IN THE SUPREME COURT OF NEW ZEALAND

SC 102/2009
[2010] NZSC 135

RAYMOND EVEREST HESSELL

v

THE QUEEN

Hearing:	9 August 2010
Court:	Elias CJ, Blanchard, Tipping, McGrath and Anderson JJ
Counsel:	R M Lithgow QC, G J King and C J Milnes for Appellant C L Mander and J Murdoch for Crown
Judgment:	16 November 2010

JUDGMENT OF THE COURT

The appeal is dismissed.

REASONS

(Given by McGrath J)

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Para No

Introduction

[1] This appeal concerns a judgment of the Court of Appeal which set guidelines on the approach to be taken by sentencing courts when a person charged with an offence pleads guilty.[1] A guilty plea has long been treated as a mitigating factor in sentencing and the Court of Appeal judgment confirms that is to continue. The judgment reiterates the well established principle that the earlier the plea is entered, the larger the reduction should generally be, and that principle is not in issue. The judgment, however, also sets out a prescriptively structured approach for sentencing courts to fix reductions in the sentences that would have been imposed if the offender had been convicted after a trial. The appeal to this Court puts in issue the prescriptive form of the guidance and the legitimacy of the courts establishing such a regime of sentence reductions for guilty pleas. The essence of the structure was that sentence reductions were determined according to a sliding scale with a 33 per cent reduction for a plea entered at the first reasonable opportunity at one end, and a 10 per cent reduction for a plea entered three weeks before commencement of the trial, at the other.[2]

Charges, pleas and sentence

[2] The appellant and his co-offender were charged with sexual offending against two girls aged 14 and 15. The co-offender was the mother of the 14 year old complainant. The offending took place on 22 September 2007 and both offenders were arrested and charged on 3 October 2007. Following a deposition hearing they were committed for trial in the High Court on 9 April 2008.

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1 *Hessell v R* [2009] NZCA 450, [2010] 2 NZLR 298.
2 At [15].

[3] The first call-over took place on 28 May 2008, when an amended indictment was filed. The co-offender pleaded guilty to the five counts she faced, on which she was jointly charged with the appellant. She was sentenced on 9 October 2008 to 12 months' home detention and was subject to release conditions for six months.

[4] At the call-over the appellant indicated his intention to defend the charges he faced and the trial was set down to commence on 8 December 2008. On 3 December, at a pre-trial teleconference, he indicated he might plead guilty. On 5 December he was arraigned and pleaded guilty to nine counts of sexual conduct with a young person under 16, contrary to s 134(1) of the Crimes Act 1961. On four of those counts he was charged alone and on the other five he was charged jointly with the co-offender. He was sentenced on 6 March 2009 by Heath J to two years and eight months' imprisonment on each charge, to be served concurrently.[3]

[5] The Judge set a starting point based on the gravity of the offending at a term of two years and six months' imprisonment (which was the same as that used by the Judge who sentenced the co-offender). He then identified as aggravating features the vulnerability of the victims (their age and intoxicated state), the emotional harm caused to them and the appellant's breach of a position of trust. As well, the Judge took into account that the appellant, aged 50 years, was significantly older than the co-offender, which was relevant to the appellant's failure to stop what was going on. The Judge added six months to the sentence starting point for these factors, increasing it to three years' imprisonment. He added a further month because of the appellant's prior criminal record involving drug offences and because he had smoked methamphetamine on the day of the offending, which impacted on his behaviour.

[6] In relation to giving credit for his guilty pleas, the Judge said:

> [41] I reject any suggestion that you could not have pleaded guilty earlier. It was always open to you, if you contested particular facts or relative culpability, to enter guilty pleas and seek a disputed facts hearing before sentence. Indeed, a very sensible time for that to have happened was when [co-offender] pleaded guilty, so that the true culpability between the two of you could have been accurately assessed by one sentencing Judge. Instead, you elected to plead guilty on the Friday before the trial was due to start, at a

[3] *R v Hessell* HC Auckland CRI-2007-004-21910, 6 March 2009.

> time when the victims were preparing themselves emotionally to relive their experiences before a jury.
>
> [42] You cannot expect any significant credit for your guilty pleas in these circumstances. I allow a credit in the region of 10%.

[7] After considering home detention, and deciding it was inappropriate, the Judge decided that the end sentence should be two years eight months' imprisonment.

[8] The appellant appealed to the Court of Appeal, one ground of appeal being that the sentencing Judge failed to give a sufficient allowance for the guilty pleas he had entered. A related ground was the disparity between his sentence and that of the co-offender.

[9] The Court of Appeal saw this appeal as providing an appropriate case for it to deliver a Full Court guideline judgment on the manner in which sentencing judges should give credit for guilty pleas.

Court of Appeal judgment

[10] In the introduction to its judgment, the Court of Appeal explained why it saw it as necessary to give fresh guidance on sentencing discounts for guilty pleas. The Court said:[4]

> This Court's traditional approach to how guilty pleas should be treated was symptomatic of the courts' general approach to sentencing, with judges vested with broad discretions. Particularly since the passage of the New Zealand Bill of Rights Act 1990, however, such unfettered discretions have increasingly been viewed as unfair. In the case of guilty pleas, it was being asked, on appeals and elsewhere, whether it is fair if offender A is sentenced by a judge who believes in tiny discounts for guilty pleas while offender B, guilty of like offending, is lucky enough to be sentenced by a judge with a generous view. The passage of the Sentencing Act 2002, with its insistence on a highly structured approach to sentencing, signalled the need to review unfettered discretions and effectively rendered the traditional approach to guilty pleas untenable. In particular, s 8(e) of that Act established as a fundamental principle of sentencing that like cases must be treated alike, so far as possible, and s 9(2)(b) identified a guilty plea as a discrete mitigating factor.

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4 At [2] per William Young P, Chambers, O'Regan, Robertson and Arnold JJ.

