IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA560/2019
[2021] NZCA 692

BETWEEN	BILLY MARK MATARA Appellant
AND	THE QUEEN Respondent

Hearing: 8 November 2021

Court: Miller, Goddard and Katz JJ

Counsel: A J Ellis for Appellant
J E Mildenhall for Respondent

Judgment: 16 December 2021 at 2.00 pm

JUDGMENT OF THE COURT

A An extension of time to appeal is granted.

B The appeal is allowed.

C The sentence imposed in the High Court is set aside.

D Mr Matara is sentenced to imprisonment for a term of 10 years and two months with a minimum period of imprisonment of 40 per cent.

Table of contents

REASONS OF THE COURT

(Given by Goddard J)

Introduction

[1] Mr Matara was convicted of attempted murder following trial at the Auckland High Court.[1] On 11 September 2017 he was sentenced by Courtney J to 10 years and two months' imprisonment.[2] This was a "second strike" offence for the purposes of s 86C of the Sentencing Act 2002: in March 2012 Mr Matara had received a first warning under s 86B of the Sentencing Act following a conviction for aggravated robbery. Section 86C(4) of the Sentencing Act required the Judge to order that Mr Matara serve the full term of the sentence, and that he serve the sentence without parole.

---

1 Crimes Act 1961, s 173(1): maximum sentence of 14 years' imprisonment.

2 *R v Matara* [2017] NZHC 2198 [Sentencing notes] at [18]–[19] and [22].

[2] The Judge recorded, as required by s 86C(6), that but for the application of s 86C she would have ordered that Mr Matara serve a minimum period of imprisonment (MPI) of 40 per cent of the sentence imposed: that is, an MPI of four years and 24 days.[3]

[3] Mr Matara sought leave to appeal to this Court out of time against both his conviction and his sentence. He subsequently abandoned his conviction appeal. The sentence appeal turns on the implications of the recent decision of the Supreme Court in relation to sentencing of third strike offenders in *Fitzgerald v R* for the sentencing of second strike offenders.[4]

[4] As the Crown accepted, the Supreme Court decision in *Fitzgerald* establishes that the three strikes regime is not intended to prevail over s 9 of the New Zealand Bill of Rights Act 1990 (NZBORA). It follows that second strike sentencing must not be inconsistent with s 9. In light of *Fitzgerald*, we consider that s 86C(4) of the Sentencing Act must be read as subject to an unexpressed qualification that it is subject to s 9 of NZBORA. A Judge is not required to order that a second strike sentence be served without parole if making such an order would be inconsistent with s 9 of NZBORA because it would result in a punishment that is disproportionately severe.

[5] We consider that a sentence of 10 years and two months' imprisonment to be served without parole amounts to disproportionately severe punishment, in circumstances where:

(a) The sentence that would be proportionate and sufficient to meet all of the objectives of the Sentencing Act would be a sentence of 10 years and two months' imprisonment with an MPI of 40 per cent. A more severe sentence is not justified by reference to any of the statutory purposes of sentencing,[5] and is disproportionate.

---

3 At [21].
4 *Fitzgerald v R* [2021] NZSC 131.
5 See Sentencing Act 2002, s 7(1).

(b) The sentence means Mr Matara loses the ability to apply for parole after some four years and denies him the opportunity of release on parole for a further six years. The sentence requires his continued incarceration for an extended period even if he is rehabilitated to the point that he no longer poses a risk to the safety of the community. And it deprives him of opportunities for rehabilitation that would otherwise have been available to him.

(c) The first warning that Mr Matara received in 2012 does not provide a rational justification for requiring Mr Matara to serve a further six years of imprisonment without the opportunity for parole and access to rehabilitation services in the early years of his sentence, in particular having regard to his mental illness and psychosis.

[6] It follows that the Judge was not required to order that the sentence be served without parole. That order should be set aside, and replaced with an order that Mr Matara serve his term of imprisonment with an MPI of 40 per cent.

