IN THE SUPREME COURT OF NEW ZEALAND SC 12/2005

IN THE MATTER of a Criminal Appeal

BETWEEN **BASIL STEVEN MARSHALL MIST**

Appellant

AND **THE QUEEN**

Respondent

Hearing 9 August 2005

Coram Elias CJ
Gault J
Keith J
Blanchard J
Tipping J

Counsel Robert Lithgow and Nicolette Levy for appellant
Brendan Horsley for respondent

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**CRIMINAL APPEAL**

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10.07am

Lithgow May it please the Court. counsel's name is Lithgow for the appellant and I appear with my learned friend Miss Levy.

Elias CJ Thank you Mr Lithgow, Miss Levy.

Horsley May it please the Court, Counsel's name is Horsley and I appear with my learned friend Miss Davidson.

Elias CJ Thank you Mr Horsley, Miss Davidson. I'm sorry we've held you up, we had a visitor, Professor Greenburgh of the NAACP. Yes Mr Lithgow.

Lithgow Thank you. My submissions are set out in really two parts and it would be a matter of opinion as to which part comes first, whether the reliance on s.4(2) of the Criminal Justice Act 1985 logically comes first or whether the reading of the so-called transitional provisions of the Sentencing Act, but I'll deal with them in the way in which they have been set out but I should say at the beginning that we are not seeking to rely on convention jurisprudence but rather to distinguish it.

Blanchard J Mr Lithgow as far as sequence is concerned isn't it more logical to deal with what you're transiting from before you deal with transition?

Lithgow Well as I say I'm happy to deal with it that way, I'm in the Court's hands.

Elias CJ Mr Lithgow I in fact really wonder whether there are two different arguments in this.

Lithgow Well I've said at the end of the first argument that the first argument may depend on the second argument but I'd like to really resile from that, that perhaps is overstating it.

Elias CJ Oh I see. So you don't put the case entirely on the interpretation of s.75 of the Criminal Justice Act.

Lithgow On the interpretation of the date that the Court or the factual matrix and the legal matrix at the Court have to consider the steps on, which we say is the 29 June, when read together with s.75 of the Repeal Act.

Elias CJ Well for myself I would have thought it all turned on the meaning of s.75 and I'm inviting you to indicate why your argument doesn't depend on that.

Lithgow Well the difficulty with s.75 on its own is that the time reference for 75 has been considered to be the date of conviction.

Keith J Has been considered by whom for what reason?

Lithgow Well in this case it doesn't matter whether it's conviction or sentencing but it relates to the wording that says "has been convicted".

Keith J Well, who is convicted, it says.

Lithgow Who is convicted, yes, so it must logically be, well it's got to be after that date, on or after that date doesn't it.

Keith J Well is that right, I mean s.75 has got to be read with s.4 doesn't it and s.4 is a clear statement of principle. S.75 just carries through the wording that I think goes way back at least to 1954 and s.4 comes in in 1980 doesn't it and doesn't that mean that there's a really very basic

change in the way, or at least an arguable change, in the way in which 75 might be read?

Lithgow Well I've visualised that in terms of sets and subsets where you have two intercepting circles, one circle is the pre-conditions in s.75 and then you have a set of minimum pre-conditions under s.4(2) and only those people that meet both when the two circles are intercepted are eligible for preventive detention.

Blanchard J Well isn't s.4(2) an overriding provision? It applies not withstanding any other enactment. An enactment under the definition in the Interpretation Act includes other Statutes but also includes other sections of the same Act.

Lithgow Yes well I had in discussing this matter with my dog intended to start with what part of notwithstanding any other enactment to the contrary did the Court of Appeal not understand, but that seemed a little rude kind of.

Blanchard J Well perhaps it wasn't pointed out to them what the definition of an enactment is. It may be in your submissions.

Lithgow Well it goes further than that doesn't it, where's 4(2)? "4(2) - notwithstanding any other enactment or rule of law to the contrary". I wouldn't have thought that that would require any explanation is there is any powers still attached to the ordinary meaning of words.

Keith J So doesn't that just override or at least provide a clear interpretation of s.75? Override's the wrong word, provides a clear interpretation.

Lithgow They have to be read together that's all. You've got to fit both criteria.

Blanchard J No it's not reading them together.

Elias CJ It modifies.

Lithgow Yes, because the ages have changed in 75 but whilst 4(2) is there it's got to be read subject to 4(2).

Blanchard J Well don't you read it "notwithstanding s.75 to the contrary no Court shall have power".

Keith J And you've got the straightforward exceptions at 152 and 155 which are practical exceptions because probation has been replaced by supervision and plainly that's going to be the new way in which people who used to get probation now get dealt with.

Lithgow Well I guess there's two theories. One is that you start looking for an interpretation before you concern yourself with whether or not there is an ambiguity or anything requires interpretation and with respect that's

what I would say the Crown has done and if you start from that end I say that those two specific references mean that the parliamentary draughtsmen in parliament knew that exceptions could be made if necessary and specifically weren't made to any sections or any laws or any rules of law other than the two mentioned ones.

Elias CJ Yes so why do we need to start with s.153 since I don't understand the Crown to be contending that the Sentencing Act applies, that the Crown is arguing that s.75 is the operative provision so can't we move on to develop that argument?

Lithgow I don't know that that's perhaps quite fair to the Crown. The Crown's argument as I understand it is that 15, you start with 153, you then look at what's meant by whether or not preventive detention would have imposed immediately prior to the commencement of the Sentencing Act, that is under s.75, and if that pre-condition is met then you go back to the Sentencing Act because the actual imposition of preventive detention is done under the new Sentencing Act so I don't understand that the Crown had abandoned that proposition.

Elias CJ Well I had understood them to be arguing that the conditions in s.75 apply. Is that not right Mr Horsley?

Horsley That's correct Your Honour and the Crown's argument on 153 was simply in response to my learned friend's argument.

Elias CJ Yes that's as I had understood it.

Horsley It was a transitional provision that in effect created the hiatus and of course the Crown said no that's not the case. That's the extent of the argument on 153.

Blanchard J So it really turns on the old Statute?

Horsley Certainly it does Sir.

Tipping J I think this is becoming over-complicated. If you couldn't have given this man preventive detention under s.75 that's the end of the argument.

Horsley That would be conceded by the Crown, yes.

Blanchard J If you couldn't have given him preventive detention under s.75 because of s.4(2).

Tipping J Or for whatever reason, but primarily here because of 4(2). He has to have been eligible for PD under the old regime and I understand the argument is, he wasn't. End of story.

Keith J Because 75 has to be read as referring to the time of the offence in terms of s.4 and 25(g) for that matter.

Lithgow Well that's one way of putting it, I just say well both have got to be met, both conditions have got to be met. He's got to be 21 or over, previously 25 or over, at the time of conviction or sentencing, which is a slightly different argument, but also meeting 4(2). Now I suppose as a matter of logic you can't be not over 21 at the time of sentencing, if you are over 21 at the time you committed the offence.

Tipping J Yes. Isn't the key question in this case Mr Lithgow that what is meant by the section shall apply to 75 to any person who is not less than 25 years of age - question 'when'?, and your argument as I understand it is that in order to make 75(1) harmonious with 4(2), the 'when' has to be answered at the time of commission. Isn't it no more complicated than that?

Lithgow Well I would like to think so, I would like to think so.

Tipping J Well why do we have to make it more complicated?

Lithgow Well English cases have said that because of the wording and the appearance of the.

Tipping J I'm not saying you shouldn't develop the argument, but isn't the ultimate issue no more complicated than that?

Lithgow You've got to be 21 because 4(2) says so.

Tipping J Yes at the time of commission and 75(1) does not expressly say when so there is not conflict between 4(2) and 75(1). Section 4(2) drives the interpretation of the ambiguity in 75(1) and **Lord Salmon** of a comparable provision in Jamaica I know he was dissenting or somewhere in the Caribbean, puts it very neatly. He was dissenting in the Privy Council but he puts your argument very neatly and you have to persuade us that this is the preferable approach, never mind the majority of the Privy Council in that case and the English case. Is it any more complicated than that? You may be right, you may be wrong, but from the point of view of the methodology we don't get to 153 if you win on 75, you may have to have a full-back argument on 153 in case you lose on 75.

Lithgow The only difference in my approaching it from Your Honours is that I would say that because of the way the Criminal Justice Act is set out you're got a set a general provisions and you have a set of separate provisions and my submission would be it doesn't matter what interpretation of 75 we come to because it also has to meet the general provisions rather than forcing, even if it said, even if s.75 said "not less than 21 years at the time of sentence" even if it used those words, it is

still covered by the general provision of 4(2) which says 'notwithstanding etc'.

Keith J Well your case is easier than that.

Elias CJ Yes.

Tipping J You're making it more difficult than you need.

Keith J And it's a much easier case than **Pora** on your side.

Lithgow Yes well I said in the end that **Pora** really doesn't have much to do with it.

Keith J Yes but just going back to the chronology, at least my quick look at the Statute book yesterday indicated that the structure of 75 has been unchanged since 1954 and may be earlier.

Lithgow Very similar earlier.

Keith J Yes, but then in 1980 following New Zealand becoming bound by the covenant and things were a bit out of kilter in timing, legislation is introduced for the purpose, as Mr McClay said at the time, of ensuring that our law complies with the provision of the covenants, so you get this very strong double direction about no retrospective criminality and no retrospective detriment in sentencing, if you can have retrospective benefit in sentencing and 75 in the 1985 Act retains the same drafting but there's been the change hasn't there, introduced by the introduction in 1980 of the predecessor to s.4 and that's reinforced in 1990 by s.25(g) of the Bill of Rights, so it's quite sharply different from **Pora** where you have got a specific Statute passed after the event which divided us, but this is a case where you know that general proposition has been stated from 1980 on and it's only in 2002 that the drafting gets cleaned up of the preventive detention provision and gets made explicit.

Lithgow Well the Crown of course argue that because it is said to have been introduced to meet our International Treaty obligations that it therefore must take the meaning that is given to similar provisions.

Keith J The only authority for that is the case that was distributed yesterday. Is that right?

Lithgow Last night, yes. Now the European.

Elias CJ We don't have the full text do we of article 15?

Lithgow No we don't have the full text of article 15 but we have got bits of it quoted, the applicable bits.

Keith J Well it's virtually incorporated now in the new Sentencing Act isn't it and in 25(g)? I think the 1980 amendment is over-complicated, well that's what's been recognised by later drafting and I mean it is possible to say simply isn't it that no one is to be disadvantaged by changes in penalties after the offence was committed.

Lithgow Well Article 15 "no one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time it was committed", so that's the first proposition, nor a heavier penalty be imposed and one that was applicable at the time the criminal offence was committed. If, subsequent to the commission of the offence, provision is made by law for the imposition of a lighter penalty, the defender shall benefit thereby. Now my submission is that this is answering the Crown submission. Your Honours have attempted to say it's really simpler than that and if the Court accepts it simpler than that we don't need to go down this path, but the proposition is that the interpretation of 4 must come from Convention and European Charter law and that's because the Minister, when introducing the Bill, and in the explanatory notes to the Bill, said that clause 21 which became part of the 1954 Act, which I could hand up because this is probably the most important part of it. Clause 21 of the Criminal Justice Amendment Bill No. 2 became s.22 of the Criminal Justice Amendment Act which was 21 of 1980 and it inserted s.43(B) of the 1954 Act, and 43(B), "notwithstanding any other enactment or rule of law to the contrary, no person shall be liable in any criminal proceedings in respect of any act or admission by him did not constitute an offence" is straight out of the convention – that's no longer in the Sentencing Act and was taken out of the Criminal Justice Act and got put into the Crimes Act at s.10(A). The next proposition was notwithstanding any rule etc related to penalty.

Keith J I thought when I first read that that applies to our case as well. It probably doesn't matter. I think subsection 1 applies equally to this case.

Lithgow Subsection?

Keith J I mean subsection 2 of this provision.

Lithgow Subsection 2 of 43(B).

Keith J Yes, because the maximum sentence has increased from 14 or 20 years or whatever the appropriate rape sentence was to potentially life.

Lithgow Right well I'll adopt that.

Keith J As is indicated by subsection 5, or subsection 4 of the present section.

Tipping J Well if that's right 4(2) as it now stands.

Lithgow Yes that's right.

Keith J And before one begins with the words that my Brother Blanchard was stressing notwithstanding any other enactment including s.75.

Lithgow As it appears in the Crimes Act it says the same thing.

Keith J Yes, yes.

Lithgow Now 3 which is our current for 2. So there were three basic operative clauses and then you might say two explanatory ones. When the Bill was introduced and when the Minister said that this was to meet our obligations under the UN Convention, he specifically referred to sub-clauses 1 and 2. But sub-clause 3 doesn't come out of any wording in the Convention. It may, it's very similar thinking but sentences of a different kind or nature does not appear in the Convention, or for that matter in the European Convention either, and no-where in Hansard is clause 3 referred to.

Keith J Well I think it's just extra caution in the drafting. You know people were worried about say the replacement of one form of community service by another form of community service or something and they're wondering how that might be handled and it could have been handled by an exception as with supervision and probation in those exceptions or sometimes may be consent would be the answer but I mean the very basic proposition is that you're not to be disadvantaged isn't it.

Lithgow Yes.

Keith J But you can consent if that made some appropriate sense.

Lithgow Yes.

Tipping J I wonder whether there isn't a further dimension to it which is that the clauses 1 and 2 of which 1 is now 4(1) isn't it, can be.

Lithgow No, 1 is now 10(A) of the Crimes Act.

Tipping J Sorry, it's 2. Clauses 1 and 2 are generic whereas 3 looks to the particular person being dealt with.

Lithgow Yes well that's a very important part of our submissions, the difference between the generic and the particular, because the wording changes talking about **that** person.

Tipping J And the interesting thing about the covenant provisions, Articles 7 and 15, is that they are generic whereas s.4(2) is specific to the actual offender.

Lithgow Yes, I mean somebody's given this a different tweak altogether.

Elias CJ Sorry, some of us didn't buy into the language of generic.

Keith J I mean 4(3) or rather 4(2) is focused on the fact that you're dealing with an individual who is going to consent or not so the drafter is going to draft specifically rather than generically.

Lithgow Yes that's up to them.

Tipping J Irrespective of the views of the other members of the Court, originally expressed Mr Lithgow, I am with at the moment subject to the Crown of course, a conceptual distinction.

Lithgow Yes, whether it's called generic or something else.

Tipping J Whether it's called generic or whatever it may be called.

Keith J But you've accepted anyway that 4(1), which is the wider and more general provision, I don't want to characterise things now, does apply to this situation as well because this maximum sentence has been increased subsequent to the offence.

Lithgow Well I do accept that and I'm embarrassed I didn't argue it in that way but I do accept that and I guess the problem is that the English cases would say that the maximum for that offence has not changed and getting back to generic we're talking about the offenders and the offence generally, it's only his maximum that's changed so he fits into a sub-category.

Keith J Well I mean the general language of Article 15 or the general language of 4(1) or 23(2) only bites when it applies to a particular person doesn't it, so even if my Brother's characterisation is right, the generic provision has to include specific individuals, it only works when it's applied to particular individuals.

Tipping J But it's easier to see an age change as being relevant to the what I'm calling the specific as opposed to the generic.

Keith J Yes that's the only point I'm endeavouring to make.

Lithgow And **Taylor** is an example of that. **Taylor**, the case we were given last night, which would adopt the view that the change applying to an individual but not to the underlying offence wouldn't conflict with the convention jurisprudence.

Keith J But the change, I haven't read it that carefully.

Elias CJ I haven't read it at all.

Blanchard J Can I put my oar in and say I haven't read it because I didn't get back to the country until midnight last night. It might be helpful if you actually outlined to us all.

Elias CJ Yes, I would find that helpful.

Lithgow Well we're not really um, I think it's wrong, I mean I think the case is wrong.

Blanchard J Yes but it still would be helpful if you wouldn't mind indulging me and I think other members of the Court, Mr Lithgow.

Lithgow Well I only got it after 5 last night and I had many other things to look at but I will.

Keith J Is the essence on page 7 where they come to the conclusion on the point?