[11] The Court of Appeal acknowledged that in sentencing judgments since 2005 it had "edged" towards more definitive sentencing guidelines on recognition of guilty pleas. A major influence on its thinking was the initial guideline on sentence reduction for a guilty plea issued by the United Kingdom's Sentencing Guidelines Council in December 2004.[5] According to its foreword, the intention of that guideline was "to promote consistency in sentencing by providing clarity for courts, court users and victims so that everyone knows exactly what to expect". Previously there had been different understandings of the purpose of the reduction and the extent of any reduction that should be given.

[12] The United Kingdom Council had published a revised "definitive" guideline by the time of the Court of Appeal's judgment.[6] The Court noted that this mandated a sliding scale of discounts starting at one-third, where the plea is entered at the first reasonable opportunity, to one-quarter where a trial date has been set and one-tenth, maximum, if the plea were entered at the "door of the court" or after commencement of the trial.

[13] The New Zealand Parliament had enacted the Sentencing Council Act 2007 on the general lines of the English model.[7] Following the change in Government in 2008, however, the Sentencing Council provided for by that Act had not been established. In those circumstances, the Court of Appeal decided that it should resume giving guideline judgments on sentencing, giving priority to guidance on the discounts for guilty pleas. Such a guideline would assist in achieving greater sentencing consistency and set out a clearer approach for the future. It would enable defence lawyers to advise on the consequences of, in particular, an early guilty plea with some certainty. The Court's guideline would not override sentencing discretion but would give lower courts guidance as to how it was exercised.

[14] The Court of Appeal decided that in future a guilty plea should be recognised by giving a discrete reduction, calculated as a percentage of the sentence that otherwise would have been imposed. The discount was to be applied after all

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5 Sentencing Guidelines Council *Reduction in Sentence for a Guilty Plea* (December 2004).

6 Sentencing Guidelines Council *Reduction in Sentence for a Guilty Plea: Definitive Guideline* (July 2007).

7 Sentencing Council Act 2007, which presently remains in force.

aggravating factors and all other mitigating factors had been taken into account. The percentage would be determined according to a sliding scale. For a plea at the first reasonable opportunity, there would be a 33 per cent reduction. If the plea came at the first callover, the reduction would be 20 per cent. At three weeks before trial it would be 10 per cent. Sentencing judges would apply a sliding scale within those identified points, according to when the plea was entered and the extent to which trauma, stress and inconvenience for witnesses was avoided and public resource expenditure saved.

[15] The judgment added that for a later plea, including after the commencement of the trial, a smaller reduction than 10 per cent might be warranted.[8] But if the case involved sexual offending, the discount for a late plea should still be 10 per cent to provide a continuing incentive to avoid the complainant in such a trial having to give evidence.[9]

[16] The Court of Appeal recognised that the prevailing method of determining a sentence of imprisonment involved the judge in two steps.[10] The first step was to determine a sentence starting point, being the term of imprisonment that would reflect the gravity of the offending conduct. The second step involved addressing relevant circumstances concerning the offender and making appropriate adjustments to increase or decrease the starting point term to reflect those factors. The sentencing judge would usually give credit at this stage for the guilty plea as a mitigating factor.

[17] In the present case, however, the Court decided that in future a guilty plea (together with any allowance to be made for special assistance given to the authorities) should be addressed discretely, at a third step in the process. Where there was a guilty plea, the sentence provisionally decided on would be reduced at the third step by applying the appropriate discount on the sliding scale according to when the plea was entered and the social and other benefits resulting.

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8 At [18].
9 At [62].
10 See *R v Taueki* [2005] 3 NZLR 372 (CA).

[18] At the time of sentencing, the judge should make clear the sentence that would have been imposed but for the plea, and therefore the amount of the reduction involved. A judge choosing not to follow the guideline, in the exercise of the discretion, was to give reasons for the "deviation".[11]

[19] The judgment also spelt out what the Court meant by "first reasonable opportunity" to plead guilty (generally the first or second appearance) and stipulated that the date should not be extended because the defendant was engaged in plea bargaining, disputing the prosecution's summary of facts, challenging the admissibility of evidence, or was awaiting a sentence indication. The Court also emphasised that the maximum discount was to be available only to those prepared to acknowledge their guilt at the outset.

[20] Remorse was seen by the Court generally to be inherent in a guilty plea and accordingly accounted for in the discount. Only when exceptional remorse was demonstrated in a practical and material way would a further discount be justified.[12] This approach was said to reflect current sentencing practice.

[21] The Court also decided that the scale discount for a guilty plea should be given without regard to the strength of the prosecution case. This was because the discount had to be predictable for defence counsel and their clients and also easy for judges to apply in busy list courts. This approach also avoided unnecessary complexity in resolving disputes over the strength of a prosecution case that could detract from the utilitarian value of the discount.

[22] The guideline was to be applied in a modified way to cases involving sentences of life imprisonment and to minimum terms of imprisonment.

Consistency and discretion in sentencing

[23] The right of a person convicted on indictment to appeal against sentence to the Court of Appeal, at that time with leave, was introduced in 1945. Early decisions

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11 At [19].
12 At [27] and [28].

of the Court in sentencing appeals emphasised the importance of sentencing discretion and discouraged consideration of other sentences imposed for the same type of offence.[13] They indicated that the Court of Appeal would approach an appeal by a convicted person on the basis that the Court had to be satisfied that the sentence was manifestly excessive, or wrong in principle, or that there were exceptional circumstances.

[24] The Solicitor-General was given a right of appeal, with leave, against sentence in 1967. The expectation at the time was apparently that the availability of Crown appeals would "tend towards greater uniformity of sentences for comparable crimes".[14] Thereafter, the Court of Appeal began to develop sentencing principles in its judgments, to address concern over inconsistency of punishment under a regime in which decisions involve exercise of wide discretion. In 1973 the Court of Appeal referred to its "increased willingness" to take disparity of sentence into account when the disparity could not be justified and was gross.[15]

[25] In 1988 the Court of Appeal said that the Crown's right to appeal against sentence "has proved its public value".[16] During the previous 18 months the Court had heard 482 appeals, of which 32 were applications by the Solicitor-General. Of those, 27 had resulted in increased sentences. In answering public criticism of sentences that had not been appealed, the Court said:[17]

> The public may not generally understand that this Court has the ultimate judicial responsibility for settling or endorsing sentencing levels for serious crime in New Zealand. The figures already given are one indication of how this responsibility works in practice. In reviewing a sentence this Court has regard, among many other factors, to current trends in offending in New Zealand and current sentencing levels overseas. Rape sentencing, for instance, is certainly not a field in which problems are peculiar to New Zealand. Obviously, too, sentencing must depend on a careful consideration of the full circumstances of each particular case. Often they cannot be conveyed by a brief summary.