Background

The offending

[7] In May 2016 Mr Matara had been living in a boarding house in Mangere East for about two months. The victim, Mr Hingaia, was a resident at the same boarding house. Mr Matara did not know him particularly well. In the early hours of 7 May 2016 Mr Matara went into Mr Hingaia's room and woke him. He asked him to come outside onto the deck for a smoke. Mr Hingaia noticed that Mr Matara had a pump-action shotgun with him. He thought that there was something a bit out of place, but said nothing. The two men sat on the deck and talked for a while. There was no argument between them.

[8] After some time Mr Hingaia went inside to the kitchen. Mr Matara followed him. When Mr Hingaia turned around he saw Mr Matara standing just outside the kitchen door, about four metres away. Mr Matara was pointing a gun at him.

Mr Matara did not say anything but shot Mr Hingaia in the torso, and a few seconds later shot him a second time. Mr Matara then ran from the house.

[9] Mr Hingaia was very badly hurt. He experienced physical disability, the result of damage to his intestines, which his victim impact statement indicated may prove to be lifelong, along with mental harm which is likely to endure.

Mr Matara's mental health at the time of the offending

[10] On 15 April 2016, three weeks before the attack on Mr Hingaia, Mr Matara went to the Manukau Community Health Centre at the urging of his partner. She was very concerned about Mr Matara's erratic thoughts and behaviour, including feelings of paranoia, auditory hallucinations and random thoughts of harming people. This behaviour seemed to be exacerbated by the stresses Mr Matara was under during the preceding six months or so: his mother had died; he had not been able to care for his children and have them stay with him because he could not find appropriate accommodation; he was unhappy in the boarding house; his relationship with his partner was breaking down; and he was struggling with life outside prison and using methamphetamine.

[11] Mr Matara was seen by a treating psychiatrist, Dr Ellis. In a statement to the police Dr Ellis recorded Mr Matara telling her about the auditory hallucinations and that he was using methamphetamine. She noted that Mr Matara was displaying auditory hallucinations, paranoid delusions and loose thought associations. She gave a broad diagnosis of "psychotic disorder not otherwise specified". That is a generic diagnosis sometimes given to a person who displays symptoms of psychosis but cannot be formally diagnosed due to recent drug use. She prescribed an antipsychotic medication.

[12] The Judge recorded in her sentencing notes that she did not know whether Mr Matara was taking the prescribed antipsychotic medication at the time of the offending. Nor did she know how recently Mr Matara had used methamphetamine

prior to the offending, though it appeared from his partner's statements to the police that he had been using the drug in the weeks beforehand.[6]

[13] A consultant forensic psychiatrist, Dr Cavney, examined Mr Matara in May 2017 for the purpose of assessing fitness to stand trial and the possibility of an insanity defence. Mr Matara did not engage with the psychiatrist. But based on the information available to the psychiatrist, including statements given by Mr Matara's partner and by Dr Ellis, the psychiatrist expressed the view that Mr Matara:

> … demonstrated clear evidence of psychosis that likely had [its] onset before the … offending. It is also probable that Mr Matara was acutely psychotic at the time …

Previous offending

[14] Mr Matara has a long list of more than 100 previous convictions. They are almost all for non-violent offending, including a substantial number of driving offences, some dishonesty offences, and breaches of community work conditions. His record also includes some assaults at the lower end of the spectrum.

[15] However in 2012 Mr Matara was convicted of an aggravated robbery committed in 2010, for which he was sentenced to four years and nine months' imprisonment. Mr Matara received a first warning under s 86B of the Sentencing Act following his conviction for this offence.

High Court sentencing

[16] The Judge adopted a starting point of 10 years' imprisonment for the attempted murder.[7] That was the starting point proposed by Mr Matara's then counsel, Mr Mansfield. The Crown had suggested an 11-year starting point.