Blanchard J What are the facts?

Lithgow Well the facts are that a young person in Britain committed an offence when he was I think 14 and a half and by the time that he was finally dealt with, finally convicted, because he pleased not guilty, he had fitted into a new category and I just may have it wrong here.

Keith J He's over 15, yes.

Lithgow Yes he's over 15. Under 15 the Court could only fine him or place him under some form of youth supervision not dissimilar to our Children and Young Persons Act. Over that period they could give him up to two years in a youth detention time prison, so in that sense it's covering much the same ground as the case provided in **Ghafoor**, and there's also the variation which is also available in New Zealand that he was charged with what we would call originally a purely indictable offence but in the process of pleading not guilty and the various things that happened the charge was reduced but had he been convicted of the original offence the Court could have sent him as here to a Higher Court for a higher range of penalties if the client was sentenced. So by the passing of time, and it was only a timeframe which arose inevitably from pleading not guilty he fitted into a new category and the European Court decided that that did not offend against the Convention and saw no difficulty with the fact that in the very exercise of convention rights, such as our rights set out in the minimum standards of criminal prosecution such as the right to time to prepare your case, the right to be presumed innocent until the Crown prove it, the right not to be compelled to confess guilt, the right to examine witnesses and the right to be dealt with in a manner appropriate to the child's age. The fact that the exercise of each of those rights placed him in a higher category and therefore eligible to the higher sentence, this Court found I would

say wrongly and entirely not binding on Your Honours and in anyway we're not relying on convention jurisprudence but they decided that there was no breach of the European convention thereby which would in this respect be the same as the international covenant.

Keith J But there is the difference from our case isn't it that their law stayed stable through the whole of the process whereas our law has been altered in the middle?

Lithgow Yes well ours is just different.

Keith J Well ours has been changed, parliament has intervened, whereas in this particular case they say that in para.3 in the middle of page 7, they say that he must be considered in the third sentence of that middle paragraph "he must be considered to have taken a risk that the proceedings would evolve in a way which was", I think it should say "not favourable to his interest if eventually found guilty". It does not find that the applicant had any legitimate expectation that his trial would have been wound up before he attained the age of 15, so I take the broader point that you were making about this judgment but on its facts it's actually distinguishable, isn't it, because ours is not a case of, is it, on the facts of **Mist?**

Lithgow Well if Mist had pleaded guilty on the day that he was charged, or within a few days of that he couldn't have been given preventive detention so his jeopardy comes from the exercise of the Bill of Rights.

Keith J Well that's the broader point you've just made but I was putting to you that it may be as well in this case it's distinguishable because ours is the case where the law has actually been changed in the meantime. It's not just a case of time going by, but I take your broader point you know I was thinking about it, it arose in **Mako** didn't it where in the Court of Appeal we allowed his appeal. We've got these two cases around the right way, have we, one of those two cases anyway was because someone exercised not only his right to a fair trial but also his right of appeal but he got lumbered with the new law and I mean the distinction I'm trying to put to you is that there's an extra element in favour of the convicted person in the case where the law has been changed.

Lithgow Although I find this reasoning to be, well I invite the Court to reject it because I mean it has about as much palatability as the disgraceful position we see of a person who spent their life being intellectually disabled when they later in time become of a minimum IQ level that they can then be put to death. I mean it's just not, it doesn't make sense, it has nothing to its credit, it's a cynical analysis and it would make life for defence counsel advising, particularly young people, rather tortuous because to say if you're 18, 19 and the Court works according to its normal schedule, but by the time you've had your trial you could get effectively life imprisonment.

Tipping J It could depend also on how long you were remanded for sentence for example.

Lithgow Well the ability as is referred to in the **Simon Atrill** article, it clearly provides ability of the prosecution to manipulate the situation and although you'd have the general protections of the Bill of Rights Act or the charter analysis, it would be a very hit-and-miss affair and very difficult to put your finger on because of the inherent delays in the Court, so somebody who offends around 1920 is very much at risk of absolutely undetectable delays on the part of the Crown or perfectly minimum legitimate delays if they're close enough in time.

Tipping J I wonder Mr Lithgow while we're looking at this **Taylor** case if you could be of some help in relation to a paragraph just immediately following the one that we were looking at before which seems to be the crunch of the Court's reasoning. When I read it I just wondered whether there was some begging of the ultimate question here because when they say "was applied to the applicant without any element of retroactivity", it really depends what you mean by retroactivity. That would be valid in New Zealand if 4(1) was the only, or might be valid in New Zealand or as my Brother Keith would probably say "it's not even valid then", but it would have some arguable validity if 4(1) was all we have in New Zealand, but it makes no allowance for the 4(2) situation.

Keith J I think if I could just add a comment before you comment Mr Lithgow. I think it's focussing isn't it in terms of the word retroactivity? It's focusing on the fact that the law as I said before is stable isn't it in this case and this young man and his advisors if they look at the legislation will know that if the proceeding does last that long then there is this apparent risk so in that sense they're not being lumbered with something that wasn't on the Statute book at the time that the proceedings started.

Blanchard J I just wonder whether we're confusing two situations. I thought that we had persuaded Mr Lithgow to look entirely at the Criminal Justice Act 1985 because the transitional provision in the Sentencing Act takes you back to the 1985 Act. If we are focusing on that then by process of deeming we are looking at a stable situation. And while I'm speaking can I just make sure of something. I'm assuming that there's no equivalent of s.4(2) in the current legislation.

Lithgow No there isn't.

Elias CJ You mean in **Taylor**?

Blanchard J No, in the Sentencing Act.

Lithgow In the Sentencing Act.

Keith J Well it just has that simple straightforward.

Blanchard J So if this case came up under the Sentencing Act we may be facing **Taylor**.

Keith J Well I don't think so, I think 25(g) and the equivalent of s.4 is just a more straightforward way of what was said in 1980.

Tipping J Well there's one very good reason we wouldn't be facing **Taylor** I think because the new s.80 something or rather specifically says "at the date of commission".

Lithgow Yes, I'll just have to check that.

Tipping J So in policy terms the legislature in the Sentencing Act, it's in the 80s.

Lithgow Oh, we're talking about preventive detention now, talks about the date of the commission of the offence.

Tipping J Yes, because that's the only situation where there is an age criteria in a sentence.

Lithgow So it's correct that in this particular problem, there's others obviously, but in this particular problem prevented detention is fixed up in the preventive detention provisions.

Blanchard J Is that why 4(2) has not been carried forward?

Lithgow Well I don't know, 4(2) it has been, I think parliament believed that the new section fully covered all the obligations but that may be a matter of opinion but that's something that's an argument for another day, but on the Crown's proposition that 4(2) was part of meeting a convention obligation, the fact that it's now left out could arguably be that parliament thought it was supernumerary to pure convention obligations and that it didn't survive, but as far as preventive detention goes its fixed itself in another way. But I think what I would just like to focus on for a moment is as raised by Justice Tipping and Justice Keith is what is the significance of the concept or the expression or the head note or the idea of retrospectivity and is there any difference between retrospectivity and retroactivity and does it matter, because the Crown's proposition is that because of the black letter-heading at 4(2) it only deals with retrospective legislation in the sense they say in the sense that there has been a change, but in my submission retrospective is just an ordinary English word and the dictionary that actually deals with the proposition most closely for the law is the Pocket Oxford Dictionary which says "relating to Statute', not limited to the future, licensing or punishing actions antecedent to applicable to what has already happened". So as set out in **Professor Burrows'** book on Statutory Interpretation on retrospective legislation, there's a

lot of shades and meaning to retrospective and the best example of that in my submission would be the case of the Court of Appeal which Justice Blanchard delivered of **Oran**. Now what happened in **Oran** is that.

Tipping J How do you spell that?

Lithgow I've got a copy of it here Your Honour.

Blanchard J I think it's pronounced **Oran**.

Lithgow **Oran**, well unfortunately the Council had left town today and that's the one thing I did want to know before I got there. Now this person tried his arm because he'd been convicted and sentenced on the Home Invasion Provisions and he wanted to appeal and in-between sentencing and appeal the Home Invasion Provisions had been abolished and so the maximum sentence was reduced and the question was, "bearing in mind that the Court of Appeal has the power under 385 to", and this Court for that matter, "if it thinks that a different sentence should have been passed shall either quash the sentence passed and pass such other sentence warranted in law where the more or less severe and substitution thereof as the Court thinks ought to have been passed.would vary within the limits warranted in law the sentence or any part of it or any condition imposed in it and any other case the Court shall dismiss the appeal". And the Court of Appeal held that the expression 'warranted in law' had to mean a sentence that was available to the Sentencing Judge. Now they also held in contradiction to the Crown submission that that would be an artificial cut-off because it would not allow a Sentencing Appeal Court to consider new factors, new factual elements such as say 'done a drug course' or some new fact that comes to light. The Court held that that wasn't the situation, that they could take into account such matters. Now there's two points to this and there's also the interpretation s.19 of the Interpretation Act that repealed Acts still carry on. Now the point about **Oran** I say is that logically that is retrospective legislation because it classically has stopped the clock back at a previous time, namely the time of the original sentencing. But it doesn't involve any change in the law. So to say that the expression 'retrospective legislation' only applies to changes is linguistically and in fact in terms of legislation not correct.

Tipping J I'm not clear how your deriving this from this case. The ratio seems to be that the position must be looked at at the date when the sentence is first imposed, not when it comes to be examined on appeal, and if as was the case here the maximum still applied at the date of sentencing you couldn't take advantage of a change between sentence and appeal. I'm not clear how you derive the proposition which may be right, but I don't see how you derive it from this case. Is there some passage in here that we should look at?

Lithgow Well the proposition is that 4 s.4 is not only talking about changes in legislation, it's talking about legislation that deals with retrospective situations and so the Crown's argument that 4(2) can't possibly apply to preventive detention because there's no change in the law, is a misunderstanding as to what retrospective means.

Tipping J What passage in the judgment in **Oran** should we note as supporting the proposition for which you are now contending, because I've just had a quick glance through it and obviously I've missed it?

Lithgow Well I'm just looking at the top of para.17 and 18 in the history of the legislation and from the actual language that sentencing was never intended.

Tipping J Where are we?

Lithgow On page 92, para.17, last sentence.

Tipping J Right, from the history, I get it, thank you.

Lithgow And then at para.18 we begin with the statutory history s.4(1)(b).

Tipping J Well 17 doesn't seem to come, 17 is dealing with the point that I've just been discussing with you, that the cut-off date is sentencing. I can't see anything in 17 now we can go to 18?

Lithgow But when a piece of legislation says that even though the Appeal Court is dealing with it now we have to deal with it as though we were a month ago in the Sentencing Court, a year ago in the Sentencing Court, that is one of the types of pieces of legislation that is properly called retrospective.

Tipping J But isn't that simply that the Court of Appeal is concerned with whether the sentence was correct or justified at the date it was imposed? I'm leaving aside certain offences that later come to light for the moment, but that's all that is surely.

Lithgow Yes but the only point I'm making is the word 'retrospective' includes any legislation that requires that the time-frame of the decision or the ingredients of the decision are hypothetically set back in time and doesn't just include, as the Crown would have it, where legislation has changed and purported to change something retrospectively. Retrospective legislation doesn't only deal with change. For example.

Tipping J Well I would have thought with respect that a far stronger argument is built on the very words of s.4(2) than it is from **Oran**.

Lithgow Well I agree but we're just dealing with things as they come along because these are all points that the Crown make.

Tipping J Alright thank you.

Lithgow Because their basic proposition is that the black letter-heading and the association of subsection 1 with New Zealand signing the UN Convention, and the meaning of the word 'retrospective' mean that 4(2) can only apply to changes in the law and I'm just giving an example as to why that narrow interpretation of what the word 'retrospective' means in the capitals means, and it's led the Crown into a faulty analysis and that is also because subsection 1 uses the word 'alter' and 'altered' and subsection 2 doesn't say anything about altered, it just says 'different'.

Elias CJ Well the heading talks about effect too so I'm not sure but this is probably a question for Mr Horsley and you don't need to take time to respond to it but the heading doesn't seem to place emphasis on new enactments if that's what's being suggested.

Lithgow Well that is certainly what the Crown rely upon and argue but I've also argued that the black letter-heading, that the Court of Appeal overstated what weight should be given to the black letter-heading because it is discretionary in any event if we're going back to the first five minutes of the hearing, in any event if there is no, well I'm hoping that the Court will find that if there is no ambiguity that we don't need to embark on a statutory interpretation exercise because if it has a perfectly sensible plain English meaning that are called 'cannons of construction' whether they're statutory now or partly statutory, just don't need to be gone into. I have set out in the submissions that the heading was put in place at a time when the law draughtsmen would have known that the Acts Interpretation Act said that they weren't to be taken into account, so it seems a little bit odd to suggest that that could modify, that the change in the Acts Interpretation Act could modify meaning in that way.

Keith J It's retrospectivity and retrospectivity isn't it?

Lithgow And there's also the Crown proposition that reading 4(2) in that way upsets the section related to making a mistake as to age.

Elias CJ Section 137.

Lithgow 137, yes, and that would be a good example of a black letter-heading which says the opposite of what the section says because the section heading says "sentence not invalidated by mistake in age of offender", but when you read it it's a code for correcting such mistakes at the option but compulsory once the option's exercised of the subject, so in a.

Elias CJ But in any event I don't understand the argument if there is a statutory condition of age. This provision must be where it can't apply to those circumstances, it must apply when the Judge has proceeded in

sentencing on mistake but not where he doesn't have jurisdiction to impose the sentence because of age.

Lithgow Yes. That's quite an old provision where ability to get a person's age settled is not so simple but also criminals use their brothers' identities and things like that and that often needs fixing up, and it doesn't depend on whether or not it's been done for a good reason or a bad reason. Now another example just in the same area of law, s.26 of the New Zealand Bill of Rights Act says "retroactive penalties in double jeopardy". But the section doesn't mention a single retroactive penalty - it's about convictions, so to try and solve these, I say conundrums, which don't exist by the heading on some kind of purposive basis. Purpose-based analysis in my submission would just be wrong in this case because the heading just doesn't have that degree of thought go into it.

Keith J Section 137, apart from being an old provision, applies in situations where age at the time of conviction already sentencing is significant too, doesn't it, where people are sentenced to particular types of Institutions and so on. Is that right?

Lithgow It was when we read the Hansard very important for people who got to preventive detention, not preventive detention, corrective training which was very short and not in a prison. In some areas people liked it, in some areas people hated it but sometimes people wanted to go there to get out of jail, sometimes they didn't and dealing with that because.

Keith J Yes and as my Brother said earlier in respect to Borstal as well.

Lithgow Oh sorry Borstal as well.

Keith J So under the 54 Act say where that provision I think had essentially the same form the Sentencing Judge has to focus on the age of the offender at that time, at the time of sentence so that they're within the timeframe.

Lithgow And this may become important again if we get youth prisoners and that kind of thing.

Tipping J I notice Mr Lithgow that the Court of Appeal didn't bring into account as far as I could see into the exercise at all and it may be that it doesn't carry a great deal of force but s.7 of the Interpretation Act which in a sense reinforces the provisions of s.4, that's the general provision that an enactment will not have retrospective effect. Now obviously 4 is more specific to this sort of situation but it does demonstrate a general legislative policy doesn't it that unless it's crystal clear you can't have a worse outcome than you could have had when you did it.

Lithgow Yes. If you've also got spare time you could work out the inter-relationship between s.7 of the Interpretation Act which says "shall not

have retrospective effect with the application under s.4 which says the provisions of this Act also applies to this Act", so quite where that gets.

Tipping J Well I've got lashings of spare time so arise to your invitation.

Keith J Section 4 also says that it applies to earlier Acts going to your point about. Well that was a very deliberate decision explained at the time.

Tipping J Was it basically the heading to s.4 that seemed to carry the greatest weight in the Court of Appeal's mind when dealing with your argument or against your argument Mr Lithgow? That's the impression I got from reading the judgment but there was a wider and more elusive dimension wasn't there, something to do with statutory purpose or legislative purpose?