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13 *R v Brooks* [1950] NZLR 658 (CA); *R v Radich* [1954] NZLR 86 (CA).
14 C N Irvine "Editorial" [1966] NZLJ 313.
15 *R v Rameka* [1973] 2 NZLR 592 (CA) at 593.
16 *R v Cargill* [1990] 2 NZLR 138 (CA) at 140 per Cooke P.
17 At 141.

[26] This focus on seeking consistency, in conjunction with a careful evaluation of the individual circumstances of the case, was also reflected in the Court's sentence guideline judgments during this period. In a judgment which increased to eight years' imprisonment the starting point for rape sentencing, the Court recognised that this would probably result in an increase in the average length of rape sentences but emphasised that it was not intended to fetter sentencing judges in assessing the gravity of particular cases:[18]

> In the end, almost everything turns on the facts of the particular case. It is part of the judicial responsibility to weigh these.

[27] The importance of consistency in sentencing was accordingly a well established principle in the administration of criminal justice when Parliament enacted the Sentencing Act in 2002. But, in giving that principle effect, the Court of Appeal continued to recognise that:[19]

> It is only by allowing the sentencing authorities a wide discretion that they are enabled to take account of the innumerable factors affecting the nature of the offence, the circumstances of the offence, and the circumstances of the offender, all of which should ordinarily be weighed in determining the appropriate sentence in the particular case.

Sentencing on guilty pleas: historical approach

[28] In 1968, the Court of Appeal referred without criticism to a dictum of the English Court of Appeal in 1967:[20]

> "it is undoubtedly right that a confession of guilt should tell in favour of an accused person, for that is clearly in the public interest."

In 1984 the New Zealand Court of Appeal acknowledged that "Courts often take a plea of guilty into account as a mitigating factor and give a 'discount' for such pleas".[21] The following year the Court said that it should be regarded as a matter of public importance and in the general interests of all women who were victims of

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18 *R v A* [1994] 2 NZLR 129 (CA) at 132 per Cooke P.

19 *Fisheries Inspector v Turner* [1978] 2 NZLR 233 (CA) at 237 per Richardson J.

20 *R v Taylor* [1968] NZLR 981 (CA) at 987 per Wild CJ referring to *R v de Haan* [1968] 2 QB 108 (CA) at 111 per Edmund Davies LJ.

21 *R v Ripia* [1985] 1 NZLR 122 (CA) at 128 per Cooke, McMullin and Somers JJ.

serious sexual offending that the perpetrators should be encouraged to enter pleas of guilty, adding that a "real and apparent reduction", its extent "measurable in practical terms", was required.[22] In 1989 the policy considerations were identified more formally by the Court in these terms:[23]

> Associated with that factor of co-operation with the authorities is the giving of credit for the plea of guilty. In New Zealand, as in other jurisdictions, it has long been recognised by the Courts as ordinarily mitigating culpability and justifying a reduced sentence. The three reasons for this sentencing principle have been repeated by this Court on numerous occasions: it spares the victim the ordeal of giving evidence; it saves the State the time and expense of a defended hearing; and it may be evidence of the offender's acceptance of responsibility for wrongdoing and contrition. The allowance which can and should be given will depend on the particular circumstances, including the nature of the offences, the strength of the police case, the stage at which the guilty plea is entered, and whether the plea is considered by the Court to reflect genuine remorse. There have been many cases where very substantial reductions for guilty pleas have been recognised in sentencing appeals, and that is especially so where long prison sentences have been in contemplation.

[29] Thereafter, the Court refrained from giving detailed or structured guidance in its judgments on the extent of the allowance or discount that should be given for guilty pleas. In *R v Mako*, when a Full Court reviewed the Court's guidelines for aggravated robbery sentences, it referred to submissions concerning the guilty plea and the credit for it appropriate in the circumstances:[24]

> This Court has repeatedly stated that pleading guilty should attract a meaningful discount from an otherwise appropriate sentence. The Court has resisted laying down any specific quantum or proportion for such discount because of the widely varying circumstances in which it might be entered. Generally, however, it is accepted that the earlier the plea the more generous the discount. This is not the appropriate occasion to reiterate the reasoning underlying such discounts but it can be said that an early plea is likely to reflect acknowledgment of wrongdoing and contrition. The consequent saving in resources and early release of victims from the anxiety of the long and upsetting criminal processes are further factors.

[30] This approach reflected the Court's continuing adherence to the principle that the weight given to the guilty plea as a mitigating factor was, in every case, to be a matter for the sentencing judge. The mitigating impact would vary according to the circumstances in which the plea was entered.

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22 *R v Paul* CA 68/84, 1 March 1985 per Woodhouse P.
23 *R v Strickland* [1989] 3 NZLR 47 (CA) at 51 per Richardson J.
24 *R v Mako* [2000] 2 NZLR 170 (CA) at [14] per Gault J.

[31] In the first sentencing guideline judgment following the 2002 Act, a Full Court of the Court of Appeal in 2005 addressed sentences for serious violent offending.[25] In referring to objectives of sentencing guidelines in the context of the new Act, the Court said:[26]

> The principal objective of the guidelines set out in this judgment is consistency. Consistency has always been an objective of sentencing policy, and s 8(e) of the Sentencing Act 2002 now gives that statutory backing. We hope that this judgment will provide a single point of reference for sentencing Judges and counsel, and that this will lead to consistency in the sentencing levels imposed on offenders. What we seek to achieve is consistency in the approach adopted by sentencing Judges, which should in turn lead to consistency in sentencing levels. This does not override the discretion of sentencing Judges, but rather provides guidance in the manner of the exercise of that discretion.