[17] The Judge accepted that Mr Matara was most likely psychotic at the time of the offending, at least as a result of methamphetamine use, but possibly as a result of some other underlying disorder as well or instead. The Judge took this into account

---

6 Sentencing notes, above n 2, at [11].
7 At [18].

in assessing Mr Matara's culpability, and in particular in assessing the offending as not being premeditated.[8]

[18] The Judge imposed an uplift of two months for the aggravated robbery in 2010.[9]

[19] There were no personal factors that could reduce the sentence.[10]

[20] The Judge then went on to deal with the consequences of the fact that this was a second strike sentencing. She said:

> [20] … Because this conviction is a stage 2 offence you must serve the sentence, which will be ten years and two months without parole or early release.
>
> [21] Although you will be required to serve the full term of that sentence I am nevertheless required to indicate whether and, if so, what minimum period of imprisonment I would otherwise have imposed. I think that it is clear that had the issue of parole been live, and given the seriousness of the offence and the effect on the victim, a minimum period would have been required and I would have regarded a period of 40 per cent as appropriate.

[21] In passing sentence the Judge made the following observations:

> [22] … All of what I have just explained adds up that you will be sentenced to ten years and two months for this offending. I hope that as you sat and listened to what your counsel said today you understood and accepted many of the points that he made. You have clearly had a really difficult life. It is to your credit, I have to say, that there is hardly any violence in it and it is a great shame that you have committed this offence and it has been so serious. And I recognise that some of your offending started way, way back. You have got a lot of Youth Court offences. And I recognise that that is the hallmark of a really disrupted childhood and difficult life and Mr Mansfield has urged you, even at this late stage, to take steps to do what you can to make things better for yourself and probably the drug use is the one thing that would make the most difference. So I have had to sentence you today to a non-parole sentence, which is a high one. If things were different I would not have done that. But I urge you to do what you can in prison to make [your] life better. …

---

8 At [15].
9 At [19].
10 At [20].

Extension of time to appeal

[22] Mr Matara's appeal was filed almost two years out of time. The delay is to some extent explained by Mr Matara's mental health issues. But in any event, as the Crown acknowledged, whether or not an extension should be granted in this case turns largely on the merits of the appeal.

[23] Because we consider that the appeal has substantial merit, we grant an extension of time to appeal.

Submissions for Mr Matara on appeal

[24] Mr Ellis, counsel for Mr Matara, focussed on the implications of *Fitzgerald* for second strike sentencing. He submitted that s 86C(4) must be read subject to the same unexpressed qualification as s 86D(2), namely that the subsection is subject to NZBORA, and s 9 in particular.[11] On that approach, he submitted, Mr Matara's sentence was so disproportionately severe that it was inconsistent with s 9 of NZBORA, in particular having regard to Mr Matara's mental illness and psychosis (a factor emphasised by the Supreme Court in *Fitzgerald*).[12]

[25] Mr Ellis submitted that at the least, this Court should determine that Mr Matara is subject to an MPI of four years and 24 days before being eligible for parole, and is not required to serve his entire term of imprisonment without parole.

[26] Mr Ellis went on to argue that if Mr Matara had received an MPI of four years and 24 days, he would already be eligible for parole. That eligibility would have meant that he would have been offered appropriate rehabilitative courses. But because he has not been treated as eligible for parole, he has not received rehabilitation support, and his detention has been unfairly extended as a result. The appropriate response on appeal, Mr Ellis submitted, should be a sentence of imprisonment of four years and 24 days, with the result that Mr Matara should be immediately released.[13]

---

11 *Fitzgerald* (SC), above n 4, at [220] per O'Regan and Arnold JJ.

12 See for example, [82] and [141] per Winkelmann CJ, [167] and [231] per O'Regan and Arnold JJ, [252] per Glazebrook J and [324(d)] per William Young J.

