or an evaluative assessment of, them) and especially so in cases where those findings of fact were based on credibility assessments.

[18] Section 121 set out the High Court's powers on appeal:

> **121 High Court to hear and determine appeal**
>
> (1) The High Court shall hear and determine every general appeal and make such order in relation to it as the Court thinks fit, and, without limiting the generality of the power conferred by this subsection, may exercise any of the powers referred to in the succeeding provisions of this section.
>
> (2) In the case of an appeal against conviction, the High Court may—
>
> > (a) Confirm the conviction; or
> >
> > (b) Set it aside; or
> >
> > (c) Amend it and, if the Court thinks fit, quash the sentence imposed and either impose any sentence (whether more or less severe) that the convicting Court could have imposed on the conviction as so amended, or deal with the offender in any other way that the convicting Court could have dealt with him on the conviction as so amended.
>
> …

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18 Summary Proceedings Act 1957, ss 115(4) and 119(1).

19 *Sena v Police* [2019] NZSC 55, [2019] 1 NZLR 575 at [7]–[10]. See also *Herewini v Ministry of Transport* [1992] 3 NZLR 482 (HC) at 489–490.

20 Footnotes omitted.

[19] Section 121(3)(b) of the SPA specified the basis for allowing an appeal against sentence, providing that if the High Court determined that a sentence imposed was "clearly excessive or inadequate or inappropriate" or if the Court was "satisfied that substantial facts relating to the offence or to the offender's character or personal history were not before the Court imposing sentence" then the Court may quash or vary the sentence.

Issues

[20] There are two issues to be determined:

(a) Was the appellant born on 8 April 1986 rather than 4 April 1984 and therefore a young person at the time of the 2001 offending?

(b) If so, what are the consequences for the 2001 convictions and sentence?

[21] The appellant's conviction appeal relates only to the fact of his age. He does not deny the offending.

[22] The respondent's position is that the appellant has not established that the 4 April 1984 date of birth used in 2001was incorrect. Mr Baker, for the respondent, points out that the 8 April 1986 date relies on the appellant's aunt having provided the correct date of birth in 1993 when she and the appellant arrived in New Zealand. That, in Mr Baker's submission, is open to question. He notes that the appellant has himself chosen to use dates of birth other than 8 April 1986, both prior and subsequent to the 2001 convictions and sentence, and has not explained why he did so. Mr Baker submits the Court cannot be satisfied there was an error in the 4 April 1984 date of birth used in 2001.

[23] Mr Baker then submits that, even if the Court were satisfied the appellant's date of birth is 8 April 1986, the 2001 convictions and sentence are not invalid as remedies are available for a rehearing and substitution of sentence.

Was the appellant born on 8 April 1986 rather than 4 April 1984 and therefore a young person at the time of the 2001 offending?

Evidence

[24] The evidence is by affidavit with all but two deponents required for cross-examination. The evidence on behalf of the appellant comes from his aunt and cousin. The evidence on behalf of the respondent is provided by personnel from the New Zealand Police | Ngā Pirihimana o Aotearoa, the Legal Services Agency, Waka Kotahi | New Zealand Transport Agency, Immigration New Zealand, the Ministry of Social Development | Te Manatū Whakahiato Ora, Oranga Tamariki | Ministry for Children and Te Tari Taiwhenua | the Department of Internal Affairs, as well as the lawyer who acted for the appellant on his 2001 sentence appeal.

[25] The purpose of the respondent's evidence is to demonstrate that the appellant had used different birth dates at various times during his dealings with official agencies and that there was some inconsistency between the information provided by his relatives at various points during such interactions.

(i) Fresh evidence

[26] Section 119 of the SPA addressed the issue of fresh evidence being brought by the parties at the appeal stage. It provided:

> (3) The High Court shall have the same jurisdiction and authority as the District Court, including powers as to amendment, and shall have full discretionary power to hear and receive further evidence, if that further evidence could not in the circumstances have reasonably been adduced at the hearing, …

The approach taken to fresh evidence admitted under this section was in practice the same as that later articulated by the Court of Appeal in *R v Bain*: namely that the evidence must be sufficiently fresh and sufficiently credible but that the overriding criterion is the interests of justice.[21]

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[21] *R v Bain* [2004] 1 NZLR 638 (CA) at [22], affirmed by the Privy Council in *Bain v R* [2007] UKPC 33, (2007) 23 CRNZ 71 at [34]. See further *McCabe v Police* HC Hamilton AP26/95, 26 June 1995.

[27] The fact the parties filed fresh evidence in a referral rather than an appeal does not change the rules for admissibility of fresh evidence.[22] It is accepted that freshness and credibility may be less rigorously applied in relation to a case for the prerogative of mercy bought under s 406(a) of the Crimes Act 1961.[23] The same approach should be taken to a referral under the CCRC Act.

[28] In the present case, the respondent has challenged whether the appellant's evidence is sufficiently fresh and sufficiently credible. Mr Baker notes there is no affidavit evidence from the appellant to explain why the issue of his age was not dealt with at the time of the 2001 convictions and sentence or the 2002 appeal.