Later, the Court said of the factors that were relevant to the assessment of the appropriate sentencing starting point:[27]

> We do, however, emphasise that a sentencing Judge needs not only to identify such factors, but also to evaluate the seriousness of a particular factor ... The evaluative task is an important aspect of sentencing: without it, there would be a danger of a formulaic or mathematical approach to the assessment of sentencing starting points.

This approach to sentencing discretion in guideline judgments is consistent with the earlier authority we have referred to.

[32] From 2005, in a number of judgments, the Court of Appeal started to move away from the reservation about quantifying discounts that had been expressed in *Mako*. Several decisions indicated that the Court was likely to revisit its earlier resistance.[28] In these decisions the Court referred favourably to the first guideline of the United Kingdom Sentencing Guidelines Council, already discussed. It provided for a one-third reduction in sentence for a plea at the first reasonable opportunity, up to a one-quarter discount after a trial date had been set and a maximum of one-tenth for a guilty plea entered after a trial had begun. The Court of Appeal also referred to

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25 *R v Taueki* [2005] 3 NZLR 372 (CA).
26 At [10].
27 At [30].
28 For example *R v Hannagan* CA 396/04, 9 June 2005 per Hammond J; *R v Growden* CA 67/05, 25 October 2005, per Potter J.

the judgment of the New South Wales Court of Criminal Appeal in *R v Thomson*,[29] which it observed permitted reductions of 10 to 25 per cent depending on the timing of the plea. The Court of Appeal did not deliver a definitive guideline judgment during this period because it appeared that Parliament would establish a Sentencing Council. It did, however, in 2007, say in relation to credit for guilty pleas:[30]

> ... despite the absence (as yet) of a guideline judgment, it is now well established that guilty pleas at the earliest opportunity should give rise to a discount of 30 to 33%.

The Court later added that the discount should be applied after all aggravating and mitigating factors have been taken into account. And in 2009 it became more prescriptive:[31]

> Although there is no guideline judgment on discounts for guilty pleas, recent decisions have explained in detail the allowances which can be expected for the entry of a guilty plea. In the absence of special circumstances an accused person will be entitled to a discount of 30-33% for a guilty plea entered at the earliest reasonable opportunity, a 25% discount for a guilty plea entered at about the time of committal for trial at the preliminary hearing, and a discount as low as 10% where a guilty plea is given very late, for example at the court door at the commencement of the trial or during the trial itself.

[33] By that time, as the Court of Appeal later acknowledged, its decisions were inconsistent with earlier authority.[32] This prompted the Court to select an appeal, that of the appellant, as the vehicle for delivering a guideline judgment on sentence reductions for guilty pleas.

The statutory requirements

[34] As indicated, the Court of Appeal's adoption of structured guidance on fixing discounts in sentences for guilty pleas was premised on its conclusion that the traditional view of the scope of sentencing discretion was in conflict with the Sentencing Act and what it saw as the requirement of that Act of a highly structured

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29 *R v Thomson* [2000] NSWCCA 309, (2000) 49 NSWLR 383.
30 *R v Proctor* [2007] NZCA 289 at [27].
31 *R v H* [2009] NZCA 77 at [21]. *R v Walker* [2009] NZCA 56 at [19]–[20] is to the same effect.
32 *Hessell* (CA) at [4].

approach to sentencing. This conclusion was challenged by counsel for the appellant in this appeal. It is accordingly necessary to consider the provisions of the 2002 Act in order to decide if they require alteration to the approach previously taken by the courts in relation to discretion in sentencing and, in particular, to the approach taken to credit for guilty pleas. The purposes of the Act are expressed in s 3 at a high level of generality. One is to set out the purposes for which persons may be sentenced. Others include promoting those purposes and aiding in the public understanding of sentencing practices by providing statutory principles and guidelines to be applied by the courts. It is also a purpose of sentencing to provide for the interests of the victims of crime.

[35] The Sentencing Act 2002 contained, for the first time in a New Zealand statute, a comprehensive statement of sentencing purposes and principles. The key provisions in the Act for present purposes are set out in Part 1 under the subheading "Purposes and principles of sentencing". Section 7 states eight purposes for which a court may sentence offenders. They include holding the offender accountable for harm done, promoting a sense of responsibility in the offender, providing for the victim's interests, providing reparation, denouncing the conduct, deterring the offender and others, protecting the community and assisting the offender's rehabilitation and reintegration. Significantly, s 7(2) provides that the order in which these purposes appear in s 7 does not imply that any purpose referred to must be given greater weight than the others.

[36] Of particular relevance to the issue of sentencing credit for guilty pleas are s 8(e) which addresses the desirability of consistency in sentencing and s 9(2)(b) which treats a guilty plea as a mitigating factor. The two provisions must, however, be read in their relevant statutory context. Section 8 states principles of sentencing:

> **8 Principles of sentencing or otherwise dealing with offenders**
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> In sentencing or otherwise dealing with an offender the court—
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> (a) must take into account the gravity of the offending in the particular case, including the degree of culpability of the offender; and

(b) must take into account the seriousness of the type of offence in comparison with other types of offences, as indicated by the maximum penalties prescribed for the offences; and

(c) must impose the maximum penalty prescribed for the offence if the offending is within the most serious of cases for which that penalty is prescribed, unless circumstances relating to the offender make that inappropriate; and

(d) must impose a penalty near to the maximum prescribed for the offence if the offending is near to the most serious of cases for which that penalty is prescribed, unless circumstances relating to the offender make that inappropriate; and

(e) *must take into account the general desirability of consistency with appropriate sentencing levels and other means of dealing with offenders in respect of similar offenders committing similar offences in similar circumstances; and*

(f) must take into account any information provided to the court concerning the effect of the offending on the victim; and

(g) 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; and

(h) 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; and

(i) must 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; and

(j) must take into account any outcomes of restorative justice processes that have occurred, or that the court is satisfied are likely to occur, in relation to the particular case (including, without limitation, anything referred to in section 10).