13 Referring to *Mills v HM Advocate* [2002] UKPC D2, [2004] 1 AC 441.

Submissions for Crown on appeal

[27] Ms Mildenhall, counsel for the Crown, submitted that the Supreme Court decision in *Fitzgerald* is not directly applicable to sentencing under s 86C and should not alter the established approach to sentencing under that provision. *Fitzgerald* was concerned with mandatory sentencing under s 86D of the Sentencing Act, which deals with mandatory sentences imposed for third strike offences. By contrast, s 86C does not dictate a mandatory sentence. This Court has, on a number of occasions, considered the scope of sentencing discretion and relevant considerations under s 86C. In *Barnes v R*, this Court said that for second strike offences (other than murder) "the normal sentencing approach applies".[14] This Court confirmed that in "exceptional cases" the loss of parole could be taken into account in determining a second strike sentence, to avoid a manifest injustice.[15]

[28] Ms Mildenhall accepted that *Fitzgerald* establishes that the three strikes regime is not intended to prevail over s 9 of NZBORA. But she submitted that the approach to second strike sentencing adopted by this Court in *Barnes* is sufficient to ensure consistency with s 9 of NZBORA in that context, so it is not necessary to read any further qualification into s 86C of the Sentencing Act.

[29] Applying the *Barnes* approach, Ms Mildenhall said this is not one of those exceptional cases in which it would be appropriate for the statutory direction that the sentence be served without parole to result in a modification of the sentence. Mr Matara's first strike offence did involve serious violence, unlike the first strike offending in *Barnes*.[16] There could be no criticism of the two-month uplift imposed by the sentencing Judge:[17] this was not a case like *Wipa v R* where a lesser uplift might be justified having regard to the loss of parole under s 86C.[18]

---

14 *Barnes v R* [2018] NZCA 42, [2018] 3 NZLR 49 at [53].
15 At [77]–[79]. See also *Wipa v R* [2018] NZCA 219 at [37].
16 See *Barnes* (CA), above n 14, at [9]–[10], quoting *R v Barnes* DC Dunedin CRI-2014-012-1060, 22 September 2014 at [3]–[5].
17 Sentencing notes, above n 2, at [19].
18 *Wipa* (CA), above n 15, at [36] and [41]–[42].

[30] In summary, Ms Mildenhall submitted, there is no tenable argument that Mr Matara falls outside the category of second strike offenders for whom Parliament intended to deny parole. There is no basis for any adjustment to the sentence imposed.

Discussion

The three strikes sentencing regime

[31] The three strikes regime is set out in ss 86A to 86I of the Sentencing Act, which were inserted into that Act with effect from 1 June 2010 by the Sentencing and Parole Reform Act 2010. These provisions apply to sentencing following conviction for a "serious violent offence", a term defined in s 86A. Any offence against a long list of offence provisions is treated as a serious violent offence for the purposes of the three strikes regime. The term is in many respects a misnomer: offending that comes within the definition may not involve any violence at all,[19] and may not be especially serious.[20]

[32] Section 86B governs sentencing for a first strike offence. The court must give the offender a "first warning" of the consequences if the offender is convicted of any serious violent offence committed after that warning. The warning is given orally, following entry of the conviction, and in a written notice.[21]

[33] Section 86C governs sentencing for second strike offences other than murder. As relevant, it provides:

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

---

19 As, for example, in *Barnes* (CA), above n 14, at [9]–[10], quoting *R v Barnes* (DC), above n 16, at [3]–[5].

20 As in *Fitzgerald* (SC), above n 4, at [16]–[20].

21 Sentencing Act, s 86B(1) and (4).

(b) record, in relation to each stage-2 offence, that the offender has been warned in accordance with paragraph (a).

(2) It is not necessary for a Judge to use a particular form of words in giving the warning.

…

(4) If the sentence imposed on the offender for any stage-2 offences is a determinate sentence of imprisonment, the court must order that the offender serve the full term of the sentence and, accordingly, that the offender,—

(a) in the case of a long-term sentence (within the meaning of the Parole Act 2002), serve the sentence without parole; and

(b) in the case of a short-term sentence (within the meaning of the Parole Act 2002), not be released before the expiry of the sentence.