[29] It is not seriously contended that the context relied on by the Commission is not a fair reflection of the circumstances. That is, the appellant and his family were refugees from a war-torn country with all the challenges and trauma that entails. It can fairly be inferred that their familiarity with English and the New Zealand justice system was limited. I take that into account when assessing why the questions about the appellant's age, and the evidence about it, were not raised earlier. I address the credibility of the witnesses below and find no reason to doubt it. In any event I am satisfied it is in the interests of justice to admit the evidence.

(ii) Evidence on behalf of the appellant

The aunt

[30] The appellant's aunt (the aunt) says she knows that the appellant's date of birth is 8 April 1986. She is confident about that for two reasons.

[31] First, her daughter, the appellant's cousin (the cousin), was born in their country of origin on 7 March 1986, only one month before the appellant was born. The cousin was born in the hospital and the aunt says she remembers that she had to

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22 See *Redman v R* [2013] NZCA 672 at [23]–[25] in respect of a reference under s 406(a) of the Crimes Act 1961. Prior to the enactment of the CCRC Act, the prerogative of mercy in s 406 of the Crimes Act provided an avenue for a convicted person to seek a remedy in cases where a miscarriage of justice may have occurred. It was usually sought after rights of appeal had been exhausted. Acting on the advice of the Minister of Justice, the Governor-General could refer a person's conviction or sentence to the High Court or Court of Appeal. The process under the CCRC Act has replaced s 406.

23 *Redman v* R, above n 22, at [23].

record her birth date on a form for the doctor. However, as a result of war in their country of origin, the relevant documentation has been lost. The aunt says that a person does not forget the date their daughter is born. She explains that her culture celebrates the 40th day after the birth of a baby. This is a very important ceremony and it is therefore necessary to remember the baby's date of birth. This celebration took place in respect of the cousin. I note at this point that, despite this evidence, the aunt is less precise in respect of the dates her other children were born.

[32] Secondly, the aunt was present at the appellant's birth. He was born at home because there was insufficient time for the appellant's mother to reach the hospital. The appellant's grandmother looked after the cousin while the aunt walked to the midwife's house and then to where the appellant's mother lived.

[33] Furthermore, the aunt explains that she was very close to the appellant when they lived in their country of origin. Because he was so close in age to the cousin, he was frequently at the aunt's house and she effectively raised him. Once the war started, everybody fled and the appellant stayed with her. This is how the appellant came with her to New Zealand.

[34] The aunt, along with the appellant, the cousin and several other family members, arrived in New Zealand in mid-May 1993 under the Refugee Quota Programme. She exhibited to her affidavit a number of documents from the New Zealand Immigration Service recording which family members accompanied her, the date she and her family arrived at the refugee centre and the date from which they became residents of New Zealand under the Refugee Quota Programme.

[35] Shortly after arrival, the aunt also completed a declaration listing the appellant's immediate relatives. This records the appellant's date of birth as 8 April 1986 and his age as seven years. It records the appellant's immediate relatives as his parents and three brothers. Only the years of the appellant's relatives' birth are given, not the day and month. The aunt exhibited a letter from a health centre to Immigration Services dated two months after their arrival in New Zealand which lists the family members in her care, as well as their ages. The appellant and the cousin are both listed as being seven years old.

[36] Finally, the aunt exhibited a copy of the appellant's New Zealand Immigration Certificate of Identity and Residence Permit, issued in 1993, which records his date of birth as 8 April 1986.

[37] The aunt's evidence was challenged in cross-examination. Mr Baker drew her attention to several documents, produced in evidence on behalf of Immigration New Zealand as part of the documentation provided when she arrived in New Zealand. Throughout the documents there are inconsistencies about the birth dates of multiple family members as well as other discrepancies.

[38] One such document is a UNHCR Resettlement Registration Form, which records the aunt's date of arrival in a previous country of asylum as being September 1991.[24] The document records immediate family members, including the cousin, whose date of birth is recorded as 1984, and six other children, with dates of birth ranging from 1978 to 1987.

[39] The aunt said she had not seen that document before. She said the information in the form was completed by an interpreter and that the birth dates of the cousin and two of her children had been incorrectly recorded.

[40] Another document is a declaration completed in May 1993. It records the information provided on the flight list when the aunt and her family travelled to New Zealand. Any alterations to the flight list are made subsequent to arrival. The declaration was signed by the aunt and an immigration officer. Notably, the cousin's birth date on the flight list is shown as 1984 and on the alteration as 7 March 1986. The name of one of the aunt's sons is shown on the flight list with the birth date of 1986, however this name is changed in the alteration to that of the appellant, date of birth 8 April 1986, and description of nephew.

[41] The aunt explained that her son had not travelled to New Zealand with them, and he was born in 1987. I note the flight list recorded another son, birth date 1987, with the alteration recording a new surname and a birth date in 1988.

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[24] United Nations High Commissioner of Refugees.

[42] Another document issued by the Refugee Reception Centre on New Zealand Immigration Service note paper records a list of the aunt's immediate relatives and children. The cousin and one of her sons are both listed as having a 1986 birth date. The aunt explained that this was incorrect and that she had been helped by others to complete the documentation. She accepted she did not have both a son and daughter born in 1986 but rejected the suggestion that it was her son who was born in 1986 and the cousin in 1984.

[43] The aunt said the appellant was just like her son and lived with her when they first came to New Zealand. She was not aware he had used various dates of birth and did not remember that he had a driver's licence in 1999 which, if he were born in 1986, would have made him just 13 years old at the time.