And s 9, after listing aggravating factors to be addressed, goes on to list mitigating factors:

9 Aggravating and mitigating factors

...

(2) In sentencing or otherwise dealing with an offender the court must taken into account the following mitigating factors to the extent that they are applicable in the case:

(a) the age of the offender:

(b) *whether and when the offender pleaded guilty:*

(c) the conduct of the victim:

(d) that there was a limited involvement in the offence on the offender's part:

(e) that the offender has, or had at the time the offence was committed, diminished intellectual capacity or understanding:

(f) any remorse shown by the offender, or anything as described in section 10:

(g) any evidence of the offender's previous good character.

[37] The Act is explicit that nothing in the order in which sentencing purposes appear in s 7 implies that any such purpose must be given greater weight than any other. Likewise, nothing in s 9(1) and (2) prevents the court from taking into account other aggravating or mitigating factors that the court thinks fit.[33] As well, no such listed factor must be given greater weight than any other which the court might take into account. In these respects the text of ss 7 and 9 clearly indicates that the weight given to the listed purposes of aggravating and mitigating factors in the context of any particular sentencing occasion is for the court to determine. Nothing in its text indicates a different approach should be taken under s 8.

[38] The importance of these statutory statements of sentencing purposes, principles and relevant factors aggravating or mitigating the offending, lies in the clarity with which they have been expressed to the courts and to the public. Both are now better informed of what sentencing courts are required to take into account in sentencing. The text of s 8(e) confirms the courts' approach to seeking both consistency in sentencing in the interests of equal treatment of like offending and offenders, and full evaluation of the circumstances to achieve justice in the individual case. In enacting the new legislation, Parliament was certainly concerned over the need for consistency in sentences, but was equally concerned that the sentence be appropriate in the particular case.

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[33] Section 9(4)(a).

Guideline judgments and the Sentencing Act

[39] It should be borne in mind that the purposes, principles and factors listed in the 2002 Act were largely, although not entirely, recognised by the courts prior to its enactment. This was known to members of the House of Representatives. In reporting back the Sentencing Bill to the House, the Justice and Electoral Committee said of what became s 7:[34]

> Most of us consider clause 7 provides judicial guidance by making it clear why the particular sentences are available and the purposes for which they are to be used. Clause 7 sets out in statute the sentencing purposes that are stated in case law from time to time but which have not previously been laid down in legislation in this country. Most of us believe it is a realistic approach and does not inhibit judges from taking account of the particular facts of individual cases. It also assists public understanding of the sentencing process.

[40] As to the principles, in what became s 8, the Select Committee said:[35]

> In providing explicit sentencing guidance to the courts, the sentencing process must reflect certain basic principles and take a common approach to sentencing. Principles have to be established to determine the relative amounts of punishment that can be justified in particular cases, and they need to be capable of being applied across cases. Many of the principles in clause 8 restate current sentencing rules from case law. They must be applied in every sentencing decision to achieve consistency and transparency.

[41] While these passages indicate the Legislature's desire for consistency, there is no suggestion that it is to be achieved by curtailing sentencing discretion in favour of a more structured approach than the courts were applying at common law. Rather, the Select Committee believed that a proper judicial evaluation of individual cases in applying the purposes and principles set out in the Act would lead to consistent sentencing.

[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

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34 Sentencing and Parole Reform Bill (148-2) (Commentary) at 6.
35 At 7.

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.

[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 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.

[44] The 2002 Act did not require a departure from this approach. It rather sought to clarify what judges had to take account of under it and to assist public understanding of the sentencing process.

Allowing for guilty pleas in sentencing

[45] In the administration of criminal justice, courts give credit in sentencing for a guilty plea principally for policy reasons. The policy expressed in s 9(b) reflects the benefits that a guilty plea delivers to the administration of justice and to those who otherwise must participate in the trial process. Avoiding the need for a trial saves the government costs associated with the judiciary and providing prosecution and defence services (the latter most often through legal aid). There are also savings in fees paid to witnesses and jurors and in costs associated with the use of court facilities. Another benefit is the reduction in the back-log of trials. The number and length of criminal trials has increased, with consequent delays in persons charged facing trial. This impedes the effective operation of the system in the interests of justice. As well as such savings in public expenditure and demands on state resources, the social utility of guilty pleas includes benefits for witnesses and, in particular, victims who are spared the stress of giving evidence in the adversarial

context of a criminal trial. A guilty plea often also assists victims and their families through its acknowledgement of responsibility for the offending. Even very late pleas will usually generate some of these systemic and social benefits. These considerations are based on expediency and social utility but are of importance to the effective operation of the criminal justice system. In consequence, it is now generally recognised that providing encouragement for guilty persons to admit their guilt is a necessary incident of criminal justice.[36]

[46] A guilty plea may also support other indications of remorse as a separate mitigating factor under s 9(2)(f), a matter we discuss later.[37] It is, however, the benefits that guilty pleas bring to the criminal justice system, and participants in it, which provide the core justification for recognising such pleas in a tangible way in the sentence. This justification does assume that all those who respond to incentives to plead guilty are in fact guilty. If that assumption is wrong, the incentives distort the criminal justice system and are contrary to the public interest. More fundamentally, they risk infringement of human rights.

[47] All persons charged have the right, under common law as affirmed by the New Zealand Bill of Rights Act 1990, to be presumed innocent until proved guilty according to law.[38] This right is expressed in the Bill of Rights in terms of being "proved guilty" at a trial, but, as in other common law jurisdictions, under New Zealand's criminal procedure, the presumption of innocence may also be rebutted by an acknowledgement of guilt in the form of a plea of guilty to the charge. The Bill of Rights Act also protects the right of a person charged not to be compelled to confess guilt.[39] As Professor Ashworth points out, this right requires the prosecution to prove its case without recourse to either evidence coerced from an accused or admissions in circumstances analogous to coercion.[40] Other relevant protected rights include the right to a "fair and public hearing by an independent and impartial court".[41]

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36 *R v Place* [2002] SASC 101, (2002) 189 ALR 431.
37 At [63]–[64].
38 Section 25(c).
39 Section 25(d).
40 Andrew Ashworth and Mike Redmayne, *The Criminal Process* (4th ed, Oxford University Press, Oxford, 2010) at 314.
41 Section 25(a).