…

(6) If, but for the application of this section, the court would have ordered, under section 86, that the offender serve a minimum period of imprisonment, the court must state, with reasons, the period that it would have imposed.

(7) The court must give the offender a written notice that sets out the consequences if the offender is convicted of any serious violent offence committed after the warning given under subsection (1)(a).

[34] Section 86D governs sentencing for third strike offences other than murder. Section 86D(2), which was the focus of the Supreme Court decision in *Fitzgerald*, provides as follows:

86D Stage-3 offences other than murder: offender sentenced to maximum term of imprisonment

…

(2) Despite any other enactment, if, on any occasion, an offender is convicted of 1 or more stage-3 offences other than murder, the High Court must sentence the offender to the maximum term of imprisonment prescribed for each offence.

[35] Section 86D(3) provides that when the court sentences an offender under s 86D(2), the court must order that the offender serve the sentence without parole unless the court is satisfied that, given the circumstances of the offence and the offender, it would be manifestly unjust to make the order.

[36] Section 86E governs sentencing for murder, where it is a second strike or third strike offence.

[37] Section 86H provides that for the purposes of pt 6 of the Criminal Procedure Act 2011, which governs appeals, an order under s 86D(3) or (4) is a sentence.

[38] Section 86I provides for ss 86B to 86E to prevail over inconsistent provisions:

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

Parole where three strikes regime does not apply

[39] Eligibility for parole is governed by the Parole Act 2002. An offender such as Mr Matara who has been sentenced to a fixed term of imprisonment of more than two years is generally eligible for parole after serving one third of that sentence.[22] As soon as practicable after an offender's parole eligibility date, the Parole Board considers the offender for release on parole.[23] The guiding principles for the Parole Board are set out in s 7 of the Parole Act. The paramount consideration for the Board in every case is the safety of the community.[24]

[40] Section 20(5) governs eligibility for parole of an offender subject to a fixed-term sentence for a second strike or third strike offence:

> **20 Parole eligibility date**
>
> …
>
> (5) If an offender is required, by an order under section 86C(4) or 86D(3) of the Sentencing Act 2002, to serve a sentence without parole, the offender—
>
> (a) does not have a parole eligibility date in respect of the sentence; and
>
> (b) may not be released on parole in respect of that sentence.

---

22 Parole Act 2002, ss 20 and 84.
23 Section 21(1).
24 Section 7(1).

[41] Where a sentencing court considers that the standard non-parole period specified in the Parole Act of one-third of the sentence is insufficient, it may impose an MPI under s 86 of the Sentencing Act:

> **86 Imposition of minimum period of imprisonment in relation to determinate sentence of imprisonment**
>
> (1) If a court sentences an offender to a determinate sentence of imprisonment of more than 2 years for a particular offence, it may, at the same time as it sentences the offender, order that the offender serve a minimum period of imprisonment in relation to that particular sentence.
>
> (2) The court may impose a minimum period of imprisonment that is longer than the period otherwise applicable under section 84(1) of the Parole Act 2002 if it is satisfied that that period is insufficient for all or any of the following purposes:
>
> (a) holding the offender accountable for the harm done to the victim and the community by the offending:
>
> (b) denouncing the conduct in which the offender was involved:
>
> (c) deterring the offender or other persons from committing the same or a similar offence:
>
> (d) protecting the community from the offender.
>
> …
>
> (4) A minimum period of imprisonment imposed under this section must not exceed the lesser of—
>
> (a) two-thirds of the full term of the sentence; or
>
> (b) 10 years.
>
> …

[42] In the present case, the sentencing Judge considered that if the three strikes regime had not applied to Mr Matara, an MPI of 40 per cent of the full term of his sentence would have been appropriate. That is, the Judge considered that a non-parole period of one third of the sentence imposed would have been insufficient to meet the objectives set out in s 86(2), but, importantly, a non-parole period of 40 per cent of the full term of his sentence would have been sufficient to achieve those objectives.