[44] The aunt did not recall attending a Youth Court family group conference (FGC) for the appellant on 9 November 2000 in respect of a dangerous driving charge. According to the record it was attended by the appellant, the aunt, the appellant's father and grandfather. The FGC recorded the appellant's birth date as 8 April 1984. Had his date of birth been 1986, the appellant would have been only 14 years old at the time.

[45] The aunt was aware that the appellant had served a sentence of imprisonment in 2001. She said she took papers to the prison to show that he was only 15 years old but nobody listened. She did not speak to the lawyer acting on the appellant's appeal, only the prison guard.

The cousin

[46] The appellant's cousin says she was born on 7 March 1986 and this is the date she has been told all her life. She says that she is older than the appellant by approximately one month and she has been consistently told that the appellant's birth date is 8 April 1986. They were both seven years old when they arrived in New Zealand in May 1993.

[47] The cousin says the appellant was always treated as being the same age as her (albeit one month younger). She attended numerous birthday celebrations for the

appellant and they all corresponded to the date of 8 April 1986. She and the appellant were in the same year group at school, although he appears to have been at secondary school while she was still at intermediate school, and he left school much earlier than her. In cross-examination, she could not remember whether she was in the same class at primary school as the appellant. She said they attended English lessons together, as English was not their first language. She was not sure whether the appellant went to the same intermediate school as her but reiterated she always knew they were the same age.

[48] The cousin was unaware the appellant had his driver's licence by 1999.

(iii) Evidence on behalf of the respondent

<u>The appellant's early interactions with the police</u>

[49] The Constable who arrested the appellant on 6 August 1998 took a statement from the appellant and prepared the police file. He also provided evidence about two associated files relating to the appellant's escape from the custody of the Department of Social Welfare on 24 August 1998.

[50] The police files from that time show four different dates of birth recorded for the appellant: 0 April 1984, 6 April 1984, 8 April 1984 and 20 May 1984.

[51] The appellant's date of birth is recorded on his statement as 6 April 1984, his age is recorded as 14 and his occupation as mushroom picker. The Constable believes he read the statement to the appellant before the appellant signed it. The appellant's age is also recorded as 14 on the other two files.

[52] The police records show the appellant was a student at an intermediate school. His date of birth is recorded as 20 May 1984 but it is clear that the "4" of 1984 has been written in manuscript on top of another date. This appears to be part of the police records regarding the appellant's offence history, involving incidents occurring on: 6 August 1988; 22 June 1998; 2 October 1997; 18 August 1997; and 9 May 1996.

[53] The Constable was unaware of the appellant's Certificate of Identity, recording his birth date as 8 April 1986. He said that the appellant's date of birth had come from the appellant himself, although the Constable assumed he would have confirmed it with the appellant's father. He said that a person's date of birth is generally confirmed by another source, for example a driver's licence or, in the case of a youth, by confirming the date with parents. In this regard, he referred to the police report form he completed at the time. The report recorded as follows:

> When [the appellant] appears in court he may state that he was born in 1985. His father states that he was born 1984 and is 14 years old.

[54] I interpose to refer to counsel's advice that the appellant's father is apparently in Australia but his exact whereabouts are unknown.[25] The respondent has not provided any detail of its efforts to locate the appellant's father and why he should be considered unavailable as a witness. As such, that statement attributed to the appellant's father is hearsay.[26] There is no dispute that the statement was recorded however the context in which the statement was made and any motivation for it is unknown. For example, the appellant's father might have been concerned about repercussions given the appellant was apparently working as a mushroom picker and not attending school. That, however, is simply speculation. I can take the matter no further and attach no weight to the statement.

The 2001 offending

[55] The evidence of the Senior Constable who arrested the appellant on 7 August 2001 in respect of three of the offences which are the subject of the Referral (wilful damage, resisting arrest and assault of police) is that the appellant first gave a name other than his own and a date of birth of 12 February 1980. This was recorded on the charge sheet. On 21 July 2001, an alias had been recorded by the police for the appellant, indicating he had previously used alternative names. The appellant was thereby identified in relation to the 7 August 2001 offences and his name and a date of birth of 4 April 1984 were recorded on the Caption Sheet. He is described as a male,

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25 The hearing on 13 November 2023 was adjourned part-heard to enable further inquiries to be undertaken following the respondent's disclosure of details concerning the appellant's father. In a joint memorandum dated 15 December 2023, counsel advised there was no further evidence to place before the Court.

26 Evidence Act 2006, s 18.

from his country of origin, aged 17 years, living locally and unemployed. The Senior Constable confirmed he was unaware of the appellant's Certificate of Identity.

Appeal to the High Court

[56] The appellant's appeal to the High Court was heard on 5 February 2002.[27]

[57] The High Court Judge recorded the appellant as being 17 years old, born overseas and a New Zealand resident for a number of years.