Lithgow Well the poor criminal lawyer would say that the Courts have gone purpose-mad, that is trying to determine purpose because of the Interpretation Act, determine purpose before looking at what the ordinary words mean and overcoming ordinary words, but the Court's analysis appears to be that of the Crown, firstly that somebody was getting away with something, therefore it was a gap and parliament wouldn't have wanted that, therefore that was their purpose, therefore it had to be interpreted in a way that would overcome that failure of purpose and I had challenged the Crown then and now to find these 21-year olds convicted for the first time of a specified offence that had previously been given preventive detention so I consider that to be rhetorical only that there was a lacuna as the Judge said if there is it probably only applies to one person then the proposition that the black letter-headings are the key to understanding purpose then they also decide that s.4 has to be read as a whole and that therefore somehow the degree to which 4(2) as they accept appears to be different from 4(1) it has to be made to conform to 4(1), now that's just wrong in my submission because 4(2) stands alone.

Tipping J What was puzzling me Mr Lithgow was when at the end of para.45 of the judgment the Court of Appeal said that the anomaly which you pointed out about trial delays and so on, the interpretation for which you were contending was at odds with what we believe was parliament's purpose. Now where did they get the purpose from? Did they get the purpose from anything outside the compass of the Act or this individual section or were they just inferring a purpose from the statutory language?

Lithgow Well I think they've borrowed with respect that purpose from the other successful purpose argument and that is for the first part of the argument that the 153 was not intended to create a hiatus.

Tipping J Well that's a point that one can fully understand but that's a completely different issue isn't it?

Lithgow But it's got nothing to do with 4(2), and they've borrowed that purpose. That doesn't make sense. The only other purpose that was in the running was the purpose to meet the International Convention and that the international convention's only talking about changes, change legislation.

Tipping J I'm also interested in what you may wish to say if anything in relation to the Court's reliance on the apparent view of **Associate Professor Hall**.

Lithgow I don't that is his apparent view, I think it's just an observation of **Hall**.

Tipping J Because I mean anything that falls from him is worthy of very careful consideration.

Lithgow Well he's there talking about **Judge Strettell's** decision and all he says presumably when he says "the note to" presumably means the head note would certainly suggest the narrower interpretation to be the correct one but there's no development of the argument there, no questioning. If you read that together with the section of **Professor Burrows**.

Tipping J Well before you go off **Hall**, you see the introductory words of **Hall's** discussion in subsection 2 and 4 are "despite the fact that the purpose of ". Now I wonder if that's where they got the concept of purpose from. That it was **Professor Hall** who was saying that this was the purpose of it. There's a sort of reasonably close conjunction between.

Lithgow Well that was the Crown's basic proposition. The whole of s.4 only dealt with altered legislation but as he says in the end of the paragraph "42 is arguably worded in such broad terms as to encompass the situation where there is merely a change in the personal circumstances of the offender, for example his or her age between commission of the offence and time of sentence" and then he gives the decision of **Police v I**, which being a Youth Court decision as really the limit to how far he could adopt it or make use of it, so I suggest that his para.s4.4, dealing with subsection 4(2) simply sets out all the competing propositions.

Tipping J Well the last sentence clearly suggests what the author's view is. That's where they've got the whole idea of purpose and the marginal head note and it seems to me that they're adopting what **Professor Hall,** albeit perhaps tentatively, although the last sentence isn't all that tentative, seems to be suggesting, so your argument is, and I'm not saying it's the worst for it, that the author is not correct.

Lithgow Well classically we would say that he hasn't argued it through, he's just identified the competing things, he's laid down the proposition if you like, and chosen one view over another but you could scarcely say that it's reason though because it must by his very way of looking at it

be that bearing in mind the Interpretation Act and that it requires interpretation, and that retrospective means changes in legislation and not simply legislation that applies to an earlier point in time, that only having mentioned one of those propositions – well it's just a comment in my submission and it's wrong and it begs the question what use can be made of the marginal note or even if I accept that it can be used, what meaning it bears. Because the first proposition here which with respect I endorse is why are we even arguing about the marginal note when the section itself makes perfect sense, and I'm not sure that the Courts have yet said anything about that under the Interpretation Act that we will or will not go to the Interpretation Act if we can understand it perfectly well without it.

Keith J Well as you say the Interpretation Act is discretionary isn't it.

Lithgow On that.

Keith J The Court can have regard to those other indications.

Elias CJ What about the additional argument that the Court of Appeal raises in para.41 based on s.75(1)(b)? Do you want to say anything about that?

Lithgow Well I must say I had kind of assumed that was an available analysis. It's not the one I would have chosen but based on the discussion earlier I'm more than happy to go with a different analysis.

Tipping J Isn't the point that this is a different purpose, that this is a pre-condition to the imposition of a sentence isn't it? It's not applying a sentence that you couldn't apply at the date of commission. That was the thought I had frankly that it's not comparing, to use the clique "apples with apples", I think that's the answer I would get if I was in your shoes, I'm not expressing whether that's the completely right answer but it's clearly a different focus.

Lithgow Well if I have you correctly the Judge is just considering the bullet point rules to see whether they're correct but he also has to go and have a look at the general propositions as well but he has got to tick all those off, and whether the word 'conviction' should be read into there when it doesn't appear, simply because of the, if you like the temporal sense, the time base sense of the grammar I had swallowed but I would prefer the opposition put earlier by Justice Keith and Justice Tipping that it doesn't have to be done that way just because they're done that way in England because we've had a statutory intervention apart from anything else.

Keith J Well if you wanted to make an argument on the words here you could make the opposite one that in 75(1)(b) it's been put in and in the introductory words it hasn't been. But anyway I agree, I think the point that my Brother Tipping's made is a good one isn't it, that it is a pre-condition that somebody has been convicted after a particular age

when there might well be a lesson read to them about the fact that if they continue down this track.

Tipping J It doesn't engage the retrospectivity issue at all.

Lithgow So its got the first leg of the double.

Tipping J Exactly. It's the second leg that we are concerned about.

Lithgow Well that's how I see it. However just while we're dealing with this, because this is one thing which the New Zealand Courts have never effectively determined, and that is the question and I'm not inviting the Court to determine it in this case but just to see that a whole new range of problems arise. That is what is meant by 'convicted of an offence', because if one looks at the notes to the propositions on autrefois convict and equip in the text one can see that the Court of Appeal has declined to reach a determined view on when a person is convicted on indictment but some High Court decisions have accepted the Privy Council decision in **Richards v McQueen**, Privy Council from Jamaica 1993 Appeal cases at 217 which goes through the common law and the law and the Statutes of various jurisdictions and says there is no easy answer but the problem is that you've got to find the time when everything is set in concrete, that is the charges can't be modified any further, the.

Elias CJ I don't know why you complicated in this way because s.75(1) establishes the condition that your not less than 21 years of age and then there are the further qualifications because of course you can't impose the penalty of preventive detention until those other two conditions are met, but it doesn't mean to say you read those back into when the age of 21 is to be ascertained.

Lithgow Well all I'm saying is that if one's going to comply that its conviction the Court shouldn't with respect say so with such certainly as to fail to acknowledge that there's an argument upon conviction is equivalent to upon sentence because that is the point at which the Judge has determined that you are going to remain convicted and that any application you've made to change your plea has been dealt with and that you're not going to be discharged without conviction and therefore that the Privy Council's view is that the best thing to do is to call that the point of sentencing so if we're going to read something into 75 and it's for historical interest only now I suppose because they now say 'commission of the offence' for preventive detention that there is that argument to be worked through and it's therefore in that respect better not to be stated finally. I have a copy of that case if the Court is interested.

Tipping J Well I wonder whether it's of any help because I had an impression there was a definition if convicted on indictment in the Crimes Act.

Lithgow Well s.3 says that in certain situations you're convicted on indictment but the argument is that that's convicted on indictment not convicted on indictment because it's to distinguish between the similar provision to distinguish between the summary jurisdiction and the indictable jurisdiction, so for example it says if you plead guilty under s.153(A) the Summary Proceedings Act, you're convicted on indictment when clearly you're not because it hasn't reached that point and taking the argument in the Privy Council they would say well you can still apply to reverse your plea and there's a whole procedure set out in the Crimes Act for that very purpose and the procedure does not refer to undoing your conviction, it refers only to undoing your plea. So there's a lot in that and it's a different argument for a different day and I would just invite the Court not to assume that that's all done and dusted because it's one of the unfinalised areas of our Criminal law. Do Your Honours wish to take the adjournment and I'll get clear as to what we might have missed.

Elias CJ Alright we'll take the adjournment now thank you.

Court adjourned 11.26 am

Court resumed 11.47 am

Elias CJ Yes Mr Lithgow

Lithgow If I could simply now turn to what the Court of Appeal had said in 4 and I know that this is a different case and it's part of submission that it's a different case but looking at my submissions of page 15 and there's a quote there from **Pora** at para.73, quoted as page 73 demonstrating the Court's identification that subsection 2 is concerned with the particular.

Elias CJ We have read this Mr Lithgow. Is there an additional point you want to make to us?

Lithgow Well I was just a little bit concerned because I think at the very beginning it was suggested that **Pora** didn't. Well those paragraphs are there because it was suggested.

Tipping J Would you like to read it out?

Lithgow Well this is a unique opportunity to reconsider the wording without overturning yourself because I mean without having any problem.

Keith J There was no ratio in that case except that the appeal had to be allowed.

Lithgow Yes well like a number of cases in these areas they always seem to end up with a sentence closer to what they wanted even if it can't be made to fit. Whether subsection 1 will or wont bear a certain analysis is

really for another day. At 4(2) the basic proposition is as I was invited to concentrate on at the beginning and which I've done by circling the target and looking towards the middle rather than going straight to it, it is solely about how on earth can you get around to notwithstanding any other enactment to the contrary that's a negative way to look at it. My primary submission is the Crown is supposed to enjoy the law and this is part of the law and that's what it means that really they should be just endorsing it, not trying to find ways around it because the common-sense analysis is despite what is perhaps a touch flippantly said in **Lord Rogers**' speech, which is converted to an article, the time of the commission of the offence is the critical thing in criminal law. The time you ultimately get sentenced and the circumstances of that can be an entirely different set of circumstances altogether and why shouldn't the basic punishment regime be fixed on the time at which you committed the offence. It's easy to make fun of the proposition that we're all supposed to know the law and other such things but in my submission **Lord Roger** has been perhaps hard done by in the limited quote that was given to the Court. He simply identifies that some commentators consider that there's problems with the philosophical proposition that people consider their circumstances at the time they commit offences, but it's the least problematic of all the time-frames and in my submission it was properly in the Criminal Justice Act that it means what it says, it's not some kind of aberration or mistake, it's not to be talked away by interpretative aids which are unnecessary to the purpose and that it is the general provision which is the second leg of the double and without being able to meet that preventive detention can't be imposed.

Elias CJ Thank you Mr Lithgow. Yes Mr Horsley.

Horsley Thank you Ma'am. May it please Your Honours? The Crown's case is a relatively simplistic one. It is to this effect. First.

Blanchard J Did you mean simple?

Horsley Yes Sir, simple in the sense of.

Blanchard J But no simplistic I hope.

Horsley Well, no Sir, simple, and that is that s.75 when taken alone can only be read to apply to somebody who has attained the age of 21 as at the date of the conviction for the relevant offence.

Keith J But it can't be taken alone can it Mr Horsley? It's just not the way we read Statutes.

Horsley Well this is the second part to it Sir and my learned friend suggests that it can't be taken alone because we have s.4 of the Criminal Justice Act.

Keith J And s.25(g) of the Bill of Rights.

Horsley Of course Sir, and the Crown accepts that both of those are either interpretative aids or perhaps even more substantial than interpretative aids. However the Crown's argument is that they have absolutely no effect and/or application to s.75 of the Criminal Justice Act, so the starting premise is what does s.75 mean. When we look at s.75 the clear interpretation is as accepted by the Court of Appeal that it must apply to an offender who has attained the age of 21 years of age and been convicted of an offence. That the critical point is the age at which the offender is when they are convicted in terms of eligibility for preventive detention is made manifestly clear in the Crown's submission by s.137 of the Criminal Justice Act, and that is the section which deals with what happens if the sentencing Court made an error in determining the relevant age.

Elias CJ Do we have that?

Horsley Section 137 is one of the critical provisions that the Court of Appeal considered in determining what the relevant age was and with greatest respect.

Keith J But it applies to a very wide range of matters doesn't it and it's been in that form has it since 1954 or earlier?

Horsley That's another point Sir that I'd come back to and that is that of course this Act, the 1985 Act, was a complete repeal of the 54 Act.

Keith J Of course, but the wording I was asking about not whether the 54 Act was still in force.

Horsley Yes Sir, I understand that s.137 in terms of error as to age has always been expressed that way.

Keith J And so it wasn't adjusted as it might have been in the light of the 1980 amendment.

Horsley To the extent Sir that it was considered and passed unchanged when the entire repeal of the earlier Act took place in 1985. The Crown submission is that it takes into account that 1980 amendment when it is re-passed.

Keith J Which begins "notwithstanding any other enactment including s.137".

Horsley Yes Sir and the point about that is obviously that if my learned friend's submission is correct we have some quite fundamental internal consistencies in the Criminal Justice Act. My submission with respect to that is that that is extremely unlikely to have been the position given that this 1985 Act was a complete repeal of the 54 Act and one can assume that the legislation was intended to be internally consistent at that time.

Keith J Well no you can't assume that and that would deny the effect of the words at the beginning of s.4. They're intended aren't they to indicate that s.4 is the critical overriding provision?

Horsley That is true Sir that s.4 as stated in very strong terms in terms of it's notwithstanding any other enactment, however the point the Crown makes is that it actually has no application to this particular situation and I'll have to come back to that because that comes back to the issue of what the purpose of s.4 is and thereby what the interpretation and application of s.4 is to these remaining provisions under the Criminal Justice Act. So if I could just start with s.137, again the very clear words of that are that when in respect of an offence a Court sentences to relevantly 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, the sentence shall only be or 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 the sentence. Critically that makes it crystal-clear in the Crown's submission that it is the age at the time of conviction which is relevant in terms of any error that might have been made at sentencing. If s.75 was to have read into it the words 'the offender must have been aged 21 as at the date of the commission of the offence' the error in age has reflected in s.137 should also say 'as at the commission of the offence'. It does not. We are talking about age as at the date of conviction. That is with respect consistent with the Court of Appeal's interpretation and with great respect to my learned friend I understood him to actually be accepting the proposition that the clear words of s.75 meant that we were looking at either the age as at the date of conviction or the age as at the date of sentence when one was looking at eligibility for parole. Again that interpretation is consistent with the approaches.

Elias CJ Did you mean to say eligibility for parole?

Horsley Sorry, preventive detention Your Honour, sorry. And again that interpretation is consistent with the overseas authorities and I take you simply to the decision of before that I have cited which repeats the well accepted proposition it seems in English law that it is the date of conviction which is relevant when one is talking about crossing thresholds in ages and if we look at paras 31 and 32 of that decision under tab 4 of the respondent's bundle – 'the approach to be adopted where a defendant crosses a relevant age threshold between the date of the commission of the offence and the date of conviction should now be clear. The starting point is the sentence that the defendant would have been likely to receive if he had been sentenced at the date of the commission of the offence has been described as a powerful factor.' Oh sorry Your Honours that is actually a different point that I was making there. Sorry Your Honours I should have actually been referring you to um that is the point I was making with respect to inconsistency.

Blanchard J You were wanting to refer to para.22 I think.

Keith J It's common ground so the issue wasn't argued.

Horsley Yes that's correct.

Keith J Well how does it help us?

Horsley Because it was decided in **Danga** as well Sir and in the earlier decision of **Baker**.

Tipping J Where are these?

Horsley They are also in the bundle of documents. **Baker's** at tab 2 and **Danga** at tab 3.

Keith J Well **Danga** is before the Human Rights Act isn't it? Oh it's at Privy Council, sorry.

Blanchard J But do any of those cases turn on provisions which are comparable to s.4(2)?

Horsley **Baker** considered the position of retrospectivity and determined in that that the clear meaning of the words that you would look at be a type of sentence that could be imposed and in that particular case it was the death penalty for someone who had turned 18 at the time of sentence and.