[48] The tension between a system offering incentives for guilty pleas and protection of these fundamental rights arises in this way. In pleading guilty an accused will be motivated by the prospect of a lesser penalty than would be imposed following conviction at trial. The incentive to plead can be strong if the accused is advised by counsel that a plea may avoid a custodial sentence, or substantially reduce the likely term of imprisonment imposed following a trial. The concern is that the pressure this puts on the accused can, potentially, lead to persons charged pleading guilty to offences they may not have committed.

[49] It is established that the opportunity of a person to plead guilty, rather than face trial, does not infringe criminal process rights provided there are adequate protections in the criminal justice system and, in particular, the right to plead guilty is free from constraint.[42] The approach taken by the New Zealand courts before 2005 incorporated those protections. A crucial question in this case is whether the departure from earlier practice that has been formalised in the Court of Appeal's judgment carries the risk of impacting on the rights of persons charged in a way that jeopardises the community's overriding interest in guilt being properly determined and proper sentences for criminal offending being imposed.

[50] It is necessary next to consider the provisions in the Sentencing Act 2002 which are of particular relevance. Section 9(2)(b) requires the sentencing court to take into account as a mitigating factor "whether and when the offender pleaded guilty". Parliament has, in this provision, confirmed that a guilty plea may legitimately contribute to a reduction in the severity of the sentence and that an earlier plea should generally in that respect carry greater weight than a later one.[43] Beyond affirming these principles, the 2002 Act does not indicate any policy as to the approach sentencing judges should take to guilty pleas as a mitigating factor in sentencing.

[51] Section 8(e) requires that the desirability of the principle of consistency in sentencing be taken into account. Its terms do not favour the adoption of a more

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42 *X v United Kingdom* (1972) 40 CD 64 at 67.

43 Parliament implicitly accepts that allowing a sentence reduction for a guilty plea does not discriminate against those who, having been convicted at trial, do not receive a sentence reduction.

structured approach to sentence reductions by reference to a sliding scale according to when the plea is entered as a primary consideration. It is the desirability of consistency "in respect of similar offenders committing similar offences in similar circumstances" that must be taken into account. *All* circumstances in which the plea was entered must be addressed, not merely the timing. Parliament of course can be taken to be aware of the approach of the Court of Appeal prior to the Sentencing Act 2002 in seeking sentencing consistency, including the issue of guideline judgments. The legislative history, as reflected in the passages cited above from the Select Committee's Report to the House of Representatives,[44] indicates that, in giving express guidance in the 2002 Act, Parliament was concerned to achieve further consistency and transparency in sentencing decisions, but without inhibiting the courts from fully evaluating the particular circumstances of individual sentencing cases.

[52] Under the Court of Appeal's approach, the sentencing judge must determine the appropriate point on the scale according to the time of the plea and the extent to which trauma and public expense is saved. Exactly how that consideration is to operate within such a prescriptive structure is not clear, but deviations from the scale are to be explained. Other contextual circumstances that in the past have been considered, including the strength of the prosecution case or remorse shown by the defendant, are not taken into account.

[53] The difficulty of principle with this approach is that it puts aside factors of apparent relevance to the mitigatory weight that should be given to a guilty plea. This problem was referred to in the main judgment of the High Court of Australia in *R v Wong* as follows (emphasis in original):[45]

> To take another example, to "discount" a sentence by a nominated amount, on account of a plea of guilty, ignores difficulties of the kind to which Gleeson CJ referred in *R v Gallagher* when he said that:
>
> > It must often be the case that an offender's conduct in pleading guilty, his expressions of contrition, his willingness to co-operate with the authorities, and the personal risks to which he thereby exposes himself, will form a complex of inter-related considerations, and an attempt to separate out one

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44 At [39] and [40].

45 *R v Wong* [2001] HCA 64, (2001) 207 CLR 584 at [76] per Gaudron, Gummow and Hayne JJ.

> or more of those considerations will not only be artificial and contrived, but will also be illogical.
>
> So long as a sentencing judge must, or may, take account of *all* of the circumstances of the offence and the offender, to single out some of those considerations and attribute specific numerical or proportionate value to some features, distorts the already difficult balancing exercise which the judge must perform.

[54] The passage was subsequently referred to in *R v Markarian* by a majority of the High Court of Australia in affirming the principle that "a sentencing court will, after weighing all of the relevant factors, reach a conclusion that a particular penalty is the one that should be imposed".[46] In Australia this principle covers guilty pleas as one of the relevant factors. McHugh J, who delivered a separate concurring judgment in *Markarian*, favoured use of a quantified discount for guilty pleas as they were offered "as an incentive for specific outcomes in the administration of criminal justice and [were] not related to sentencing purposes".[47] He did not, however, endorse guidelines that fixed the size of the reduction according to the timing of the guilty plea.

[55] New Zealand's approach to sentencing differs from that favoured by the High Court of Australia in that the gravity and culpability of offending are addressed as separate matters rather than by what is referred to as "instinctive synthesis". Nothing in this judgment should be taken as suggesting a departure from the flexible approach that has been followed in New Zealand. The views of the High Court of Australia expressed in *Wong* and *Markarian* in relation to the treatment of guilty pleas and the need for the sentencing judge to be satisfied at the conclusion of every sentencing of the appropriateness of the particular penalty imposed are nevertheless helpful.

[56] Since *Markarian* was decided, the Australian Law Reform Commission has reviewed federal sentencing laws. Under federal legislation the fact that an offender has pleaded guilty is a relevant factor to be taken into account at sentencing.[48] The

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46 *R v Markarian* [2005] HCA 25, (2005) 228 CLR 357 at [37] per Gleeson CJ, Gummow, Hayne and Callinan JJ.