[58] At the time of conviction, s 5 of the CJA provided that violent offenders were to be imprisoned except in special circumstances. The appellant's appeal counsel did not dispute that s 5 applied to the charge of male assaults female, which arose out of an incident involving the appellant, his girlfriend and his girlfriend's sister.[28] The thrust of his submission was that the total sentence imposed was too long and thereby manifestly excessive. Counsel argued that the sentencing Judge failed properly to take into account the appellant's age, his guilty plea, his reconciliation with his girlfriend, prospects of rehabilitation and the requirement in s 7(2) of the CJA for a sentence of imprisonment to be as short as possible. The Judge agreed with the District Court Judge that s 5 applied and there were no special circumstances which would justify disturbing the sentence of imprisonment.[29] He considered the District Court Judge was perfectly entitled to impose "a relatively harsh" sentence in relation to the incident involving the appellant's girlfriend and her sister and that in isolation the sentence could not be considered manifestly excessive. The District Court Judge was also entitled to impose a cumulative sentence on the charge of unlawfully getting into a motor vehicle. The appeal was dismissed.

[59] The appellant's lawyer for the 2002 appeal has limited recollection of it. That said, his evidence supported the suggestion that the appellant was able to communicate in English and did not require the help of an interpreter. The lawyer did not remember any particular concerns about the appellant's understanding of the court process, saying that, if he had such concerns, he would have discussed them with the

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27 Appeal judgment, above n 11.
28 At [2] and [5]–[6].
29 At [7].

appellant and taken appropriate steps. He did not recall any particular discussions with the appellant about his age or whether the date of birth recorded on the police and court documentation was correct. However, he did think there would have been discussions with the appellant about his age and date of birth, particularly in preparing the appeal submissions and if he had assisted the appellant in completing the legal aid application form. Had he been told that the date of birth recorded on the police and court documentation might have been incorrect, he is certain he would have raised this with the police and the Court.

Interaction with other agencies

[60] The appellant's interactions with other agencies between 1994 to 2022 generated a number of conflicting birth dates ranging from 1980 to 1986. The documents are too numerous to address individually. By way of summary, the following birth dates are recorded on the listed classes of documents.

12 February 1980

- Fingerprint forms.

6 April 1981

- Ministry of Social Development records.

6 April, 8 April, 6 June 1983

- Fingerprint forms.
- Driver's licence (1999–2013).

4 April, 6 April, 8 April 1984

- Fingerprint forms.
- Ministry of Social Development Records.
- Legal Aid applications.
- Application for Steps to Freedom payments.
- Work Capacity Medical Certificate.
- Immigration New Zealand records.
- Oranga Tamariki records.

- Youth Court and FGC records.
- National Intelligence Application.

<u>6 April, 8 April 1985</u>

- Fingerprint forms.
- Oranga Tamariki records.

<u>6 April, 8 April, 20 May 1986</u>

- Fingerprint forms.
- Application for New Zealand Citizenship.
- Ministry of Social Development records.
- Legal aid forms.
- Driver's licence.
- Application for Steps to Freedom payments.
- Immigration New Zealand forms.
- Oranga Tamariki records.
- National Intelligence Application.
- New Zealand Police Youth Aid Referral.

[61] It is apparent that the dates of birth on some forms have been completed by someone other than the appellant, presumably a lawyer on his behalf, but others by him. The appellant has signed his name to documents bearing both 1984 and 1986 dates of birth.

[62] There are a number of documents that are of particular relevance.

[63] Oranga Tamariki's records show a referral in November 1994 from the principal of a primary school regarding the appellant, recording his date of birth as 8 April 1986 and the cousin's as 7 March 1986. A notification dated 1997 records that the appellant, 12 years old with a date of birth of 8 April 1985, was expelled from intermediate school but returned shortly thereafter with a teacher aide. As at 12 March 1998 the appellant was at high school.

[64] On 7 August 1998, a Youth Court Judge accepted that the appellant's date of birth was 4 April 1984. This date of birth was also recorded at the FGC on 10 September 1998, when the appellant appeared in respect of alleged offending.

[65] In June 1999, the appellant applied for New Zealand citizenship, recording his date of birth as 8 April 1986. Because the appellant was a minor, the appellant's father was required to sign the application which was by way of a statutory declaration. The appellant's father also signed a separate witnessed document recording the appellant's date of birth as 8 April 1986 and his place of birth. The Department of Internal Affairs considers a Certificate of Identification an accepted form of identification for the purposes of an application for citizenship. The appellant was granted citizenship with effect from 27 September 1999.

[66] On 16 July 1999, the police made a youth aid referral to the Children and Young Persons Service[30] in respect of a criminal charge, recording a date of birth of 20 May 1986. Several years later, on 21 November 2002, the appellant was arrested. The appellant gave a name other than his own. He was identified by way of a prisoner photograph, and his name and a 4 April 1984 date of birth were recorded on the infringement notice.

[67] The appellant used birth dates earlier than 1984 when applying for a driver's licence and an unemployment benefit. As at 18 May 1999, the appellant held a learner driver's licence which recorded a birth date of 6 April 1983. Records from the Ministry of Social Development (MSD) show birth dates ranging from 1981 to 1986. The appellant's first contact with MSD was when he obtained an unemployment benefit in 1999. He had to be at least 18 years old to do so, suggesting the appellant supplied a date of birth of 6 April 1981. Notably, even if the appellant's correct birth date were April 1984, he would only have been 15 years old in 1999, and 13 years old if his correct birth date were April 1986.