Tipping J What is the provision in **Baker** that you would equate with our 4(2) so as to give the parallel?

Horsley I think I've repeated that in my submission Sir and I'm just trying to find the passage and it's at para.44 of the respondent's submissions citing from page 61 of **Baker** and you will see Sir that I have inserted into that quote from **Baker** even if s.20(7) which was our equivalent of our s.4(2) of the Criminal Justice Act were considered in isolation Their Lordships do not consider that s.29 of the Juvenile's Law, the Death Penalty equivalent of s.75 of the Criminal Justice Act would be inconsistent with its provisions. So far as they relate to penalties for criminal offences they are directed to invalidating laws passed after an offence is committed which increase retrospectively the penalty that may be imposed for that offence. They are not directed to laws which have no retrospective effect but provide prospectively that different penalties for the same offence may be imposed on different categories of offenders.

Tipping J Is it s.20, subsection 7 of their Constitution. 61, letter C.

Horsley Now with respect Your Honours that interpretation is on all fours with the position that we have.

Tipping J But that's not quite the same is it? It says you can't oppose which is severer in degree than the maximum penalty which might have been imposed, that looks to me to be if I can be allowed the word more generic.

Horsley That may be the case Sir but that comes back to our interpretation argument of s.4 and the purpose of s.4, so I suppose from the Crown's point of view the first thing that the Crown sees it as being necessary to convince this Court of is that on its face at least s.75 does provide for an assessment as at the age of conviction.

Tipping J Well I'm not sure that I'm with you. I would have thought if you looked at 75 purely in isolation which is what your first step was, and without bringing 137 into account, it's ambiguous. It could mean either date of commission or date of conviction. I take your point about 137, it's probably your best point but if you looked at it without reference to 137, I am not sure that I can accept the proposition that in isolation it drives so clearly of conviction as to admit of no other possible interpretation.

Horsley The reason I say that Sir is that any other interpretation does involve an actual addition to that section of the words 'after who is not less than 21 years of age as at the date of the commission of the offence'.

Keith J Well you're reading in as at the date of conviction. They're not there are they?

Horsley With respect Sir I'm not reading into that.

Keith J Well they're not there though. Something's got to be put in there to make the provision operative.

Horsley No Sir it's simply that this section will apply to any person who is not less than 21 years of age, so they're in front of us, they're not less than 21 years of age. The only qualifying feature.

Keith J At sentencing then?

Horsley Well that could be at sentencing, that's true.

Keith J Well that's a different argument, so are you sentencing or conviction?

Horsley I'm not arguing sentencing Sir because.

Keith J Well that's the point at which the sentence is imposed.

Horsley That is correct but the authorities, the English authorities would certainly interpret this as, or in fact **Baker** would probably interpret it as at the sentencing date. I have interpreted it as two stages that must have happened. The person before you must be not less than 21 years of age and conjunctively obviously must be convicted of a specified offence.

Keith J So if convicted at 20 and 11 months he could or couldn't be sentenced to preventive detention the next month?

Horsley I've read that Sir as having the 21 years as being conjunctive with the "and is convicted".

Keith J Well that's not logical is it, because the Judge has got to make the assessment at the time of sentencing. Why would you take an intermediate point which could be completely arbitrary?

Horsley The only arbitrary nature of it is that it in fact it gives a benefit to the accused by reading in the 21 years of age with both paragraphs A and B as amounting to conviction or time age as at date of conviction and of course to solidify that is s.137, but my point is that it cannot be read as meaning as at the date of commission of the offence. It either has to be sentence or conviction date.

Keith J That's ambiguous in your terms.

Horsley Yes Sir I suppose that's true. If there's any ambiguity it's between conviction and sentence dates. Certainly it does not permit an interpretation that allows for commission of the offence.

Blanchard J Well that's all very well but when you go to s.4(2) it reads "notwithstanding s.75 and notwithstanding s.137, no Court shall have power on the conviction of an offender to impose any sentence that it could not have imposed on or made against that offender at the time of the commission of the offence".

Horsley Yes Sir. Now the.

Blanchard J Of course I'm reading words in there but.

Horsley Yes Sir I understand that. This is where the interpretation of this section has been somewhat taken over by events. If one is reading this as a section that was inserted into this Act to give effect to our signing up to the International Covenant then it is directly related to interpretation that has been given to Article 15 and Article 7 of the respective Covenants, the European Covenants.

Gault J That's a very considerable assumption isn't it, bearing in mind the very different language between 4(1) and 4(2).

Horsley Yes Sir and what I say about interpretation of 4(2) is that it is not offender specific, in fact what we have in 4(1) is two situations, either the maximum term or maximum fine has been subsequently increased and, sorry Sir, so subsection 1 is dealing with either an increase in the maximum term of imprisonment or the maximum fine that may be imposed. Subsection 2 is dealing with something different. It's dealing with sentences or orders in the nature of a penalty that could be imposed and what it is dealing with in the Crown's submission is effectively different types of sentences or different types of penalties that could be imposed upon an offender. For instance home detention or reparation.

Blanchard J Hard labour.

Horsley Hard labour.

Blanchard J Baroness Hales got a list of them in her judgment in the House of Lords case that we relied on in **Morgan**.

Horsley And so that section to be read consistently is talking about an imposition of a different nature of penalty.

Gault J That doesn't say that does it? It seems to me the problem you have here that very carefully spelled out in subsection 1 reference to the maximum which is consistent with the international jurisprudence about the applicable sentence, but they haven't done that in subsection 2 and you it seems to me have to read in words about type or nature of sentence which are not there.

Horsley It's correct to the extent Sir that you have to interpret it.

Gault J No no I'm saying you don't have to interpret it, I'm saying you are reading in words.

Horsley With respect to this particular situation, the reason why the Crown says that subsection 4(2) does not prohibit the making of an order of preventive detention is that preventive detention was an order or a sentence or order in the nature of a penalty that was available in law and could be made against the offender at the time.

Gault J The offender, the offender at the time.

Horsley Well the offender is simply saying that this particular offender at the time of the commission of the offence was this sentence available?

Gault J If you'd said "an offender" I think your argument would be much stronger but it says 'the offender'.

Horsley And perhaps the reason why they're saying 'the offender' is simply because this is targeting at this stage anyway an offender who is faced

with, as the Crown submits anyway, a change in sentences that are available to them.

Gault J In respect of the offender.

Horsley Yes Sir.

Tipping J You have to say don't you that the offender means offenders generally?

Horsley Well certainly that is what the Crown's argument is and I thank you for your assistance Sir.

Elias CJ I'm puzzled and perhaps it's an unfair question to ask but I'm puzzled, in which case don't respond, but I'm puzzled why the Crown mounts this argument given the fact that under the Sentencing Act it's made quite clear that the policy is as at the date of the offence, given the obligations and the policy behind the Covenant, given the emphatic language in which s.4 is couched as a Bill of Rights Act, why is this argument being put forward?

Horsley There's a number of reasons why Your Honour, the first of which is that this is legislation in terms of the penalty that was available on the books that never changed. In terms.

Keith J Sorry, which never changed, s.75.

Horsley Section 75.

Keith J It's changed often. I mean I've gone back only to 1954 and it's changed in respect of who's, in respect of what offences the Court.

Horsley Yes Sir, but.

Keith J And whether there's got to be two offences or only one. There's been a lot of changes.

Horsley The point of retrospective or the prohibition against retrospectivity, and we see it more clearly defined in s.25(g) of the Bill of Rights Act, and in fact we see it now more clearly defined perhaps in s.6, is that we are endeavouring to stop new penal enactments from having an effect on people who have already committed the offence.

Keith J Well is that right, I mean the Covenant language notwithstanding what the European Court says in that case is general isn't it? I take the generic point that has been made from the Bench a number of times that the penalty that was applicable in respect of this offence and this offender is different now from what it was when he committed the offence. Even if there hasn't been intervening law, if you simply think of the tailor kind of fact.

Horsley If you read Article 15 I'd say that in fact no that is not correct.

Keith J But isn't that contrary to principle? If you take the first sentence of Article 15, the criminality one, it wouldn't have been a criminal offence in respect to people under 7 or 14 or whatever the relevant time is and if they're prosecuted later are you really going to say that those age limits can be avoided by a later prosecution.

Horsley It would still be an offence.

Keith J Yes well, but is the Crown really going to say that? Are you going to defend that before the Human Rights Committee, that kind of argument?

Horsley No Sir, the argument that's been proffered is that which was accepted in **Taylor** and that is that the essential aspect of a retrospective problem is that there is an uncertainty as to what will happen to you either by way of 'am I committing an offence' or uncertainty as to what penalty could be imposed upon me.

Keith J Well the uncertainty is here isn't it because you don't know how long the proceeding is going to take.

Horsley Well that was rejected Sir by the Court in **Taylor**.

Keith J I know, I know, but is that the persuasive, and here you've got the further consideration haven't you that parliament has intervened and has changed the.

Horsley Well If I could just take you back to the first point then. It is simply that if a person looked at the Statute books as Mr Mist theoretically can do and we take that sort of theoretical position. He knew that if he delayed or that he was not convicted until such time as he turned 21 he was eligible for that sentence of preventive detention.

Blanchard J What if he committed the crime the day before he was going to turn 21, he'd just have no opportunity. He wouldn't even have time to get a plea in.

Horsley But that's irrelevant Sir as to whether you can know of what the status is and we have always known what his status is and that is for any purpose who commits a crime but is not convicted until they turn 21 they will then become eligible for preventive detention. There's been no change to the law.

Gault J That might well be an approach adopted in other jurisdictions but why should people be subjected to this sort of lottery? What about the person who successfully appeals against the conviction, faces a retrial by which time he's older? I mean that sort of lottery shouldn't be a basis for the law should it?

Elias CJ It's arbitrary and it infringes the Human Rights protections against arbitrary result.

Keith J And also in terms of Mr Lithgow's earlier rhetoric it deprives you doesn't it potentially of your right to a fair trial and your right of appeal?

Horsley No Sir I'd completely disagree with that because.

Keith J Well it does because you're going to be subject to a greater penalty. That's what happened to **Mako** or **Pora** whichever it was.

Horsley Well it doesn't deprive you of your right to a fair trial in the sense that if there is an abuse of process or any administrative delay then that is subject to other remedies anyway in terms of, but the questions about abuse were questions about.

Keith J It's not a matter of abuse, it would just be the state of the Court lists, the decision to contest evidence, or whatever. It could be a number of quite proper reasons for the case coming on afterwards, well plus my Brother Blanchard's point about the offence being committed just a day or two before the relevant date.

Horsley Of course that has the same anomaly in a way for offenders who are 17 versus 18 and become eligible for imprisonment. At some stage there is a cut-off in terms of where and when we sentence people.

Keith J But it's less arbitrary isn't it in terms of what we're looking at here if the dates are applied to the offence not to anything else?

Horsley Well the date, the dates applied to in this particular case for preventive detention, historically the date has been applied to the age at when you are sentenced because.

Keith J Sentence and/or convicted.

Horsley Sentence and/or convicted, sorry Sir.

Keith J Well you've got to take one or the other.

Horsley Well convicted Sir. The date of conviction because of a perception that this sentence was something that should only be imposed upon older offenders irrespective of when they committed their offence and to that extent it was protective of persons because this section does not provide that anyone who commits a specified offence irrespective of age can be sentenced to preventive detention, which of course it could easily do, so instead it provides a higher threshold for the imposition of the sentence and that's why it's not so arbitrary. Equally we see it consistently applied in terms of youth offending where as in **Taylor** a

14-year old by the time he is sentenced at age 15 became eligible for different types of sanctions. No longer could he simply rely upon being fined or supervised or whatever it may have been, he was now eligible for detention in a youth offenders institute. We have that same provision here. We have previously s.8 of the Criminal Justice Act which provided that we couldn't imprison people for offences until they had turned 16 or 18, I'm sorry I can't remember, I handed up s.8 anyway, and what the exception here is 16 years of age at the time of conviction. Section 8 of the Criminal Justice Act is yet another section that Your Honours may think is inconsistent with s.4. The problem with that is that you can have.

Elias CJ Sorry what's s.8?

Horsley Section 8 provides Your Honour and it's on the front of the s.137 legislation I handed out that no Court shall impose a sentence of imprisonment on a person what at the time of conviction is under the age of 16 years except for a purely indictable offence. Now what that means though is that persons who have attained the age of 16 and over can in fact be sentenced to imprisonment for offences which are not purely indictable and we see the exact same situation that we have.

Keith J Well that penalty would have to be available in terms of the substantive criminal law as well wouldn't it, so?

Horsley Well it wasn't available Sir on this strict test because my learned friend would say "because when you were 15 you couldn't be sentenced to prison, you can't when you're 16", yet the term of imprisonment was always available as a global sentence, just as I say the term of preventive detention was always available as a global sentence, and this is where it comes back to what is the principle that s.4 is trying to uphold and it is that absolute prohibition on sentencing people for either offences or to terms of imprisonment or types of penalties that were not available on the law books at the time that they committed the offence.

Tipping J Just pause there. I think this is the crunch point in the case Mr Horsley the proper meaning and scope of 4(2).

Horsley I would accept that Sir.

Tipping J You agree with that?

Horsley Yes Sir.

Tipping J Right well if that's the case, you escape from the literal words by asking us to read the offender as meaning offenders generally. We've established that but I have difficulty doing that because it says against the offender at the time of the commission of the offence, except with

the offender's consent, which suggests to me that the focus throughout is on the particular offender.

Horsley Yes Sir and subsection 2, those parts of that subsection are endeavouring to make it clear that there will be certain penalties and new sentences that are imposed which actually work to the offender's benefit and so with the offender's consent they can have that imposed upon them.

Tipping J But assume I was with you in spirit, assume that for the moment, how can I read it as meaning offenders generally when the ordinary use of language is so clear that it's this offender, the offender in question?

Horsley It's not the offender Sir that I'm trying to necessarily get you to change the meaning of it's more the imposed any sentence or make any order in the nature of a penalty that it could not have imposed and I'm asking you to read that.

Tipping J Against, against the offender.

Horsley Well any new sentence I'm asking you to read that as Sir, or new order in the nature of a penalty that it could not have imposed, and that is the meaning that I'm attributing to that in terms of the imposition and in terms of the prohibition of what can be imposed is the prohibition on imposing a new sentence or new order.

Keith J So you're reading the word 'altered' from 1 into 2?

Horsley I suppose that's true Sir.

Keith J Well again you really haven't answered I don't think the Chief Justice's question about why the Crown would want this particular reading to be imposed on these provisions or for that matter on our international obligations.

Horsley And perhaps if I can come back to that then Sir if I haven't answered it fully. The first answer that I was endeavouring to give is that it gives a meaning which is consistent with the very clear meanings I say that are throughout the Criminal Justice Act in terms of s.8, s.75 and s.137, all of which if we give it any other interpretation will be completely inconsistent with s.4.

Elias CJ Well except s.8 is explicit.

Tipping J And we've got a **Pora** situation with regard to s.8. We haven't got a **Pora** situation so it is said with regard to s.75. You say we have.

Horsley With respect Sir I would say that we have because of s.137 that brings us into full conflict.

Tipping J I understand that, but if 4(2) is to be read in the way you propose by inserting the word 'implicitly new' what duty is 4(2) doing that is not already comprehended by 4(1)?

Horsley It's penalties that are outside a maximum fine or maximum term of imprisonment Sir, so and this perhaps comes back to my discussion with Justice Blanchard.

Tipping J New in the sense that it's.

Elias CJ Periodic detention or home detention.

Tipping J A new idea?

Horsley Yes, yes, and so the first reason is to give the Act some internal consistency. The second reason why the Crown is bringing this point is because of a basic submission that s.25(g), the new s.6 of the Sentencing Act are still important in terms of continuing interpretation and the Crown says that those provisions only apply where the law has changed between the commission of the offence and the date of the imposition of the penalty and/or age of conviction to be on how you read it.

Tipping J So are you saying that we should read 4(2) as any type of sentence that it could not have imposed except with the offender's consent. It's the concept on the type of sentence.