[43] We note in passing that the sentence imposed on Mr Matara exceeds the cap on MPIs under s 86 in two respects: it exceeds two-thirds of the full term of his sentence (s 86(4)(a)) and it exceeds 10 years (s 86(4)(b)).

Previous decisions of this Court in relation to second strike sentencing

[44] As already mentioned, in *Barnes* this Court held that when sentencing a defendant for a second strike offence the loss of parole under s 86C(4) may, in exceptional cases, be taken into account in determining the sentence imposed.[25] There must be good reason to adjust a second strike sentence for loss of parole under s 86C. That turns on whether the sentence requires adjustment to avoid a manifestly unjust sentencing outcome.[26]

[45] Mr Barnes had been sentenced to two years and seven months' imprisonment. The sentencing Judge had directed, in accordance with s 86C(4), that the sentence be served without parole. This Court considered that it was open to the Judge to impose a shorter sentence for the purpose of emphasising rehabilitation in that case, having regard to the parole consequences of s 86C(4).[27] The appeal was therefore allowed, and the proceeding was remitted to the District Court for resentencing.[28]

[46] Shortly after deciding *Barnes* this Court again had occasion to consider second strike sentencing in *Wipa*.[29] Mr Wipa had been sentenced to five years and three months' imprisonment, a term which included a nine-month uplift for previous relevant offending. Because Mr Wipa was being sentenced for a second strike offence, the District Court Judge made an order under s 86C(4) of the Sentencing Act that Mr Wipa serve the full term of that sentence without parole.[30]

[47] This Court observed that:[31]

> … an uplift for previous convictions, an order for an increased minimum period, and statutory ineligibility for parole on a second strike all serve the

---

25 *Barnes* (CA), above n 14.
26 At [77]–[79].
27 At [80].
28 At [82].
29 *Wipa* (CA), above n 15.
30 *R v Wipa* [2017] NZDC 10679 at [18].
31 *Wipa* (CA), above n 15, at [32].

> sentencing goals of accountability, denunciation, deterrence or community protection.

[48] However as this Court noted, inadmissibility to parole where s 86C applies may result in an effective sentence that is harsher than it would have been if all the circumstances of the offence and the offender had been taken into account in sentencing in the normal way.[32]

[49] This Court concluded that when considering an uplift for previous convictions, or for offending while on bail or subject to sentence, the sentencing Judge should decide whether, having regard to the loss of parole under s 86C, an uplift is needed to achieve the sentencing purposes of denunciation, accountability, deterrence and community protection.[33] In Mr Wipa's case a small uplift was justified notwithstanding s 86C, to recognise that Mr Wipa was still subject to a sentence. But an uplift was not otherwise needed, having regard to the loss of parole. This Court fixed the uplift at three months, rather than the nine months adopted by the sentencing Judge. The appeal was allowed, and Mr Wipa's sentence reduced by six months.[34]

The Supreme Court decision in Fitzgerald

[50] In *Fitzgerald* the Supreme Court considered the implications of NZBORA for sentencing on conviction for a third strike offence under s 86D of the Sentencing Act. Mr Fitzgerald was convicted of indecent assault. The offending was at the bottom end of the range for an indecent assault: the sentencing Judge considered that standing alone, and leaving aside any aggravating features of the offender, the offending would not attract a term of imprisonment.[35] But because it was a third strike offence, Mr Fitzgerald was sentenced to the maximum sentence for indecent assault of seven years' imprisonment.[36]

[51] The Supreme Court held that this sentence was so disproportionately severe that it breached s 9 of NZBORA. Parliament did not intend, in enacting the three strikes regime, to require Judges to impose sentences that breach s 9 of NZBORA and

---

32 At [34].
33 At [36].
34 At [42]–[43].
35 *R v Fitzgerald* [2018] NZHC 1015 at [21].
36 At [27] and [28(a)]; and Crimes Act, s 135.