[68] In forms submitted prior to 2016, such as legal aid applications and applications for Steps to Freedom payments, the appellant typically used a birth date of April 1984. After November 2016, the appellant began to use a birth date of April

30 As Oranga Tamariki was then known.

1986 more consistently on official forms. From 2013, the appellant also contacted several agencies to amend his birth date from April 1984 to April 1986. On 20 August 2013 the appellant's birth date was amended on his driver's licence to 8 April 1986, consequent on an application including his Certificate of Citizenship. On 27 January 2016, the appellant contacted MSD advising them that the Ministry of Justice records showed an incorrect birth date for him. He provided his Certificate of Citizenship showing 8 April 1986 as his birth date. His birth date was also changed in the police's National Intelligence Application to 8 April 1986 as of 13 May 2022.

Findings

[69] Mr Baker is particularly critical of the appellant's failure to provide evidence for the purpose of the Referral. In his submission, the appellant has failed to explain to the Court why he persisted using the 1984 year of birth throughout all stages of the proceedings the subject of the Referral. Mr Cook, for the appellant, responds that the appellant could not give hearsay evidence of his date of birth, although of course Mr Cook called the cousin whose evidence would be considered hearsay on that same basis, both in respect of the appellant's date of birth and her own.

[70] I accept Mr Cook's submission that the fact the appellant has given conflicting names and ages throughout his various interactions with various agencies does not disentitle him from any remedy that might be available to him on appeal.

[71] There is no reason to disbelieve the aunt's evidence that she was present at the appellant's birth. She gave two good reasons why she had a specific recollection of his date of birth. I acknowledge there were some inconsistencies in the initial forms purportedly signed by her as they relate to the appellant and his date of birth. Overall, however, the aunt's responses on official documentation relating to the appellant consistently recorded a specific date of birth (in contrast to the birth dates of other relatives including her own children). I accept her explanation for the inconsistencies, that is, that she was not filling out the forms herself and that they were completed with the assistance of a translator. Given the turmoil associated with her refugee status, route to and arrival in New Zealand, it would be unfair to hold any inconsistencies against her.

[72] The cousin's evidence was compelling. She is a well-educated young woman and there is no basis for me to reject her evidence. I acknowledge that she is using a 1986 birth date as told to her by her mother, who is the best person to know. There does not appear to be any doubt that she was born a month earlier than the appellant and the sole issue is whether that was in 1984 or 1986. If the appellant were born in 1984, so too would his cousin have been but there is no basis on which to conclude that is the case.

[73] The appellant was issued with an official document recording his birth date of 8 April 1986 as early as 9 June 1993, in the form of the Certificate of Identity. By 27 September 1999, he had a Certificate of New Zealand Citizenship, the appellant's year of birth of 1986 having been confirmed by the appellant's father when he signed the appellant's application for citizenship.

[74] I attach particular weight to the evidence that in 1994 the appellant's primary school apparently recorded his date of birth as 8 April 1986 and informed the Children and Young Persons Service of that in a referral. Unlike much of the other evidence, the date of birth was presumably obtained from a source other than the appellant and was provided when he was at a young age, suggesting it was more likely to be accurate.

[75] There is no doubt that the appellant had a troubled time during his early adolescence and schooling in New Zealand. It appears that, when he was attending intermediate school, things began to go seriously awry. He gave different dates of birth at different times and used aliases. He misled the authorities on a number of occasions, regardless of whether his correct date of birth is 1984 or 1986, obtaining both the unemployment benefit and a driver's licence before he was entitled to do so.

[76] The 1984 year of birth, as well as earlier dates, were used in connection with various benefits for which the appellant applied, for example a driver's licence, unemployment benefit, Steps to Freedom and legal aid. But by the time of these applications, the appellant had been issued with his Certificate of Identity and New Zealand citizenship, both recording his year of birth as 1986.

[77] Any shortcomings in the systems of various agencies in apparently failing to verify the appellant's date of birth are beyond the scope of this decision. I can only observe that the appellant used this to his advantage by giving dates of birth inconsistent with the only official records in New Zealand, apparently for reasons of bettering his own situation.

[78] Similarly, while Mr Cook criticised both the police and Oranga Tamariki for their failure to pick up discrepancies in the various dates of birth recorded for the appellant, that too is beyond the scope of this decision.

[79] There are matters which give me pause. For example, although the cousin was sure she and the appellant had gone through school together, he was clearly at secondary school when she, on her own evidence, was still at intermediate school. As against that, it is also clear that the appellant had a somewhat chequered schooling and there may be other reasons why he went to secondary school before she did. I do not have the evidence to take that any further. Some of the allegations about the appellant's behaviour also raise questions about his age. In particular, he was excluded from intermediate school when he was either 11 or 13 years old for alleged offending more commonly associated with someone older than 11.

[80] Having weighed all the evidence, I am satisfied that the appellant's date of birth is 8 April 1986.

What are the consequences for the 2001 convictions and sentence?

[81] I now turn to address the consequences for the 2001 convictions and sentence of the fact the appellant was 15 years old and therefore a young person at the time but was dealt with as though he were 17 years old.

Would the appellant have been dealt with differently had his correct date of birth been used by the prosecution?

[82] There is no dispute that, had the police realised in 2001 that the appellant's date of birth was 8 April 1986, the appellant would have been dealt with under the procedures set out in pts 4 and 5 of the CYPF Act, as it then was.