47 At [74].

48 Crimes Act 1914 (Cth), s 16A(2)(g).

Law Reform Commission was opposed to the sliding scale approach to discounting sentences:[49]

> The ALRC does not support legislative prescription of the quantum of a discount, whether in the form of a fixed percentage, a range of percentages, or a maximum percentage. Such an approach unduly fetters judicial discretion. Sliding scales of discounts based solely on the timing of a guilty plea are also problematic because they do not recognise the particular circumstances in which a plea is made.

We see force in the opposition to the sliding scale approach to reducing sentences.

[57] We also agree with the Commission's recommendation that the extent of any discount should remain within the sentencing court's discretion,[50] and that judges should have regard to:[51]

> (a) The degree to which the plea of guilty facilitates the administration of the federal criminal justice system; and
>
> (b) The objective circumstances in which the plea of guilty was made, including whether the offender pled guilty at the first reasonable opportunity to do so, and whether the offender had legal representation.

Contrition was seen as a separate sentencing factor which related to the offender's attitude and was not relevant to the assessment of a discount for a guilty plea. That would result in a double discount.[52]

[58] The Court of Appeal's approach places emphasis on the importance of encouraging early pleas, because they are seen to be delivering the greatest benefits to the system. This underlies the Court's approach of fixing discounts on a sliding scale according to the timing of the plea, having regard to the benefits delivered to the system. The approach enables defence lawyers and accused persons to be able to rely on a predictable reduction. It also makes it easier for judges in dealing with many pleas in busy list courts to apply the guideline.

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49 Australian Law Reform Commission *Sentencing of Federal Offenders* (ALRC R103, April 2006) at [11.40].

50 Recommendation 11-1, at 317.

51 Recommendation 11-2, at 321.

52 At [11.55].

[59] These factors also persuaded the Court of Appeal that the strength or weakness of the prosecution case should be treated as irrelevant when calculating the appropriate discount on the sliding scale. Requiring judges to consider that circumstance was said to be unnecessarily demanding on judicial resources.[53]

[60] This approach would mean that where a plea is entered promptly, even in the face of a very strong prosecution case, the maximum discount must be given. But that treats as irrelevant an important factor in evaluating the extent to which a plea involves acceptance of responsibility. The approach is likely to lead to the criticism that unjustified windfall benefits are provided by the system to those who have little choice but to plead guilty. Importantly also, it would put pressure on an accused to plead guilty for reasons that are unprincipled. In some cases pressure of this kind could lead to a guilty plea being entered in haste, by someone who may not be guilty of the offence charged and pleaded to.

[61] As well, the Court of Appeal's approach does not allow for a reduction where a plea is entered only after resolution of disputed facts. The Court of Appeal's expectation is that defendants should plead guilty where their disagreement with the prosecution's case is not about their guilt of the offence but relates to the prosecutor's statement of facts. This, it is said, should be left to a subsequent disputed facts hearing. If at that hearing the sentencing judge rejects the defendant's view of the facts, the appropriateness of giving a reduction for the plea will be reviewed. The last step is less objectionable. If the circumstances indicate that a defendant is not fully prepared to acknowledge guilt at the outset, that must be factored into the sentence. But the requirement that a defendant must always plead guilty before entering the disputed facts process to get the maximum discount is too rigid. The better course is to permit sentencing judges to assess the value of the plea in the particular circumstances, without a rigid requirement for application of a scale of discounts dependent on the exact timing of the plea. The same approach should apply where the defendant has exercised his or her right to challenge the admissibility of evidence.

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[53] At [35]–[39]. This approach reflected that of a sentencing establishment unit, set up by the Law Commission, which prepared draft sentencing guidelines in anticipation of the establishment of the Sentencing Council provided for but not established under the 2007 Act.

[62] Guilty pleas are often the result of understandings reached by accused and prosecutors on the charges faced and facts admitted. To give the same percentage credit invariably for an early guilty plea in sentencing without regard to the circumstances can amount to giving a double benefit. For example if the Crown agrees to accept a plea to manslaughter and drops a charge of murder in relation to offending, the acceptance of the plea can be a concession in itself. If the full credit for an early plea is then also given, the sentence may not properly reflect the offending. The only way in which the many variable circumstances of individual cases which are relevant to a guilty plea can properly be identified is by requiring their evaluation by the sentencing judge, and allowing that judge scope in light of the conclusion he or she reaches to give the most appropriate recognition of the guilty plea in fixing the sentence.

[63] The Court of Appeal also decided that, in general, remorse should not be considered independently of the guilty plea. This reflected the disputable view that a plea is "the most compelling evidence of acceptance of responsibility, remorse and contrition".[54] The Court of Appeal thought that if remorse could justify a separate discount it would be impractical for judges to refuse to recognise unsubstantiated claims of remorse. Treating remorse separately could lead to "discount creep" and increase discounts above the set points on the Court's sliding scale. As well, a general rule that the guilty plea discount incorporated remorse would also maintain the predictability of the discount. The Court did, however, accept that "exceptional remorse" demonstrated in a practical and material way could attract its own credit.[55]

[64] This approach does not fit in well with the terms of the 2002 Act, which treats "any remorse shown by the offender" as a mitigating factor that is separate from the guilty plea.[56] The statutory requirement that remorse be "shown" adequately addresses the Court of Appeal's concerns. Remorse is not necessarily shown simply by pleading guilty. Sentencing judges are very much aware that remorse may well be no more than self pity of an accused for his or her predicament and will properly be sceptical about unsubstantiated claims that an offender is

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54 *R v Accused (CA 430/96)* (1997) 14 CRNZ 645 at 647.
55 At [24]–[28].
56 Section 9(2)(f).

genuinely remorseful. But a proper and robust evaluation of all the circumstances may demonstrate a defendant's remorse. Where remorse is shown by the defendant in such a way, sentencing credit should properly be given separately from that for the plea.