New Zealand's international obligations. It was possible, and thus necessary, to interpret s 86D(2) so that it does not require the imposition of sentences that would breach s 9.[37]

[52] Glazebrook, O'Regan and Arnold JJ held that in the rare cases where the maximum sentence produced by s 86D(2) would breach s 9 of NZBORA, an offender should be sentenced in accordance with ordinary sentencing principles. Winkelmann CJ agreed that ordinary sentencing principles apply in such cases, but considered that s 86D(2) added a sentencing principle that recidivism by those caught by the three strikes regime is to be viewed as very serious and worthy of a sterner sentencing response.[38]

[53] The four Judges in the majority adopted somewhat different paths to their conclusion that s 86D(2) of the Sentencing Act must be read as subject to an unexpressed qualification to ensure consistency with s 9 of NZBORA.

[54] The Chief Justice emphasised the presumption of rights-consistency in s 6 of NZBORA. That presumption applied with particular force in the case before the Court for two reasons. Imposing a sentence in breach of s 9 of NZBORA entails not only a breach of one of the fundamental rights running through the common law, and now embodied in NZBORA, but also a breach of New Zealand's international obligations. The presumption that statutes should be read, so far as possible, consistently with New Zealand's international obligations was engaged.[39] Second, the direction given by s 86D(2) is addressed to the judicial branch of government: it instructs Judges as to how they must sentence. Sentencing for criminal offences is the constitutional role of the judicial branch of government. In exercising the discretions conferred under the Sentencing Act, Judges are bound by NZBORA and must respect and affirm the rights and freedoms it sets out.[40] If s 86D(2) was not subject to an unexpressed exception relating to compliance with NZBORA, Parliament would have directed Judges to impose sentences which are so disproportionate to the gravity of the offending as to breach s 9 of NZBORA. The courts will be very slow to conclude that

---

37 *Fitzgerald* (SC), above n 4, at [3].
38 At [4].
39 At [116].
40 New Zealand Bill of Rights Act 1990, s 3(a).

Parliament wished to direct another branch of government to breach a right as fundamental as that affirmed in s 9, and in a manner that implicates that branch in a breach of New Zealand's international obligations.[41]

[55] O'Regan and Arnold JJ emphasised the principle of legality, against the background of ss 3(a), 4 and 6 of NZBORA.[42] They considered that the statutory purpose of the three strikes regime, read in light of NZBORA, would be given effect by interpreting s 86D(2) as subject to an unexpressed qualification that the subsection is subject to NZBORA, and s 9 in particular.[43] Thus, they concluded, s 86D(2) interpreted in accordance with Parliament's direction in s 6 of NZBORA "does not require the courts to impose the maximum sentence on conviction of a third strike offence in the rare cases where the resulting sentence would breach s 9 of [NZBORA]".[44]

[56] Glazebrook J considered that reading down s 86D(2) so that it does not require the imposition of sentences that breach s 9 of NZBORA is not only possible, but also necessary to accord with Parliamentary purpose. Glazebrook J also emphasised the interpretative presumptions of consistency with international law and with fundamental human rights, and the principle of legality.[45]

Implications of Fitzgerald for second strike sentencing

[57] Section 86C(4) does not provide that the automatic consequence of a sentence of imprisonment being imposed for a second strike offence is that the sentence must be served without parole. Rather, the provision is framed as a direction to the sentencing Judge to make an order that the sentence be served without parole. Such an order is an integral part of the sentence imposed on the offender. Hence the

41 *Fitzgerald* (SC), above n 4, at [118]–[119] per Winkelmann CJ.
42 At [176] and [203]–[224] per O'Regan and Arnold JJ.
43 At [220] per O'Regan and Arnold JJ.
44 At [231] per O'Regan and Arnold JJ.
45 At [250]–[251] per Glazebrook J.

reference in s 20(5) of the Parole Act, set out above at [40], to an offender being required to serve a sentence without parole *by an order under s 86C(4)*.[46]

[58] We consider that it follows inexorably from *Fitzgerald* that the direction to the sentencing Judge set out in s 86C(4) must be read subject to the same unexpressed qualification that it is subject to s 9 of NZBORA. Or, as O'Regan and Arnold JJ put it, subject to NZBORA, and s 9 in particular.[47]