[83] The CYPF Act provided:

> **272 Jurisdiction of Youth Court**
>
> …
>
> (3) Any young person charged with an offence other than –
>
> (a) Murder; or
>
> (b) Manslaughter; or
>
> (c) A traffic offence not punishable by imprisonment –
>
> shall be brought before a Youth Court to be dealt with in accordance with the provisions of this Act irrespective of whether the offence is punishable on summary conviction or on indictment.
>
> …

[84] The exercise of powers under pt 4 were guided by a set of principles which emphasised the importance of diversion, strengthening families and keeping the young person within the community if practicable and consonant with public safety.[31] A young person's age was a mitigating factor in determining whether to impose sanctions and the nature of any such sanctions, and they were required to take the least restrictive form appropriate.[32]

[85] A young person was entitled to special protection during any investigation relating to the possible commission of an offence and to appropriate treatment prior to any arrest or questioning.[33] The circumstances in which a young person could be arrested were limited.[34] They could not be detained in police custody except if the court was satisfied the young person was likely to abscond or be violent, and suitable facilities for their detention in safe custody were not available to the Chief Executive of the Department of Child, Youth and Family.[35]

[86] Except in certain circumstances, proceedings were not to be instituted against a young person unless a youth justice coordinator had been consulted and the matter

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[31] CYPF Act, s 208.
[32] Sections 208(e) and 208(f).
[33] Sections 208(h) and 214–220.
[34] Section 214.
[35] Section 239(2).

considered by an FGC.[36] A warning or a caution had to be considered as an alternative to prosecution.[37]

[87] If a young person were brought before the Youth Court and the charges they faced were proved, an FGC was required to consider the sentence outcome and make recommendations to the Court.[38] This could have included a discharge without further order.[39] Subject to specified circumstances, the Court could not make orders unless an FGC had been held.[40] The most severe order available under the CYPF Act (aside from transfer to the District Court) was up to three months' residence in a social welfare institution, followed by up to six months under the supervision of the Chief Executive.[41]

[88] If the Youth Court had considered all options available to it and was satisfied that none of them were appropriate in the circumstances, it could convict and remit the young person (if aged 15 or older) to the District Court for sentence.[42] However, if the young person was under the age of 16 (as the appellant was) and none of the charges or convictions entered against them were purely indictable offences (and they were not), a sentence of imprisonment could not have been imposed.[43]

[89] It is clear that the appellant would have been dealt with in a significantly different way from the time of his first interaction with the police, had the police realised his correct date of birth. He could not have been remanded in custody in an adult prison, as he was. A youth justice coordinator would have been consulted, an FGC held and he could have been discharged without further orders.

[90] There is no suggestion that the 2001 offending was so serious that the Youth Court would have remitted the appellant to the District Court for sentence.

36 Sections 245 and 248.
37 Section 209.
38 Section 258(e). See also ss 262–265.
39 Section 283(a).
40 Section 281.
41 Sections 283(k), 283(n) and 311. Pursuant to s 314, the young person could be released from the custody of the Chief Executive after two months if the Chief Executive was satisfied the young person had not absconded or committed any further offence during the period which the young person was in custody.
42 Section 283(o) and 290(2).
43 Criminal Justice Act, s 8.

The offending was relatively low level, despite the fact that the charge of male assaults female was considered to reflect serious violence. [44]

[91] Being dealt with in the Youth Court, the appellant would not have had a conviction entered on his criminal history and he would have had the benefit of the confidentiality provisions applicable in that Court.[45]

[92] As above, the most severe sanction would have been three months' residence in a welfare institution followed by supervision. Any sanction should have taken the least restrictive form appropriate, recognising the principle that he should have been kept in the community if practicable and consonant with the safety of the public.

[93] A sentence of imprisonment could not have been imposed — there was no jurisdiction to do so. Despite this, the appellant was convicted and served a sentence of 11 months' imprisonment in an adult prison.

[94] It is therefore clear that there were a number of errors in the way the appellant was dealt with and they were significant. He should not have been convicted but rather he likely would have been admonished and ordered to reside for, at most, three months in a welfare institution.[46] The significance of the errors is such that, on the face of it and subject to any constraint on my reaching such a conclusion, this Court should exercise its power under s 121 of the SPA to set aside the 2001 convictions and sentence.

Do s 205 of the Summary Proceedings Act and s 137 of the Criminal Justice Act preclude this Court from exercising its powers on appeal?

[95] The fact that the appellant should have been dealt with in the Youth Court does not mean that the 2001 convictions and sentence are automatically invalid. The SPA and CJA both contained specific provisions which applied where an offender should have been dealt with in the Youth Court but was not. Section 205 of the SPA provided that a conviction was not invalid by reason only of the fact an offender should have

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44 Appeal judgment, above n 11, at [5] and [7].
45 CYPF Act, s 438.
46 Sections 283(b) and 283(n).

been dealt with in the Youth Court and s 137 of the CJA provided that a sentence was not invalidated by reason only of a mistake in the age of the offender. Section 205 of the SPA provided a mechanism for there to be a rehearing in relation to convictions and s 137 of the CJA provided a mechanism for correcting sentences wrongly imposed.