[65] In summary, the policy reasons for giving credit for guilty pleas in sentencing do not justify an approach which treats as irrelevant, or of peripheral relevance, the circumstances in which the plea is entered and what they indicate about acceptance of responsibility for the offending. The credit given should also legitimately reflect the benefits provided to the system and to participants in it. Overall, the sentencing task remains one of evaluation that leads to what the judge is satisfied is the right sentence for offending in light of the offender's acknowledgement of guilt and all other relevant circumstances.

[66] The Court of Appeal's approach was very much influenced by the United Kingdom Sentencing Guidelines Council and the work of the New Zealand Law Commission in preparation for the establishment of the similar body provided for in the 2007 Act. However, as indicated, that body has not been established.

[67] The law reform agencies in the United Kingdom and New Zealand saw valid reasons to move to a more prescriptive and structured approach to giving credit for guilty pleas in sentencing. The Court of Appeal was persuaded by their reasoning. But in giving effect to their proposals, the Court of Appeal has underestimated the complexity of the issue including the potential of the changes to impact on the protected rights of persons charged with criminal offending. It is also inappropriate for a court to make changes in sentencing policy that would restrict the capacity of judges to determine sentences that are considered to fit all the circumstances of the case. Where the development of sentencing policy is motivated by a utilitarian calculus it may not be appropriate for judicial decision. Judges should show restraint in moving beyond the area mandated by existing legislation when exercising their sentencing powers. The ultimate difficulty we have with the Court of Appeal's approach is that it is not mandated by the Sentencing Act.

Application of Court of Appeal's judgment

[68] We have the benefit of information put before us by the Crown about the operation of the Court of Appeal's decision. We received affidavit evidence from several Crown Solicitors providing us with information which suggests that *Hessell* is being applied unevenly in the District Courts. This information indicates that in some regions considerable latitude is extended to those defendants who appear to be taking a realistic attitude, as to when they may plead while still receiving a full discount, as long as the plea is entered before committal. Late pleas, entered even a week or less before trial, still attract generous discounts. Some judges are said to consider it unrealistic to expect pleas to serious charges on the basis of initial disclosure.

[69] In one region, the judges have set up a case review evaluation process for jury trials. This was seen as an opportunity to request a sentencing indication from the Court and be advised of the terms of the *Hessell* judgment. Any plea thereafter entered prior to committal was being treated as at the earliest opportunity and attracted a full one-third credit. While the information comes before the court at an early stage, it casts doubt on whether the rigidity of the guideline on guilty pleas is working as the Court of Appeal intended. Mr King argued on behalf of the appellant that this information indicated that there were difficulties in applying *Hessell* which were only being overcome by failing to apply the full rigour of the judgment.

Conclusion

[70] It will be apparent that we accept that concessions in sentencing, when a person charged pleads guilty, are both a legitimate consideration in sentencing and expedient for the administration of justice. Parliament has now in the Sentencing Act confirmed that legitimacy and required consideration as a mitigating factor of whether and when the plea is made. There are, however, strong reasons of principle for requiring that the allowance which can and should be given should be the result of evaluation of *all* the circumstances in which the plea is entered. *When* it is entered is only one of those circumstances.

[71] No serious questions have arisen in the past which suggest that the traditional approach of New Zealand courts to giving credit for guilty pleas has led to perverse outcomes for criminal justice in relation to establishing guilt of offending.

[72] The Court of Appeal's approach requires the sentencing court first to reach a provisional sentence for the crime, which takes into account the inherent culpability of the offending together with aggravating or mitigating factors relating to the offender's personal circumstances. These include where applicable "extraordinary" remorse. The guilty plea factor is then addressed by applying a sliding scale reduction to the provisional sentence, fixed principally by reference to when the plea was entered. For the reasons given in this judgment, we consider that the heavily structured nature of this approach involved an inappropriate departure by the Court of Appeal from the statutory requirement of evaluation of the full circumstances of each individual case. As well, the particular approach carries the unacceptable risk of pressuring persons to plead guilty to offences charged when they were not guilty.

[73] There is no objection in principle to the application of a reduction in a sentence for a guilty plea once all other relevant matters have been evaluated and a provisional sentence reflecting them has been decided on. Indeed there are advantages in addressing the guilty plea at this stage of the process (along with any special assistance given by the defendant to the authorities). It will be clear that the defendant is getting credit for the plea and what that credit is. This transparency validates the honesty of the system and provides a degree of predictability which will assist counsel in advising persons charged who have in mind pleading guilty.

[74] But, as we have emphasised, the credit that is given must reflect all the circumstances in which the plea is entered, including whether it is truly to be regarded as an early or late plea and the strength of the prosecution case. Consideration of all the relevant circumstances will identify the extent of the true mitigatory effect of the plea.

[75] The reduction for a guilty plea component should not exceed 25 per cent. That upper limit reflects the fact that remorse is dealt with separately. Whether the

accused pleads guilty at the first reasonable opportunity is always relevant. But when that opportunity arose is a matter for particular inquiry rather than formalistic quantification. A plea can reasonably be seen as early when an accused pleads as soon as he or she has had the opportunity to be informed of all implications of the plea.

[76] At the other end of the range, there may be cases in which there are significant benefits from a plea, warranting a sentence reduction, even though the plea comes very late. After a trial has commenced some real justification should be required before any allowance is made but there are from time to time instances where an allowance is justified.

[77] All these considerations call for evaluation by the sentencing judge who, in the end, must stand back and decide whether the outcome of the process followed is the right sentence.

Disposition of appeal

[78] Mr King submitted that the appellant was entitled to something more than 10 per cent for his guilty plea in this case. The Court of Appeal, however, applied the law as it had been prior to its judgment. The issues in relation to determining the merits of the appeal were straightforward. Mr Hessell received a credit from the sentencing Judge in the region of 10 per cent for a very late plea in circumstances where there was no reason justifying any greater reduction. The amount of that reduction was clearly within the Judge's sentencing discretion. There was appropriately no further allowance made for remorse. On that basis, the Court of Appeal's decision to dismiss the appeal against sentence was correct and does not require further discussion from this Court.

[79] The appeal against sentence is dismissed.

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