Horsley Yes Sir, that's correct.

Tipping And do you say that that helps to explain the offender's consent because if it was to do with making it harsher no offender would ever rationally consent.

Horsley No and equally there have been new sentences that have been introduced which home detention is a classic, that the offender may well have consented to because of seeing that as being a sentence.

Keith J Were there no transitional provisions?

Horsley Sorry Sir.

Keith J Were there no transitional provisions?

Horsley With respect to home detention.

Tipping J Well you can't be sentenced to that anyway so that's irrelevant.

Horsley No, no of course not.

Keith J No but when it was introduced you were implying that there were no transitional provisions.

Horsley No Sir I wasn't meaning to imply that. I can't

Blanchard J Well what else could you have been implying

Horsley No Sir I was just simply using that as an example of a new sentence. There may be others.

Blanchard J Well I suppose that theoretically looking forward the drafter might think that transitionals would get omitted so this would take care of it where there was a slightly more benevolent new type of sentence.

Tipping J I have puzzled in this about why except with the offender's consent because if it's designed to stop something worse happening then you could have suffered at the time, then it seems pretty odd that you'd consent now you say that is explained by there may be a different type of sentence which the offender might regard as better for him or her than the available range at the time you did it.

Horsley Yes Sir and that's exactly why that is the interpretation which fits with retrospectivity and that is that new legislation new sentences. The principle of retrospectivity is that they should never be given effect to the detriment of the accused and in this particular case subsection 2 simply makes it clear that the offender gets the benefit of either taking on board that new sentence or not.

Gault J Undoubtedly it does that but the question is does it do more because of its words?

Horsley Yes Sir and I understand that the question is whether it does more and the Crown submission with respect to that is no it doesn't do more and the reason why it does not and should not do more is because of firstly the internal inconsistencies it creates within the Criminal Justice Act itself and secondly possibly more importantly is that s.4 should be read in terms of the effect that it was designed to give to Article 15 of the International Covenant. **Taylor** in the UK makes it very clear that the retrospective effect that we are talking about is a change in the law, it is not to do with changes and status of an offender due to the passage.

Elias CJ So we're into **Morgan** really, we're into substance or form and this is a provision that said to apply to effect, retrospective effect.

Horsley Yes Your Honour.

Keith J Well the heading is against you isn't it?

Horsley The heading's somewhat neutral.

Keith J Well ok well I know it was being used in favour of your position by the Court of Appeal and by all but.

Horsley Yes it was Sir.

Keith J Could I just follow up over Chief Justice's comment a moment ago and go back to the question I raised with you because I'm not sure you gave a full answer to it about the first sentence of Article 15 and you've got say a provision in the Crimes Act, I don't know what it says now, but it says that "children can commit offences only from when they're 14 on". Now on your reading are you saying that that provision is on the books, someone allegedly committed an offence when they're 13, they're prosecuted after they're 14 and on your theory that would be ok, that wouldn't be inconsistent with Article 15 or with s.10(A) of the Crimes Act.

Horsley The Crimes Act Sir provides that, it doesn't provide a prohibition on you committing an offence it simply provides prohibition on you being charged at certain ages, you cannot legally be convicted of that offence at certain ages depending on what the offending is.

Keith J But once you've come over that age then are you saying that.

Horsley No because the Crimes Act makes it very clear that it is your age at the commission of that offence.

Keith J Yes and are you saying that s.10(A), say you don't have to go to 10(A) so far as those people are concerned.

Horsley No you certainly wouldn't and that situation is very different because you are not, well there's no suggestion Sir that my argument would have application to those sort of people in terms of.

Keith J Well I was just looking at Article 15. Forget about my reference to the Crimes Act because I just don't know the detail of it.

Horsley Yes Sir.

Keith J No one should be held guilty of any criminal offence on account of any act that did not constitute a criminal offence under national law at the time that it was committed, and if New Zealand law said that you can only commit offences from when you're 14 and you were in fact prosecuted afterwards, it was an offence to steal or whatever the offence being charged is has been in law books for hundreds of years, so it was an act or omission that constituted the criminal offence at the time, it's just now that you've come into the timeframe so that if our criminal law arguably allowed prosecution of a pre-14 offender after they were 14 you're saying that would be consistent with Article 15?

Horsley Article 15 is only stopping people from becoming guilty of an offence which was never in the Statute box effectively.

Keith J So you're saying yes to that situation and somebody.

Horsley Domestic law provides that we don't charge people who are under a certain age.

Keith J Yes I understand that but you're saying that Article 15 would allow us to.

Horsley To an extent Sir, yes, Article 15 doesn't interfere with what domestic law chooses to impose in terms of when we might determine that people are liable for an offence which has always been on the Statute books.

Keith J Sorry I'm not making myself clear. The reading that you're giving to Article 15 I think would allow the possibility that the law could provide that there is this offence, it's on the Statute book, it's been there for ages, it can't be committed by someone under 14 but you prosecute them later and you would say the law is on the books that's consistent with Article 15. There's been no change in the law, and that's what you're saying to the second sentence aren't you that it requires a change in the law, not just a change in circumstance.

Horsley I am saying that there is required to be a change in the law and in terms of the principle of 'no crime without law' there is a crime but our domestic law provides for certain cut-offs as to when you charge people. But my argument as I understand it Sir doesn't breach Article 15.

Tipping J So If I steal something when I'm 13 I can be prosecuted for it when I am 14, putting it at its bluntest.

Horsley Article 15 does not stop domestic law from charging people no matter what the age, Article 15 does not have this effect, of charging people no matter what their age with offences.

Tipping J I understand your point. It's not Article 15 that stops that, it's some other provision in the Crimes Act which doesn't make it.

Horsley Crimes Act and equally probably Rights of Child and various other International Covenants that we've signed up to which would stop that happening. But it's not Article 15.

Tipping J Because theft is theft. It's not Article 15, yes I understand that.

Elias CJ There's Article 15 only bites on changes to law.

Horsley Yes, yes Your Honour.

Keith J Except it doesn't say that does it? I mean on one reading of it it doesn't say that.

Horsley With respect Sir "no one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed". There must be a law in effect at the time you committed the offence to be guilty of it. That's the first part of it

Keith J And then you're saying the circumstances of the individual defendant are irrelevant.

Horsley To principles under Article 15.

Keith J Under that first sentence.

Horsley Yes.

Keith J So that if say the person was insane at the time and therefore there wasn't an offence so far as they were concerned, they could subsequently be prosecuted if they became sane again, because the offence was there.

Horsley Article 15 Your Honour has no effect on status of the offender.

Keith J Say if **President Pinochet,** who could not have been prosecuted at the time, presuming he was still President, so he would have had an immunity at that time, so there wouldn't have been offence so far as he was concerned, he could subsequently be prosecuted. That may not be as good an example. So you're really saying that Article 15 has no reference at all to the particular individual's circumstances.

Horsley None whatsoever Your Honour. The only relevance of the individual circumstances is that you're using him to determine what was available at the time.

Elias CJ It's very unattractive argument Mr Horsley because it's the argument for putting to death people who commit offences before they're of an age to be liable for capital punishment.

Horsley That's correct, although that comes into the, no one suggested that in **Baker** they could not be guilty of murder and that's the first proposition that we're talking about. We're talking about an offence. The second proposition is what penalty can then be imposed upon them and the proposition under that is that you can't get a heavier penalty imposed upon you than one that was available in law at the time of your commission of your offence.

Elias CJ Even though it could not have been applied to you.

Horsley Exactly, which is the.

Keith J So you're taking a position against the recent US Supreme Court decision? It's not a notably liberal Court is it?

Horsley They certainly applied this aspect of the test differently to how the Europeans had been applying it and with respect yes I suppose I am, I'm certainly applying the UK and **Taylor** application of this which is to say where you have a Statute book that can be read and can let you know exactly what you are liable for and is clear that if your status changes, ie, you've changed from 14 to 15, you can be eligible for different things; you change from 20 to 21, by the date of your conviction you can be liable for different things, then that does not impinge upon the principle of retrospectivity. You always knew what the penalty.

Tipping J What's the policy behind this though? Presumably it's thought that you shouldn't put people to death if they're under a certain age – I'm taking the extreme case.

Horsley Yes Sir.

Tipping J And you say that if by complete chance you get convicted and sentenced before your say 18th birthday, you're free of it, you can't be sentenced to death, but if by an equal chance you're convicted and sentenced after your 18th birthday, having done it when you were 16 or 17, that's alright because of the fortuity of the lapse of time from when you did it.

Horsley There is that basic anomaly but that is dependant upon the application that the legislation has chosen to given to when we determine that a sentence will be available. Now if the legislation clearly states that this sentence is going to be available from a certain age then that is the arbitrary cut-off.

Tipping J No it's not the arbitrary cut-off. What is arbitrary about it is that it may wholly outside your control as to whether you suffer death or not.

Blanchard J Take the situation of somebody who commits the crime the day before their birthday. In the Chatham Islands there's no resident District Court Judge there and fog closes the airport from which the flight usually goes to the Chatham Islands. They don't have any opportunity of pleading guilty before the birthday. I know it's any extreme example but is the law is arbitrary as that?

Horsley The question is whether s.4 operates to prohibit that and in fact you say that the law might be arbitrary but that is the clear intent of s.75.

Blanchard J Well you were positing on the basis that before I commit my crime to look up the law and see what the consequence is going to be and there I am with my law books in the Chatham Islands and I decide ok I'm not going to be suffering this higher penalty because I can plead guilty immediately, but I can't,

Tipping J And if it's sentence your plot would be foiled anyway.

Horsley Well the more interesting aspect of this is perhaps to look at how the English have approached the anomaly and what they have said is that the sentence that could have been imposed as at the date of the commission of the offence remains a powerful factor. In your situation Your Honour, despite the fact that you may be eligible for a different type of sentence the Sentencing Court is still going to be taking that into account.

Elias CJ Well I had a note to ask you about that because it emerges in the Court of Appeal decision and it is something that you made a substantial submission about. How can you take it into account? What's'the policy reason why it's relevant on your argument?

Horsley Why the date of the commission of the offence is relevant.

Elias CJ Yes.

Horsley Because all we're talking about is an availability for certain types of penalties.

Elias CJ But why is it a relevant factor for the Sentencing Court then to take into account that actually when you committed the offence you couldn't have had this sentence imposed on you? It can only be because there's some sense of unfairness about it.

Horsley That is partly correct. It's also to take into account the situation where we have offenders being sentenced years down the track for offences that have been committed earlier and we do to a certain extent look at what would have been imposed at the time. If they were a youth and they could not have been jailed it may well have a significant effect on the length.

Elias CJ But that's a general consideration which is always available. Why is it a relevant consideration on sentencing that at the time of the offence the sentence being considered couldn't have been imposed? Because on your argument that's fine.

Horsley On my argument Your Honour the principle of retrospectivity which would in effect render the sentence unavailable and terms of imprisonment unavailable and various other sentencing options depending on the thresholds that we cross is not bridged, therefore the Court remains able to use the full array of sentencing options available

to it as they become available depending upon critical age dates that are reached. But in using that array of options there is a recognition by the Court that it is only fair to look at what would have been imposed at the time of the commission of the offence..

Elias CJ Why?

Horsley Simply because of disparity, combinations of offences that could have been imposed which we see now as being improper in terms of the age of the offender perhaps and it's no different for preventive detention because what we see is that once you become eligible for it there are still a number of other critical factors that need to be taken into account and the Court in following **Ghafoor** which deals with this directly would consider what sentence would have been imposed at the time of the commission of the offence just as they consider what has happened in the passage of time between the commission of the offence to assess the risk to the public and those factors are simply factors that remain as I think the Court describes them as "powerful factors to be born in mind when imposing the sentence".

Keith J Well why shouldn't just be decisive. Mr Horsley you've been using the word anomaly but isn't the Chief Justice's word right – fairness or justice – isn't the basic underlying idea in Article 15 and similar formulations which in thinking could go all the way back to **Hobbs**. The basic idea is isn't it that it is unjust for the State to do something to an offender which could not have been done to that offender at the time the offence was committed. It's unjust, quite apart from all the business of being on notice and so on, it's just not considered fair.

Horsley There's two aspects to that Sir and the second aspect is no it's not considered unjust because we see numerous examples of it right through the authorities that I've cited of terms of imprisonment.

Keith J Well terms of the UK Act in cases which you were talking about the latest one it's conceded and the preceding cases are before 1990 aren't they? **Danga** doesn't seem to refer, I don't think it refers does it to?

Horsley **Ghafoor's** 2002 Sir which is the one specifically on this point and of course UK and **Taylor** which I.

Keith J But **Ghafoor** it was conceded, there was no dispute according to para.22.

Horsley Well they never dealt with the.

Keith J Common ground I would say

Horsley It was common ground that the age is the age of conviction but they never dealt with the Article 7 argument in the end and this is where they came back to the powerful factor.

Keith J So, I mean it's not helpful authority is it?

Horsley Well I consider it is Sir because.

Keith J Well if it's not argued and they say we're not going to look at Article 7.

Horsley Well they never had to obviously but the approach that's taken is one that is helpful Sir because what it does is it shows.

Keith J Well it doesn't deal with the justice argument does it and you were suggesting before that the justice argument has got some holes in it – what are they?

Horsley Well the justice argument is not an argument about.

Elias CJ Sorry, pause here. It would assist us we can adjourn early. Now you might want to respond to Justice Keith now or you might want to do that after lunch.

Horsley Certainly Your Honour.

Elias CJ Oh well perhaps Mr Horsley should ask the question and we'll have to take a slightly longer adjournment than usual so we will resume at 2.30pm if that's alright.

Horsley Thank you Your Honour. The point is that Article 15 is concerned with a prohibition on the imposition of the penalty. It will restrict it. Now if apply Article 15 across the board it removes those sentencing options that the legislation has intended to impose.

Keith J Sorry, I was asking you for your understanding of the policy behind Article 15. As I said you were using the word anomaly, I was saying isn't the basic idea the idea of justice, it is unjust for the State to visit some result on an individual in terms of criminal liability or criminal sentence that just wasn't available at the time of the offence.

Horsley I think that's what I made clear in my submissions Your Honour that the principle of, it's the two-fold principle from very early times and I'll do complete vandalism to the Latin so in English it's no crime without law and no penalty without law. The critical factors being without law. If the law is there then principles of retrospectivity are not engaged is the Crown's submission.

Elias CJ I wouldn't want you to think that I buy into that as the total justification for these sort of provisions in the 21st Century, because I would have thought that the law had developed to the stage where not applying penalties retrospectively are in themselves thought to be fair, that that policy is thought to a fair policy of the law.

Horsley Now I'll address you on that then Your Honour perhaps to just leave it at the fact that the Crown is simply saying that the fairness aspect comes into the actual imposition of the penalty. The retrospecivity is on the ability to impose a penalty and what we are saying is that you're not going to sentence 25-year olds to Borstal because they committed the offence when they were eligible for that sentence, nor are you going to put them into a youth offenders institute - the appropriate place in terms of detention is imprisonment, despite the fact that imprisonment may not have been available. To hold otherwise means that you invoke the principle of retrospectivity to reduce or to remove to set the available sentencing options but in imposing the available sentencing options you are recognising the fact that the offence occurred sometime before that option became available and that is the fairness aspect that is implied or applied.

Tipping J So its discretion not jurisdiction.

Horsley Yes.

Tipping J Is that a neat way of putting your point?

Horsley Yes, yes it is Sir.

Elias CJ Alright we'll take the adjournment until 2.30pm thank you.

Court adjourned 12.59pm

Court resumed 2.37pm

Elias CJ Yes Mr Horsley

Horsley Thank you Your Honour. There was one matter just before commencing my more substantive submissions I did want to go back to the point that His Honour Justice Keith was making or at least I that I was attempting to make an answer and I think there may have been some confusion between what I was saying and perhaps what I was portraying, anyway and that is that in respect of the questions about children who commit offences at least, I had hoped that I'd made it clear that there were other protections available for children who commit offences at a young age in terms of can it be an offence, not the least of which is the Convention for the Rights of the Child and that of course requires participating States to set an age at which capacity is deemed for children. Now as a result of that I was never suggesting I trust anyway that you could wait till after they attained a certain age and then prosecute because my understanding is of course that if it was not an offence at the time you did an act because you did not have capacity it will never be an offence, you can't deem capacity back. Equally I may have given the impression, and if I did so I regret it, that Article 15 had absolutely no application because of course it will have

an application if you for instance change the date at which you deem children to have capacity to commit offences and in those circumstances the retrospectivity principles will be engaged.