Section 205 of the Summary Proceedings Act 1957

[96] Section 205 of the SPA (in force at the time of the 2001 convictions and sentence) provided:[47]

> **205 Proceedings not invalid because defendant should have been dealt with in Youth Court**
>
> (1) No conviction or order or other process or proceeding shall be held invalid by reason only that at the time the defendant was convicted the defendant should by reason of his or her age have been dealt with in a Youth Court.
>
> (2) Where subsection (1) of this section applies, on the application of either party a rehearing of the information may be granted under section 75 of this Act, and, if at the time appointed for the rehearing the defendant is still a child or young person within the meaning of the Children, Young Persons, and Their Families Act 1989, the Court shall remit the proceedings to a Youth Court to be reheard in that Court.

[97] Section 75 of the SPA provided:

> **75 District Court Judge or Justice or Registrar or Community Magistrate may grant a rehearing**
>
> (1) Where on the hearing of any information or complaint the defendant has been convicted or, as the case may be, an order has been made against him, the District Court Judge or Justice or Justices or Community Magistrate or Community Magistrates who presided over the Court before which the information or complaint was heard may, in his or their discretion, grant a rehearing of the information or complaint, either as to the whole matter or only as to the sentence or order, as the case may be, upon such terms as he or they think fit:
>
> Provided that, if any such District Court Judge or Justice or Community Magistrate has since the date of the hearing ceased to hold office as such or died or left New Zealand, or if for any other reason it is impracticable that he should be present to hear the application for rehearing, any District Court Judge may grant a rehearing.

[47] Pursuant to s 397 of the Criminal Procedure Act 2011, s 205 remains applicable.

…

(2) When a rehearing has been granted, the conviction or, as the case may be, the sentence only or the order made on the hearing shall immediately cease to have effect.

…

Section 137 of the Criminal Justice Act

[98] Section 137 of the CJA provided:

137 Sentence not invalidated by mistake in age of offender

(1) Where in respect of an offence a court sentences to periodic detention, corrective training, imprisonment, or preventive detention an offender appearing to the court to have been at the time of conviction of an age at which the offender would have been liable to that sentence for that offence, the sentence shall not be invalid by reason only of the fact that, because of the offender's age at the time of conviction, the offender was not liable to that sentence.

(2) Where it appears that, because of the offender's age at the time of conviction, the offender was not liable to the sentence, the offender or the prosecutor or any counsel on behalf of the Crown may at any time apply in accordance with this section for the substitution of some other sentence.

…

(7) The Judge to whom the application is made, after inquiry into the circumstances of the case, may pass in substitution for the original sentence any sentence that could have been passed on the offender at the time of conviction.

…

[99] It is helpful to consider the legislative history of this section.

[100] Section 137 was preceded by s 43 of the Criminal Justice Act 1954 and was replaced by s 143 of the Sentencing Act 2002. The overall content of the provision remained substantially similar throughout the three Acts.

[101] The reasoning for s 43 was described in the Criminal Justice Bill 1954 as follows:[48]

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[48] Criminal Justice Bill 1954 (48–1) (explanatory note) at v.

> Clause 43 provides that a sentence is not to be invalidated by reason of a mistake in the age of the offender; but where such a mistake is discovered application may be made to the Court for the substitution of a sentence which could lawfully have been passed on him at the time of his conviction.

[102] The Criminal Justice Act 1985 added imprisonment to the list of sentences covered by the provision. The wording changed from "detention in a detention centre, borstal training, corrective training, or preventive detention" in s 43(1) of the Criminal Justice Act 1954 to "periodic detention, corrective training, imprisonment, or preventive detention" in s 137(1) of the CJA.

[103] Section 143 of the Sentencing Act is a modified re-enactment of s 137, which came into force on 30 June 2002, shortly after the appellant was sentenced.[49] Like s 137, it provides that a sentence "is not invalid by reason only of the fact that the offender was … under the age at which he or she was liable to the sentence imposed". The explanatory note to the Sentencing and Parole Reform Bill 2001 described the section which would become s 143 as follows:[50]

> Clause 131 deals with the situation where there is a particular age criteria in relation to a sentence, and a mistake is made as to the actual age of the offender which means that the offender was in fact not liable to the sentence. The clause provides that the mistake in age does not invalidate the sentence, but provides for a later application for the substitution of another sentence.

Discussion

[104] Section 205 of the SPA appears to proceed on the basis that there is no dispute that a defendant should have been dealt with in a Youth Court (in contrast to the appellant's case). Section 205 provided for a speedy remedy without the need for an appeal. Either party could apply for a rehearing and the matter would be referred back to the District Court Judge who presided, except if impracticable. This reinforces the conclusion that s 205 anticipated an error as to the offender's age would be identified shortly after the conviction. Pursuant to s 75, when a rehearing was granted the conviction or sentence immediately ceased to have effect.

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49 Sentencing Act 2002, s 2 and Sentencing Act Commencement Order, cl 2.

50 Sentencing and Parole Reform Bill 2001 (148–1) (explanatory note) at 29.

[105] Section 137 of the CJA similarly envisaged a speedy process to correct an error where an offender had been mistakenly sentenced to a sentence unavailable because of the offender's age. Either party could apply for substitution of some other sentence that could have been passed on the offender at the time of conviction, suggesting it was anticipated that the mistake was one recognised shortly after sentencing and then quickly rectified.

[106] Parliament's intention is reasonably clear. If someone outside the specified age range mistakenly received one of the age-barred sentences or should have been (but was not) dealt with in the Youth Court, this would not invalidate the sentence or conviction. A remedy was available by way of an application for the substitution of another sentence or a rehearing. This would streamline the court's ability to address a potentially unjust sentence or conviction as it would not waste all the progress already made in the proceeding. For example, if an offender had already been found responsible for the offending, a new defended hearing would not necessarily be required. If an offender were serving a sentence of imprisonment for which they were not liable due to age, a writ of habeas corpus would not be available. Rather, the sentence could be substituted without an appeal or the need to restart the entire proceeding.

[107] While both ss 205 and 137 provide that the conviction and sentence are not invalidated by the mistake about age, they are simply saying that the jurisdictional error does not render the conviction or sentence a nullity. Rather they remain in force until corrected. They do not preclude the conviction or sentence being set aside and indeed both provide mechanisms for that to occur. The conviction is subject to a rehearing and immediately ceases to be of effect once that rehearing is granted. The sentence is liable to be substituted for any other that could have been passed. Neither section precludes the alternative of the error being corrected on appeal. The use of the word "may" in connection with granting a new hearing or substituting a sentence suggests that there remained other pathways for rectification and does not preclude an appellate court from quashing the conviction. The alternative interpretation, that the court did not have to grant the application in every case, seems unlikely.

[108] The circumstances of the appellant's case demonstrate why there must be an alternative pathway to rectification in addition to ss 205 and 137. The SPA and CJA provisions appear designed for use where there is no dispute that a mistake as to age has occurred whereas the respondent disputes that there has been any such mistake. In any event, a rehearing is required, whether through the use of these sections or via an appeal under s 115 of the SPA.

[109] Furthermore, s 137 of the CJA provided that the sentence was not invalid by reason "only" of the fact that because of their age at the time of conviction, the offender was not liable to that sentence. In the case of the appellant, not only was he not liable to a sentence of imprisonment but also he was not liable to be dealt with in the District Court and convicted. In other words, his circumstances fell outside s 137 in any event. This again highlights the importance of an appeal pathway existing beyond s 137 to enable the errors to be rectified.

[110] A rights consistent analysis confirms that the appellant's remedies are not limited to s 205 of the SPA and s 137 of the CJA.[51]

[111] The right not to be subject to disproportionately severe treatment or punishment is relevant, as is the entitlement to minimum standards of criminal procedure, which includes "the right, in the case of a child, to be dealt with in a manner that takes account of the child's age".[52] Under art 3(1) of the United Nations Convention on the Rights of the Child all actions concerning children, including those taken by the courts, must have the best interests of the child as a primary consideration.[53]

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51 See for example the discussion of the Supreme Court in *Fitzgerald v R* [2021] NZSC 131, [2021] 1 NZLR 551 at [41].

52 New Zealand Bill of Rights Act 1990, ss 9 and 25(I). Although s 2 of the CYPF Act defined "child" as "a boy or girl under the age of 14 years", this Court has held that in interpreting the rights of the child under the New Zealand Bill of Rights Act it is the definition used by the United Nations which was likely contemplated, being a human under the age of 18 years: United Nations Convention on the Rights of the Child 1577 UNTS 3 (opened for signature 20 November 1989, entered into force 2 September 1990), art 1; *R v Kaukasi* HC Auckland TO14047, 4 July 2002 and *R v Hamilton* HC Whangarei TO30025, 16 September 2003 at [43].

53 United Nations Convention on the Rights of the Child, above n 52, art 3.

[112] In any event, the CRCC Act provides that a referral must be heard and determined by the appellate court as if it were a first appeal.[54] The respondent does not suggest (and it is difficult to see how it could) that this Court cannot consider the Referral because an appeal is precluded by ss 205 and/or 137. If this Court must hear and determine the Referral as if it were a first appeal, the remedies available on appeal must be available.

[113] I conclude that ss 137 and 205 do not preclude this Court exercising its powers under s 121 of the SPA to set aside the convictions and quash the sentence.

Conclusion

[114] The appellant does not deny the offending. He pleaded guilty to all the charges except that of unlawfully getting into a motor vehicle in respect of which he was found guilty following a judge alone trial. His appeal against conviction is limited to the fact of the convictions as opposed to whether the offending itself was proved. Given his true age at the time of the offending, the appellant should have been dealt with in the Youth Court, where no convictions would have been entered. This error was significantly compounded by two further jurisdictional errors when he was sentenced in the District Court rather than the Youth Court and sentenced to eleven months' imprisonment.

[115] The 2001 convictions and sentence were imposed over 20 years ago. I am satisfied the appropriate outcome in the circumstances is to set aside the convictions pursuant to this Court's powers on appeal in s 121(2) of the SPA. While setting aside a conviction would usually render a sentence appeal nugatory, given the Youth Court context the sentence appeal must also be addressed. The sentence of eleven months' imprisonment has long since been served and it is simply too late to substitute any other order that could have been made in the Youth Court. Pursuant to s 121(3) of the SPA, the sentence is quashed and there is no substituted order.

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[54] CCRC Act, s 20.

Result

[116] The appeal is allowed. The 2001 convictions are set aside and the sentence is quashed.

Thomas J

Solicitors:
Crown Law, Wellington for Respondent

Copy to: Criminal Cases Review Commission, Hamilton for Appellant