Elias CJ I just wonder whether that's right in terms of your argument because the offence and the penalty will continue and it's only the circumstances of the particular offender will change. It changes by operation of law but I just wonder whether it's.

Horsley But in terms of that application it is deemed that children cannot, in terms of the principles under the UN Convention and how it's been interpreted into our law in terms of capacity, ie, mens rea then the offence cannot be committed because of a lack of mens rea but if you deem that children can have mens rea at a younger age then you engage the principles of retrospectivity and I'm not sure whether that came across clearly in my previous discussion with you.

Keith J It does in a general way though constitute a criminal offence doesn't it at the time that the child took the actions in question.

Horsley Yes it does, it does.

Gault J I think our Act says it cannot be convicted.

Horsley Yes Sir that is right and you can't be convicted of it and the reason for that is the protections that the UN Convention give to children.

Tipping J The reason for this is the Crimes Act says so.

Horsley Yes and effectively though that does follow the Convention as well. And perhaps just sort of refer back to another earlier point by Your Honour Justice Keith with respect to the US authority. That authority in terms of the imposition of a death penalty on children who are detained at the age of 18 or more to the point the prohibition on sentencing persons who committed an offence of murder prior to the age of 18 the recent US Supreme Court decision, and it's in **Roper v Simmonds** the US Court did not determine the inability to impose a death penalty on the basis of retrospectivity rather they determine it on a bridge of cruel and unusual punishment.

Keith J Their retrospectivity doesn't apply to sentences does it? I think it just criminal liability.

Horsley It applies to any ex post facto law so in a sense that a retrospective sentence as in a change of the legislation which increased the statutory maximum would be ex post facto law and it would have the same effect Sir, that would be deemed invalid under their Constitution as well.

Keith J I think my point in referring to that case was that they were focusing on the age at the offence at the time not any subsequent age.

Horsley Yes they did and that was despite a Statute that actually said that the death penalty could be imposed for anybody who had attained the age of 18, so rather than saying it was a retrospectivity issue there in terms of it should be taken back to the Commissioner of the date of the offence, they said no your problem here is. And perhaps that sort of ties in with the general submission that the Crown makes about the purposes behind s.4, and that is that it very much is limited in the Crown submission to situations where legislative changes have had these effects on people whether they be like in position of new offences or in our particular case in position of new penalties.

Gault J Can I ask you about that? About three questions actually Mr Horsley. I'm not sure how they tie together but in s.4(2) I understood you to say that to give the correct meaning to it in accordance with your argument we'd have to insert something like the words 'of a type that could not have been imposed'. Now are you also saying of a type that has been introduced so that it must also be new? How much are we reading in?

Horsley I think when I first made that submission Sir I did use the word 'new' and that is in effect what the Crown's submission is that you were talking about a penalty or sentence that is in fact different or new to what was available at that time.

Gault J I think I'd be helped if you could give me the words you think should be in there to bring out the meaning you contend for but don't do it immediately, I'd just be interested in that. My other question related to your drawing the analogy with s.8 and you suggested that somebody who committed a summary offence before the age of 16 but convicted after attaining that age could be sent to prison. How do the alternative interpretations of s.4(2) bear on that?

Horsley Sorry Sir do you mean my alternative interpretation?

Gault J Well there are two alternatives we've been presented with and I'm just wondering whether it makes any difference to that proposition on the application of s.8 whether you adopt one or the other.

Horsley Yes Sir in my submission it does. The submission put forward by the appellant is that the effect of s.4(2) is that you cannot have imposed upon you anything that could not be done if you had been sentenced at the very time that you committed the offence so if someone was 15 years of age s.4(2) would be read such that "I could not be sentenced to a term of imprisonment therefore despite the fact that I am now 17 years or 18 years of age I still cannot be sentenced to imprisonment. The only available sentencing options to the Court are those that were available when I was exactly the age of the commission of the offence". On the Crown's interpretation the penalty that was available

is in fact unchanged. It was still a term of imprisonment that was available. You look at the offender now, he is now aged 17 years of age and s.8 doesn't stop you from imposing a term of imprisonment on that person so the availability to the Sentencing Court will be imprisonment rather than some other youth based sentence, and of course when one extends that out or extrapolates that out to being much more of an adult when it is entirely inappropriate and unlawful to actually impose various youth sentences on that person, you are left with no options, you have no sentence available it would appear other than perhaps a fine, so that is the difference in effect that the Crown sees as given to the two interpretations.

Gault J Thank you. Finally I'm just going to ask you is it part of your argument that if the appellant's interpretation of 4(2) were correct, 4(1) wouldn't be needed at all.

Horsley Is it part of my argument Sir? No because for whatever reason despite the fact that we see an amalgamation of all of those subsections now into the Sentencing Act when s.4 was enacted there was a specific distinction drawn between maximum terms of imprisonment or maximum fines that may be imposed and then variations in the types of penalties that could be imposed, so they deal with two, perhaps three.

Gault J That's what I was wondering if 4(2) means any sentence as the appellant contends, not as you contend, why would you need 4(1)?

Horsley Yes Sir, sorry I mistook what you were saying but that is exactly right, you wouldn't need 4(1).

Gault J I can't see what purpose 4(1) would serve if the appellant is correct.

Horsley That is correct Sir and I'm sorry I misinterpreted what you were saying.

Gault J Yes thank you.

Tipping J I wonder if I could just build on my Brother's questions about s.8 Mr Horsley? Section 8 is a limitation as its heading suggests. What the Court can't do, what is inconsistent in reading 4(2) as a further limitation? I know this has a focus on time of conviction but that's expressed and it says that unless someone is 16 you can't imprison them except for purely indictable, but 4(2) read literally is a further limitation that doesn't necessarily cut across 8(1) at all.

Horsley Only to the extent Sir that if 4(2) is imposed not only as s.8 needing to be reworded to read something like no Court shall impose a sentence of imprisonment on a person who either at the time of conviction or at the time of the commission of the offence is aged under 16 except for a purely indictable offence.

Tipping J Aren't they here dealing with different concepts? The 4(2) is dealing with the idea that you can't get with prejudice to its precise meaning, you can't get sentenced more heavily or differently from what you could have been at the time of the offending. 8 is simply designed to demonstrate that unless it's purely indictable you can't imprison people who are at the time of sentence or conviction aged under 16. I can't quite see why s.8 gives you the assistance that's claimed for it. That's my hesitation at the moment, because it seems to me that it's fulfilling a different purpose and the focus on the date of conviction is quite explicable in that purpose but it doesn't really trench on the ambit of 4(2). Probably I'm not putting this very well.

Keith J It assumes doesn't it that there's a power to sentence this person somewhere else in the Statute book to imprisonment and that power has got to be read with s.4 in the first place and then with s.8 so assuming that the original sentence provision empowers imprisonment for this offence and for this offender then s.8 says no, if the person is still under 16 at the time of conviction so it's cumulative.

Tipping J Cumulative not disjunctive.

Horsley In my understanding the way that it would work would be the offence provision itself will set out the term of imprisonment or maximum term so that's our provision, it sets out what the penalty is. That may provide for imprisonment. Obviously for our purposes we have to assume that it does. If it is an offence of something not purely indictable say male assaults female for instance then if in the absence of any of these causes a 15-year old could be sentenced to imprisonment. Subsection 8, sorry s.8 says no if you are 15 you can't be sentenced to imprisonment but my learned friend would argue that the effect of subsection 2 of s.4 is that even after you have attained adult status because you could not have been sentenced to imprisonment when you were 15 years of age, you still cannot be. You can never be sentenced to imprisonment.

Tipping J Yes but that's an additional limitation.

Horsley But the effect of that Your Honour is that if that is right, you have left the offender stranded effectively in the Youth Court and you have only available to you those sentencing options that were available at the time that he was 15, and of course that becomes a nonsense if the person is 30 and we're talking about sending them off to a Family Group Conference or something like that, so in fact what happens is that the penalty which is why the Crown's interpretation with respect is to be preferred, and that is that it is only a change in the penalty that is prohibited by subsection 2 and that s.8 works effectively to stop you jailing under 16-year olds, but if you're 30 years of age you may in fact even be serving a custodial sentence, the option of imprisonment as an addition for that offending is available to you.

Gault J That nonsense as you describe it was expressly legislated for in the Children & Young Persons Act following **Edge** wasn't it?

Horsley In terms of the ability to.

Gault J That the person should face the regime that was in existence at the time of the offending.

Horsley That was in the District Court decision Sir.

Gault J No the Court of Appeal held the contrary that was an amendment immediately after the decision that I was looking at the other day.

Horsley I'm not sure Sir, I'm not sure how **Edge** effects that.

Gault J I think 2.2 of the Children, Young Persons & Their Families Act was amended after the decision which is one of the collections we've got.

Horsley Yes Sir, and in my understanding it was still available for a Sentencing Court to exercise the sentencing options.

Gault J It's only analogy but it does indicate an instance where public policy was legislated for.

Horsley Yes Sir.

Blanchard J I notice that in the Sentencing Act s.18 they've changed the policy, they've changed the age to 17 years but now the trigger point is the time of commission of the offence.

Elias CJ Yes and it's the same in s.80, again are you contending that that result is a nonsense, because your argument suggests that it is, the argument you've just been addressing to us?

Horsley I'm sorry Your Honour I'm not sure why my.

Elias CJ As I understood your argument you were saying it would be a nonsense to strand someone to be treated according to the regime in place when he was 15 if he came before the Court at the age of 30, but that is what s.80, I think it is s.80, the new preventive detention provision provides as I understand it and Justice Blanchard reported to you that that is what s.18 provides for also.

Horsley That provides for the availability of the option of sentencing to preventive detention now as at the age of commission of the offence.

Blanchard J And it's 18.

Horsley And it's 18.

Blanchard J So they've altered the ages and thereby increased the eligibility for imprisonment but they've recognised that it shouldn't depend upon the vagaries of when the conviction occurs.

Horsley Yes, although there's no discussion of that regrettably as to why that was done and.

Blanchard J Well it's pretty obvious it was done because it's unprincipled the other way. In other words it's been put to you by the Chief Justice before and I'm putting it to you now that what the Crown's arguing for is very unprincipled and that parliament has recognised this and changed it.

Horsley I think to the extent that that provides a greater degree of certainty and perhaps removes some of the anomalies that my learned friend has raised about delay between commission and conviction, yes it does. In terms of it being unprincipled, that was in fact the intention of parliament at the time Sir and that is why the Crown is saying to give effect to it. The only reason why it should be given effect to is if this Court accepts my learned friend's submission that s.4 in fact overrides the clear provisions of s.75 and 137 of the Criminal Justice Act to give it an interpretation which the Crown says was not that one which was intended, so with all due respect the principled nature of the argument is one which upholds an interpretation which the Crown says was quite proper of s.75 and 137 and equally one which recognises the purposes behind s.4 in terms of what it's trying to achieve in terms of retrospectivity and consistent now with s.25(g) of the Bill of Rights Act and s.6 which seemed to very much provide for variation in penalty between the commission of the offence and the convictional sentencing, and what the Crown are simply saying is that there has been no variation in the penalty available thus the sentence of preventive detention was properly applied. It may well be that the legislative drafting now in terms of bringing it back to the commission of the date of the offence is a tighter drafting, is perhaps even the policy reasons better drafting, but that's not to say that the clear intention of parliament at the time was not that one would be eligible for preventive detention if you were convicted at age 21 or above.

Tipping J Because you are surfing and I understand why that s.75 in isolation is quite clear, I wonder if you would bear with me Mr Horsley where I put to you something that's niggling at me, if you wouldn't mind just turning to s.75. This may sound a little semantic but I'd just like your help with it. Have you got it there in front of you?

Horsley Yes Sir.

Tipping J "This section shall apply to any person who is not less than 21 years of age and who either is convicted". Now if the 21 years of age were focused on date of conviction or sentence, wouldn't it be 'and has been' convicted? The present tense in 'is' suggests to me, at least

arguably, that is not less than 21 years and is then convicted. The tense is wrong if it is backward looking.

Horsley Perhaps Sir, but the Crown's submission is not that it's backward looking, it's that those two are contemporaneous and conjunctive. You're a person who is not less than 21 years and you're a person who is convicted of an offence, so the two present tenses that are used are actually.

Tipping J Conjunctive.

Horsley Yes Sir, that's why I suggested that in fact.

Tipping J Well it reads to me as though the draftsman has an eye to the date when sentence falls for decision.

Horsley That is perhaps taking us right back to the start where.

Tipping J Would you bear with me because I think that was your suggestion wasn't it?

Horsley My suggestion was that the only two possible interpretations could be conviction or sentence.

Tipping J Well to me if it has to be a choice between those two it reads more naturally as when you're considering what sentence to impose, because it is a question of whether or not someone is eligible for a particular sentence, so you're not considering that until you've actually already got a conviction.

Keith J And the reports.

Tipping J And all the necessary other bits and pieces. So at the date of sentencing you're asking yourself whether or not the person was 21 years of age, when you say if it was at date of conviction or today, the day of sentencing, wouldn't it be 'has been convicted'? Like its analogise to having been previously convicted, it's in the past conceptually. If your standing on the date of sentence which to my eye this is how it would naturally be read because the issues don't arise until your sentencing someone.

Horsley I think that's right that if you were, and I think this is why it fits in with s.137 Sir, because if you say to a Sentencing Judge as at the date of sentence you have to be 21 years of age so he is 21 years of age, then your argument becomes correct Sir, you would say then and he has been because you would previously have been convicted of an offence then it could well be read that 21 at the age of sentence is in fact the correct definition but because it says and is, sorry Sir.

Tipping J You're saying this is really all too subtle, one should read it more broadly than this rather semantic or tense orientated.

Horsley It is fairly subtle Sir and it's difficult because I have read this a number of times and I do understand the difficulty in interpreting between sentencing and conviction but the way that it seems to read most logically is a person who is not less than 21 years of age, so that's the first criteria, and is convicted, so those two things are conjunctive, they have to both be happening at the same time and that seems to fit with s.137.

Tipping J And I suppose if I'm right it should have been who was not less than 21 years of age I suppose but thank you I think I've satisfied myself Mr Horsley but there's probably not much in that. Thank you.

Horsley Thank you. So the basic Crown premise then comes back to one of we need consistency within the Criminal Justice Act, that consistency is achieved by the reading of s.4(2) that the Crown says is consistent with the principles of retrospectivity and particularly with that principle that retrospectivity is about certainty, and the Crown says because there's been no legislative change, no change to the penalties, then there is and was always certainty in terms of the imposition of s.75 and preventive detention. I would refer Your Honours to an article that I have put into the bundle and that is the **Atrill** article which is at tab 6 where **Mr Atrill** develops the principle with respect to underlying justifications for the principle of retrospectivity and it starts at page 2, the relevant parts, and the first influential factor is, or justification is the value that is placed on legal predictability, so a person ought to be able to choose whether he complies with the law or not and the second justification was as basically set out in the paragraphs here that of equality and basically it serves to protect individuals from vindictive legislation so that purpose of post expos facto law that attacks minority groups, or as the author says, groups unable to dominate the political or judicial branch of a government and the third principle is that the retrospective laws give procedural protections in terms of stopping punishments that were arbitrarily inflicted and this came back to a Bill of Attainer type argument whereby we are concerned about and perhaps **Pora** perhaps got close to that where we have retrospective legislation being passed because of specific persons or incidents that have occurred and the 4th factor is a factor that **Mr Atrill** identifies in American but not European context as that the clause cited above served to 4 to 5 a separation of powers. Now those general discussions of the principles fit very neatly in my submission with the general discussion albeit brief in **UK and Taylor** and if I could just refer Your Honours to page 7 of that decision, and the Court stated that it recalls in this connection that it has had occasion to stress in the contexts of its judgments under Article 7 that only the law can define a crime and prescribe a penalty from which it follows that an offence must be clearly defined in law. Importantly this condition is satisfied where the individual can know from the wording of the relevant provision if need be with the

assistance of the domestic courts interpretation of it what acts in omissions will make him liable and it would add for the purposes of the instant case, what penalties can be imposed. The Court then goes on to note that the offences of which the applicant were convicted were clearly defined in Statute and that Statute also defined the sentencing powers of the domestic Courts with respect to young offenders convicted of such offences as well as the age of the offender for the determination of a sentence. So effectively once you can reliably inform yourself of the procedures that will occur, Article 7 is not breached, its principles of retrospectivity are not breached.

Keith J But you can do that with certainty only if your taking a particular date, can't you and if you don't know how long the trial is going to take, you don't know how long the legal process, there is no predictability.

Horsley The Court in **Taylor** actually dealt with that argument Sir and they said with respect to the application contesting the charges against him, and that's the third paragraph on page 7, 'he must be considered to have taken a risk that the proceedings would evolve in a way which was favourable to his.

Keith J I think that must be unfavourable.

Horsley It should be unfavourable to his interests if eventually found guilty.

Keith J Yes but that's a risk, not something that's predictable. It's not as in my Brother Blanchard's case of someone committing the offence just a few days before and having a brief time when they might be able to plead guilty. This is a risk isn't it and this UK case took a little time and in that time he went pass the age of 15.

Horsley He did, he did.

Keith J So I mean you couldn't predict. There was no certainty at the moment of the committing of the offence.

Horsley Except that the state of the law was certain and that.

Keith J Yes but not in terms of what was going to happen to him, and if you go back to the top of the page can you really say that in terms of this business of getting advice what acts and omissions will make him liable, this is before he's committed the offence and they're adding, they're glossing, what penalties could be imposed.

Horsley Well the acts and omissions of course are the ability to take advice in terms of what is on the Statute books is what I'm proposing to do so that's the.

Keith J And what penalties can be imposed.

Horsley And what penalties can be imposed.

Keith J And that's not certain on your reading or on the **Taylor** Court's reading, so it doesn't fit with **Atrill's** first point.

Horsley I submit it does Sir, because.

Keith J It doesn't fit with equality either because a co-offender who was somewhat younger would not be subject to the penalty, this increased penalty and.procedural collections don't arise do they in these cases, nor does separation of powers, so the actual reasoning doesn't apply to help the **Taylor** Court.

Horsley Except Sir that I would argue that the certainty is there. You know when you've become eligible for a greater offence. The fact that there is some uncertainty as to what's going to happen with your trial process is a different issue altogether and that was one which was probably more amenable in my submission to the abusive process type argument.

Keith J But you can't make an abusive process argument in this case where the thing went reasonably smoothly didn't it? It didn't take very long.

Horsley Yes Sir and the abusive process was rejected but the other arguments about it in terms of fairness apply equally to an offender who is 21 years and one day versus a.

Keith J Oh no, the law draws lines and if you're on the wrong side of the line that's it.

Horsley That's correct Sir and to that extent anyway the Crown is simply arguing that it doesn't engage principles of retrospectivity in the sense of uncertain law or changes in the law more to the point between the time of the commission of your offence and the sentencing and/or conviction date, and that is the critical aspect of it Sir.

Keith J It doesn't mention justice as a justification for the principle which is surprising isn't it? Doesn't that go all the way back to **Hobbs** that's when the primary argument that people have made?

Horsley Certainty appears to be the primary argument Sir with respect to retrospectivity, it's not.

Keith J Not according to **Hobbs** I don't think. I mean just in terms of the guy who started this debate.

Horsley Yes Sir that may be the case and the justice of it does appear to be in the ability to know either what you're up for or whether what I'm doing is an offence and it is unjust to pass laws that change that status that you had at a certain time.

Tipping J Might it not be thought that the fundamental difficulty with **Taylor** is that they focused on the state of the law as an abstract rather than its application to the individual case. You won't agree with that, you'll say that that's perfectly conventional but that really is the difference isn't it? You can say that in the abstract the state of the law is entirely certain but how it's going to apply to your case at the time that you commit the offence is inherently uncertain unless you're locked in to the offence state regime.

Horsley There are more uncertainties, but the question becomes whether that breaches that principle of retrospectivity.

Tipping J No it's whether it reaches the principle, **Atrill's** principle of predictability.

Horsley It is predictable to the extent that you know that if you have not been convicted by the age of 15 as it is here or 21 as it is in our case.

Tipping J You know in the abstract but you don't know, the man in the cell is going to be more interested in how it's going to effect him than abstract jurisprudence. That's the difficulty I have at a conceptual level with **Taylor** that it seems to me to be all rather abstract.

Horsley And I suppose the answer to that is that is what the principle of retrospectivity is about, it's about categorising offences so that all persons who are a particular age or at any given time anybody can look up the law and know what they're in for. As to whether there are going to be.

Elias CJ It's not just about certainty of knowledge, it's about certainty of application and that's what you don't have here, and the case was put to you about a co-offender slightly older, slightly younger, but he might have a co-offender slightly older, he could have the offender that we're concerned with perhaps being convicted, taking the matter on appeal, the thing going back to retrial and ending up with an entirely different sentence than the sentence available to his co-offender. So it's not just certainty about knowledge, it's making sure that there's certain application, it's an aspect of equality.

Horsley That is a difficult proposition Your Honour because all that the Crown is saying is that the eligibility for a certain sentence might change but you know, you do know that your eligibility can change. You know when it will kick in and you know what will happen if it does or in terms of eligibility.

Elias CJ Then all retrospectivity in penalty is open then because you always know that the penalty can change.

Horsley No, no, sorry, that the penalty or availability for a certain option does change when I hit a certain date, so there is definite certainty here and it has to be remembered that it is only eligibility, we're not talking about mandatory imposition or anything like that, we are just talking about certain cut-off dates that you have to be able to identify and know when they will apply. You as a Court may think that it's regrettable that in the past we've defined things by date of conviction and that the present change to the Sentencing Act to define things by date of commission of offence is a better way of looking at it, but there is and was still certainty in that application. We know exactly when Mr Mist became eligible for preventive detention. It was when.

Gault J We're all going around in circles it seems to me being referred to **Taylor** of course. **Taylor** is directed to the wording of Article 7 of the European Convention which is the same as Article 15. Section 4(2) is not of that wording and what we're here to discuss is whether the difference in wording means a difference in meaning. I don't get any help from **Taylor** at all.

Horsley The only assistance that I would ask the Court to take from **Taylor** is that the Crown's premise has always been s.4 was intended to apply in Article 15.

Gault J Well how do we know that?

Horsley I think in **Morgan** this Court held that Sir.

Gault J We were talking about 4(1) which is in very different terms and did rest upon some international jurisprudence about what 'applicable' meant in Article 15 of the Covenant and that word 'applicable' is in Article 7 that **Taylor** was addressing, it is not in s.4(2). Now if they had intended to implement that different wording could have been selected. It happens that this particular wording was selected and we've got to try and give it meaning but it seems to me to beg the question to say that its purpose was to implement and only implement Article 15.

Horsley In terms of how Article, oh sorry, s.4 is to be interpreted, Article 15 provides an interpretative assistance. The submission is simply that subsection 4 is designed to prevent applications of retrospectivity. Those applications of retrospectivity have been examined in the context of Article 15 and Article 7. Those sort of interpretative analyses that have been applied the Crown submits are equally applicable to s.4 in order to give that a meaning which is consistent with other provisions within its own Act and in the absence of that sort of interpretation we are left with a fundamental conflict the Crown says between s.75, 137 and s.8 of the Criminal Justice Act, which is why the Crown impeaches upon this Court an interpretation which gives proper effect to those provisions and which is consistent with the interpretation given to Article 15. I recognise Sir.

Keith J The only case on Article 15 that you know about is **Taylor** is it?

Horsley I have not come across a single case where legislation has not changed and there has been held to be a breach of retrospectivity principles.

Keith J My question's around the other way. It's **Taylor** is the only case supporting this interpretation.

Horsley Taylor appeared to be on all fours Sir and was the case that I found.

Keith J Certainly at the top of page 7 suggests that it's a new case doesn't it? A new issue. And there's no interpretation of Article 7 by the Human Rights Committee at some point?

Horsley **Taylor** was the European Court of course.

Keith J Yes sorry I've got the numbers back to front. Article 15, is there any authoritative.

Horsley No Sir I haven't found an application on Article 15 but in my submission it is to all intents and purposes the same.

Keith J Thank you yes.

Elias CJ Mr Horsley I wonder whether subject to what my colleagues might want to put to you, I wonder really whether we have exhausted the argument. We understand the points that you're making to us, and we would find it helpful if you could address the question put to you by Justice Gault which was how you would read s.4(2), what words you would read into that for the purpose of believing what your contending for.

Horsley Simply.

Tipping J You put in any new type of sentence or make any new type of order I suggest.

Horsley I think it is as simple as that and that the words.

Gault J That is new and is of a type that could not have been imposed.

Horsley Or that is of a type it could not have imposed.

Blanchard J And omit the words against the offender.

Tipping J I don't think you'd need to do that.

Keith J It's really that did not exist.

Blanchard J You wouldn't satisfy me.

Keith J That did not exist you're really saying aren't you?

Horsley Yes I am and in terms of how we word that I'm.

Keith J Well it's pretty considerable surgery isn't it, so that in the fourth line it would say "to impose any sentence or make any order that did not exist at the time of the offence except with the offender's consent".

Horsley It's simply asking for a reading of the words "could not have imposed" as meaning "were not in existence".

Keith J Well it's, I think I put it to you earlier you were really saying the word "altered" from subsection 1 had to come into subsection 2, it's that idea.

Horsley In essence that is right. It's carrying through a legislative change in the penalties or sentences available.

Keith J And in terms of the argument about the heading for the section you really want to say 'new penal enactments not to have effect to the disadvantage of the offender'. Because as some of us indicated earlier you know I think the word 'effect' helps the appellant in this case.

Horsley It's difficult to see what assistance that has because as a basic premise we're simply saying penal enactments do not have retrospective effect to the disadvantage of an offender.

Keith J Yes but that could be an existing provision couldn't it. I mean you prefer words like 'new' or 'altered' or something rather than things that have a retrospective effect, that have a backward looking effect simply because of the passage of time in this case.

Horsley I would Sir but the head note didn't really apply or give the Court a great deal of assistance. I don't think it goes against my argument. It's interesting I think the exact same head note has carried through into s.6 of the Sentencing Act yet that is even if anything more clear as to what it's talking about in terms of retrospective effect, so.

Tipping J Well you seem to have managed to persuade the Court of Appeal that the heading did have quite substantial effect in your favour. Are you somewhat resiling from that Mr Horsley if that's not an unfair observation?

Horsley I'm not convinced Sir that I had a great deal to do with convincing them about that.

Tipping J You mean this is something that they generated for themselves, is that what you're suggesting.

Horsley Well I'd be hesitant to divorce myself from all responsibilities Sir but it's not something that was heavily relied upon as I can recall by the Crown and certainly not in written submissions. At that stage there was a recognition, well this section was of course in force before the Interpretation Act theoretically at least headings, marginal notes were not necessarily interpretative aids and so to that extent it wasn't relied upon heavily at all. But other than that I'd commend the Court of Appeal's decision too Your Honours.

Elias CJ Well you don't disagree do you with the suggestion that the particular offender in this case is disadvantaged by the interpretation that you contend for?

Horsley He's become eligible for a sentence which is a more disadvantaged sentence, yes that's right. As to whether he's disadvantaged by operation of s.75(137) I would say no because those were always there and he knew about that.

Elias CJ I mean it occurs to me that the heading could equally have read "penal enactments not apply retrospectively to disadvantage of offender". I mean you're still left with the issue which we've been debating as to whether this is retrospective application.

Horsley Yes.

Elias CJ And your argument is simply no there has to be a change in the substantive law to achieve a relevant retrospective effect?

Horsley Yes, yes it is, and that particularly that there's no conflict between s.4 and s.75, given proper interpretation.

Elias CJ Yes. Any questions.

Horsley I'm not sure if I can assist the Court any further.

Blanchard J Yes you can. Mr Horsley if the Court were to be of the opinion that preventive detention was not available should the matter go back to the Court of Appeal?

Horsley I think it has to Sir because the issue of the finite sentence was never fully resolved. Unless there are further questions from the Bench those are my submissions Your Honours.

Elias CJ Yes thank you. Yes Mr Lithgow, do you want to be heard in reply?

Lithgow I'm just a little bit taken back now by the suggestion it should go back to the Court of Appeal because in our original application for leave we sought to argue the underlying premise that prevented detention or any

other sentence should be imposed and were not permitted to do that so I thought that that had.

Tipping J Sorry I don't follow you. Surely your client can't have it both ways. If preventive detention is not available and the Court of Appeal were wrong, the Crown is entitled isn't it to pursue the second leg of its appeal, that it was too short a sentence.

Lithgow Well in fact most of the decision is devoted to a consideration of the other propositions which I haven't put before Your Honours, about the effect of what occurred the night, the evening before the hearing, and that is the passing of the extended supervision regime which the Court set out in some detail allows for extended supervision for I think up to 30 years because of his sentence that he got and they set out there and in fact that is good law and being quoted on extended supervision for in the absence of preventive detention that's an entirely appropriate way to deal with it.

Elias CJ But they didn't resolve the Crown's appeal on the alternative basis.

Tipping J They didn't have to did they because they didn't reach the point.

Lithgow Well can it go back to the Court of Appeal in any event because we can't have the same Judges.

Elias CJ That doesn't matter.

Tipping J If the Court of Appeal should have found that Justice Neazor was right then I can't see how the Crown can be prevented from asking the Court of Appeal to examine its alternative submission.

Keith J And the Court has set aside hasn't it, the Court of Appeal has, the 16 years imprisonment.

Lithgow And the other reason why that would seem extremely limited usefulness would be that at 106 the Court accepted that the minimum non-parole period of 10 tens was appropriate.

Keith J Yes but that goes doesn't it? There's no preventive detention sentence and the 16 years has been quashed, what does the minimum term hang on to.

Lithgow Why is the 16 years quashed.

Keith J Well it says so. Paragraph 109.

Tipping J At the moment there is a warrant under the hand of a Judge of the Court of Appeal supporting preventive detention. If we say that wasn't on either we or the Court of Appeal have to substitute something for it otherwise there will be no warrant at all.

Lithgow Well if I've misread that, is there another sentence somewhere?

Keith J But in any event the Crown hasn't had a go. It hasn't had a decision rather on this second.

Elias CJ We don't have a decision to review. Really Mr Lithgow by all means take a bit of time to think about it but I can't see any other possible outcome if we were to allow the appeal.

Tipping J I would have thought this point would have been anticipated.

Lithgow I can promise you that it wasn't.

Tipping J What did you think was going to happen Mr Lithgow if your client won the appeal, that we were just going to reimpose the sentence under appeal in the Court of Appeal and the Crown would have lost any opportunity to challenge its length. Is that what you thought would happen?

Lithgow Well I thought that it would be covered by 2(A), that on an appeal to the Supreme Court against sentence, where the Supreme Court thinks a different sentence should have been passed it shall either quash the sentence passed or pass such other sentence warranted in the law and substitution thereof. I haven't looked at it. I've missed where it says you can remit it back to the Court of Appeal for them to have another go at it.

Blanchard J Well that would mean then that we undertake a sentencing exercise.

Lithgow Which is what I had invited Your Honours to do in the leave application and that was.

Tipping J There must be par somewhere in the Act to remit a point to the Court of Appeal, I'm sure there is.

Gault J Yes, I'm sure there is.

Blanchard J I don't know that I for one interpreted what you were seeking in the leave application was that.

Lithgow Well it had not occurred to me, bearing in mind the limitations of the appeal that it could because Your Honours would determine that, well it's an appeal against sentence and it's.

Blanchard J What are you reading from?

Lithgow 385(2)(A).

Blanchard J Of what?

Lithgow Of the Crimes Act because in relation to ordinary appeals you can quash the conviction, direct the judgment.

Elias CJ Section 26 of the Supreme Court Act isn't it?

Lithgow Or direct a new trial. I see 26 there but I would be reluctant just to assume that that created the power to remit a sentence a sentence appeal back to the previous Appeal Court but that may.

Blanchard J Why not. The Supreme Court can also remit a proceeding that began in a New Zealand Court to any New Zealand Court that has jurisdiction to deal with it. The Court of Appeal's got jurisdiction.

Tipping J And the only reason it didn't get work because it took a different view on the hypothesis we're discussing.

Lithgow I think I would prefer to lay all the books out on the table and have a bit of a think about that because.

Elias CJ Well Mr Lithgow you can put in a memorandum if you come up with any compelling reason to suggest that we couldn't follow that course. I'm very grateful to Justice Blanchard for raising the point because quite frankly I had thought beyond argument and so haven't thought to raise it with you. Now do you want to be heard on anything else in reply?

Lithgow Yes thank you. Now the first matter is first of all attempting to achieve consistency, internal consistency the Crown said with the Criminal Justice Act which of course has been the subject of a number of decisions of the Court of Appeal. It had said the Criminal Justice Act of all Acts was one of the ones that had very many internal inconsistencies but looking at s.137. Section 137 is simply a miscellaneous provision to fix a problem and the expression invalidated I suggest is directed solely at the problem of warrants and warrants of imprisonment and all the things that go with a so-called invalid sentence to simply create a chain of validation but equally does not for one moment attempt to hold on to a sentence that has been wrongly imposed. Strangely and long before the.

Tipping J The force of 137 from Mr Horsley's point of view in its specific reference to preventive detention is that it appears that the relevant age is the age at the time of conviction. Now how do you deal with that?

Lithgow Well it tells you how to fix one.

Tipping J No, no, it's not a question of fixing it, it's a signal that you judge age for PD purposes as at the date of conviction.

Lithgow Well it is one indicator but it's only dealing with one variation as to why the sentence may be wrong relating to age and that is it may be wrong related to age at the time of conviction and of course this section pre-dated.

Tipping J But your submissions is that age at the date of conviction isn't the issue, it's age at date of commission. Mr Horsley says well look here's 137 it clearly indicates that when you're dealing with PD it's age at date of conviction. It's a pretty good point. There may be an answer to it but the Court of Appeal didn't develop this at all they just made a passing reference to it.

Lithgow Well that's because it can't possibly define another section. It may be an indication as to something but a miscellaneous provision related to fixing the kind of mistake that occurs and which is a improved version on sentence or process without jurisdiction.

Tipping J Is your submission effectively that it cannot prevail over s.4(2)?

Lithgow No.

Tipping J You say no.

Lithgow Well no, it's subject to 4(2) just like anything else.

Tipping J So that is your submission?

Lithgow Yes, only because 4(2) says it is and it's under the general.

Tipping J I'm just trying to get to the.

Blanchard J What this seems to be saying is that where some sort of mistake has been made about the age of the offender and a sentence has been imposed that shouldn't have been imposed it's valid but there's every opportunity for an application to get the matter sorted out.

Lithgow And it must be sorted out if the applicant is the offender.

Blanchard J Yes.

Lithgow Which pre-dates European jurisprudence.

Blanchard J But in the meantime he could get habeas corpus.

Lithgow Because he hadn't exhausted that.

Blanchard J Well because s.137(1) says that this sentence is not invalid by reason of the fact that a mistake has been made in his age.

Lithgow It's just a simple method to fix it and it was also in the 54 Act and, well there is a reference to the 48 Act but I don't know what that says.

Tipping J You see subsection 2 similarly suggests that the relevant date for the age in the context of preventive detention is the offender's age at the time of conviction.

Lithgow Which section sorry.

Tipping J Subsection 2 of s.137, but the only answer to this I would have thought is that this can't prevail against 4(2).

Gault J The only reason you referred to it is by way of confirmation of an argument that without 4(2), s.95 applies at the date of conviction.

Lithgow Which may be right which is an argument I said at the beginning I thought was right but I'm open to other interpretations.

Keith J And as my brother said very early in the day 4(2) operates notwithstanding this provision in terms of its opening words.

Lithgow Yes, now **Baker**, which was a case that the Crown referred Your Honours to and I invite you just to turn to tab 2, page 61 of **Baker**.

Elias CJ Is this a new point now?

Lithgow This is a new point. I just say 137 is just an administrative section it doesn't define anything other than a pathway to fix something up. Now **Baker** which the Crown asserted at page 61, the Fundamental Rights and Freedom's Provisions of the Constitution of Jamaica, s.20(7) as being equivalent to 2.4(2) I invite you to simply highlight the provision and see that it is not equivalent to s.4(2), even if the case was in any other way endearing, it is not like 4(2) because it talks about generic offences and also like our Bill of Rights Act it doesn't purport to override previous provisions where our s.4(2), as we've been through so many times, notwithstanding any other enactment to the contrary. So even if a New Zealand Court found the reasoning narrative in **Baker** useful, which I advise you not to, because it's a disgrace then.

Tipping J That's hardly appropriate advocacy Mr Lithgow, really.

Lithgow Well how can it be, how can we have.

Tipping J You can say it's wrong, but to say it's a disgrace, really, I think we've got to try and preserve some sort of .

Lithgow To hang a child, what other word is there for it.

Tipping J Alright, alright, I just indicate some displeasure of that sort of advocacy.

Lithgow Well of course the relationship between the Privy Council and the problems that arise by the Statutes of the Caribbean have caused enormous ill-feeling in all kinds of different ways.

Blanchard J Well we don't need to be dragged into it.

Lithgow And to some of the language of their own decisions is at least as strong as that. But then the decision of **Taylor** has been well thrashed out, the decision of **I**, the New Zealand case of **Judge Strettell**, obviously follows the propositions, neither of them binding on this Court obviously. Now the certainty I say is created by the date of the offence because that's what gets set in concrete and uncertainty is created by allowing other dates to come in. It should be remembered with respect that the Criminal Justice Act has been changed from time-to-time but it hasn't always tried to make things harsher so we shouldn't assume always that provisions are intended to not be protective. There have been periods when the criminal justice has been amended and s.4(2) was put in at a time in just such a phase and there were in Hansard people who scoffed at the propositions that it should follow the charter, and when the age was lowered for preventive detention but the opposition were suggesting there should be no lower age limit, so certainty is important when parliament has got it's own tumult to deal with. The s.8 argument as to whether or not s.8 is covered by s.4(2) is set out in my submissions para.75, 76, 77, and 78 and fundamentally the proposition is that s.4(2) does cover that and when one looks at the Criminal Justice Act in context as we are exhorted to do, during that period of the Act, although it had many complications, we had s.6, 7, sorry we had s.4 was a limitation on imprisonment, 5 was a requirement to imprison except for special circumstances, 6 was a limitation on imprisonment, 7 was a limitation on imprisonment and 8 was a limitation on imprisonment so they're all the general propositions in one part of the Act that says for example you can get 7 years for forgery and another part of the Act that says you can't be sentenced to imprisonment for a non-violent offence unless in special circumstances, and another part that says and you can't get it if you couldn't have got it at the time you did the deed. So I at all times reject the proposition that those general sections somehow imply repeal, or erode or damage or do any other unlaw-like activity to s.75, they just have to be read together because that is the law. Now there was a brief discussion about why it was that it was at the election of the offender that election also appears in the correction of sentences due to mistake in age, it's consistent generally with that kind of protection and right that it could be waived and of course there could be all kinds of reasons because we don't know what kinds of sentences may impact on different people in different ways. Some people may be willing to waive one provision that deals with a time element in return for a greater harshness and we just can't say but there's nothing

determinative about the power to waive. The English jurisprudence generally has the problem that the cases that are cited that retrospectivity and certainty of law is not something inherent to the English law because of their common law offences which were not permitted to lend to New Zealand once the **Stevens** code got going, but still there can be people who are convicted of offences which have never been written in black and white anywhere in England but that's a concept which the English law is evolving out of because of European jurisprudence but we've always accepted that that wasn't permissible, so **Lord Roger's** article etc, where it toys with these ideas is simply throwing about the ideas of the English legal system. Now the proposition then about children committing offences is illustrative because with respect has very little to do with the European Convention or the UN Convention because these sections are pretty much the same as they were in the 1908 Act only the dates have changed, nor do they all deal with an understanding. The first proposition is children under 10 "no person shall be convicted of an offence by reason of any act done or admitted by him when under the age of 10 years".

Elias CJ Section?

Lithgow Section 21. Subsection 2 says "the fact that by virtue of this section any person has not been or is not liable to be convicted of an offence shall not effect the question whether any other person who's alleged to be a party to that offence is guilty of that offence" and so it does starkly raise the problems that the analysis that the offence is there, only status is shifting and changing, does make you wonder how set in concrete 21 is but we would assume that it had to be protected and the person growing older could not possibly be modified by a change in another law. Now of course s.22 dealing with children between 10 and 14 does deal with understanding of acts and omissions being wrong and has a greater flexibility but the reasoning that the Crown give that where a offence exists but personal status questions change, is not a retrospective problem and my submission is by submission is wrong. Justice Gault's question and repeated by Your Honour the Chief Justice about how 4(2) would have to be read has been set out or attempted in our para.74 where it's given a go and we put without limiting subsection 1 of this section except as provided in sections 152(1) and 155(1) but notwithstanding any other enactment or rule of law to the contrary where a penalty of a different nature has become available between the time when the offender commits the offence and the time when sentence is to be passed, the sentence imposed should be a penalty of a nature that may have been imposed when the offender committed the offence, unless the offender consents, but it doesn't say that, and as we set out in para.75, the most significant proposition, putting aside offenders specific or generic is that the word 'alter' has not been used and I say it all gets back to a misunderstanding as to what the word 'retrospective' covers.

Gault J I also wondered about the inclusion of the opening words in subsection 2 without limiting subsection 1, how on earth should it limit subsection 1 on your own interpretation?

Lithgow I don't know how it could but I took it to mean if you're covered under 1 then you don't need to read on. That's about all but I can't think of a circumstance where something covered by 4(2) would somehow clash with 4(1).

Keith J Well it's cautious drafting isn't it? You get the sense of the people involved with this trying to make it absolutely clear that it's not going to be retrospective disadvantageous effect.

Lithgow In any way, shape or form one might think. Well I hope so. Just dealing with s.8 and being 'stuck' as it was called in the Youth Court and without trying to unravel the whole thing, s.2, something subsection 2 related to "where proceedings are being considered or have been taken in respect of any offence allegedly committed by a person when that person was a child or young person, the age of that person at the date of the alleged offence shall be that person's age for the purpose of" then it's got various provisions and they do become quite complicated and it wasn't resolved in the Court of Appeal decision so parliament has had a go at covering every variation and it's not simply.

Tipping J At s.2(2) of what Mr Lithgow?

Lithgow Well it shows on the screen as 2(2) but it's a definition section of the Children, Young Persons & Their Families Act. Again with respect to Justice Gault's proposition 3, if the Crown argument was correct that would beg the question as to what s.4(1) was for.

Gault J I think it was the other way round. If your argument were correct there doesn't seem to be any need for subsection 1.

Lithgow Well that may be correct. The questions of the extra limitations in s.6, 7 and 8 were covered. I do support the propositions discussed that what the Crown are arguing for has the difficulty that they characterise it as some kind of failing of a criminal control system but that in itself their propositions are unprincipled mainly in the sense that the modern ideas of certainty and consistency are directly undermined. So whilst asserting that they are achieving consistency and certainty, in my submission they achieve a greater uncertainty, an inconsistency, because it attaches sentences liability to a date uncertain, whereas the s.4(2) provides a simple protection for a date certain. Your Honour Justice Tipping looked at s.75 again with a fresh eye starting again from the beginning, we've been dealing with the proposition that this was an amended in 1987, sorry 1993 that must be, **Mr Mist** is convicted of a single qualifying offence, didn't need a pre-requisite offence but Justice Tipping looked at the proposition where it looks at

a pre-existing, so looking at the old words "this section shall apply to any person who is not less than 25 years of age and who having previously been convicted on at least one occasion since that person attained the age of 17 years of a sexual offence is convicted of another sexual offence" and then it says "being an offence committed after that previous convicted" and the grammar being in the tense of a Sentencing Judge that that also, although it doesn't need to be decided, may leave open the question as to what s.75 really meant to attach its self to in any event.

Tipping J Are you reminding me of that simply to ruminate on the fact that I tended to abandon the thought or do you have some more subtle purpose Mr Lithgow.

Lithgow I'm sorry I missed that Your Honour.

Tipping J I'd rather talked myself out of it if perhaps you didn't quite catch that nuance.

Elias CJ It may be a good idea not to talk him back into it.

Lithgow Because of the way the Act is being mucked about with, there is quite a bit of grammar that's available to try and give it a go but in my submission that's probably because it's not a one-draft person Act, it's probably not the most fruitful method. The Crown's proposition that an offender in the circumstances of this case could look up the law and know where they stood, I am breathtakingly generous to the defence who would have to give that advice because I support the proposition that the only thing that's certain is the date you committed the offence.

Blanchard J I'm surprised that **Mr Mist** was unaware of the observation of the the Marschallin in Der Rosenkavalier

Lithgow Yes, although that would be retrospective being a German populist song from the turn of the Century before last but no doubt popular in Palmerston North, but again translation problems.

Blanchard J Populist song, what, a populist song?

Lithgow Der Rosenkavalier isn't it a populist opera.

Blanchard J Hardly.

Lithgow Not. Wrong?

Blanchard Richard Strauss.

Lithgow Yes well wasn't he a.

Blanchard It's not populist.

Lithgow I thought that was Strauss's reputation but never mind.

Blanchard J It's not Johann, it's Richard, one of the great composers.

Elias CJ Sorry Mr Lithgow, what further points.

Lithgow That just would not have been certain and the decision in **Taylor** glosses over all that but it is a direct attack on the other rights under the Bill of Rights Act as one catalogue of rights for an orderly resolution of criminal process against you when you get a lawyer to look through it all, decide what you've done, what you're at risk of, what you're options are but I submit that it is the opposite of certainty if your penalty which as subsection 3 I think of s.4 of the Criminal Justice Act says is the longest penalty available. Subsection 4 "for the purposes of subsection 1 of this section a sentence of preventive detention shall be deemed to be a sentence of imprisonment for a term equal to the maximum period for which the offender may be detained pursuant to the sentence". So if you get that sentence you've received the maximum. I don't think the split second timing of the committing offences in the Chatham Islands is the, I don't think only those extreme examples are the warning signs, there are a number of, and always will be, a number of anomalies and lacunas which arise under whichever way it is interpreted, but obviously if the Crown's interpretation is correct then there would be other lacunas I think under the new Sentencing Act if the offences were committed when you were under 18 because under the new Sentencing Act the date of the commission of the offence is now the operative date so deciding it one way or another doesn't remove any people that may have achieved some advantage from a particular set of times and dates so in my submission it would be wrong to try and fix it on the basis that as the Crown put on the basis that it somehow the hiatus, and that that is something because parliament never seeks a hiatus or a lacunas, something to re-write the words of s.(4(2) in order to achieve a purpose as I think the Court of Appeal attempted to do, the purpose of a unbroken transition. By going right back to the very beginning it is the proposition at s.4(2) notwithstanding any other enactment or rule to the contrary "has no room to move" that's what it says, it's a reasonably common form of words, it appears in the Crimes Act and in other Statutes and that's what it means.

Elias CJ Thank you Mr Lithgow. We will reserve our decision in this matter. Thank you all counsel for your assistance, and Mr Lithgow if you want to put in a memorandum when you thought about matters you may do so and of course Crown will respond but I think perhaps when you think it through you may find it unnecessary.

Lithgow That's fine. I will notify by the end of next week whether I intend to file anything one way or the other. Is that suitable.

Elias CJ Could you have an indication by the end of this week? It would help us if you could.

Lithgow I'm going away with the Bar Association on Thursday so that would be difficult.

Elias CJ Well do your best Mr Lithgow. Thank you.