[59] The reasoning of the Supreme Court in relation to third strike sentencing in *Fitzgerald* is equally applicable to second strike sentencing. There is no express provision in s 86C, or elsewhere in the three strikes regime, to require that Judges impose sentences inconsistent with s 9 of NZBORA. The interpretive direction in s 6 of NZBORA, the principle of legality, and the presumption of consistency with international obligations all apply with equal force in relation to s 86C(4). Very clear language would be needed before reading s 86C as a direction by Parliament to the judicial branch that it should impose sentences inconsistent with NZBORA, and with New Zealand's international obligations. In the absence of such language, s 86C(4) should not be read as requiring the judicial branch to impose such sentences.

[60] The Crown accepted that second strike sentencing must be consistent with s 9 of NZBORA, but argued that this could be achieved by applying the approach endorsed in *Barnes*. We have reviewed the cases in which the *Barnes* approach has been considered.[48] Sentencing courts have on a number of occasions made relatively modest adjustments to end sentences imposed on second strike offenders in reliance on *Barnes*. We are not aware of any case in which reliance on *Barnes* resulted in a substantial sentence reduction. As we explain below, there will be cases in which a modest adjustment to an offender's end sentence will not address the disproportionality that stems from a denial of parole.[49]

---

46 Section 86C(4) is not referred to in s 86H, which relates to appeals from certain orders under the three strikes regime being treated as sentence appeals. But we do not consider that this omission can be taken as implying that an order made under s 86C(4) is not a sentence, or an element of a sentence, or that there is no right of appeal from such an order.

47 *Fitzgerald* (SC), above n 4, at [220] per O'Regan and Arnold JJ.

48 See for example, *R v Ma'anaiama* [2020] NZHC 551 at [41]; *R v Moala* [2019] NZHC 758 at [39]–[40]; *Wipa*, above n 15, at [41]–[42]; and *Paerau v R* [2018] NZCA 139 at [45].

49 We have concluded that this is such a case: see [76] below.

[61] We need not consider whether the approach adopted in *Barnes* is consistent with, and remains available following, the decision of the Supreme Court in *Fitzgerald*. That question will need to be decided by the Permanent Court if and when it arises in another case. For present purposes, it is sufficient to say that even if the *Barnes* approach remains available following *Fitzgerald*, the reasoning of the Supreme Court in that case requires s 86C(4) of the Sentencing Act to be read subject to the unexpressed qualification that it is subject to s 9 of NZBORA.

[62] It is therefore necessary to consider whether Mr Matara's sentence of 10 years and two months' imprisonment, to be served without parole, is disproportionately severe for the purposes of s 9 of NZBORA. If it is, then the unexpressed qualification applies and the Court is not required to make the non-parole order provided for in s 86C(4). Rather, consistent with the view of the majority in *Fitzgerald*, ordinary sentencing principles would apply. In the present case, that would mean that Mr Matara should be sentenced to imprisonment for 10 years and two months, and an MPI of 40 per cent of that term should be imposed under s 86 of the Sentencing Act.

Is the sentence imposed on Mr Matara disproportionately severe?

[63] There is no suggestion that the term of imprisonment imposed — 10 years and two months — raises any concerns under s 9 of NZBORA. To the contrary, that was the sentence that the sentencing Judge considered was appropriate having regard to the purposes and principles of sentencing under the Sentencing Act.[50] It is not challenged on appeal before us.

[64] Rather, the question is whether the order made under s 86C(4), requiring Mr Matara to serve the whole of that term of imprisonment without parole, results in the overall sentence being disproportionately severe.

[65] If that order had not been made, Mr Matara would have been subject to an order under s 86 of the Sentencing Act setting an MPI of 40 per cent of his term of imprisonment. The Judge considered, and we agree, that such a sentence would be

---

[50] Sentencing notes, above n 2, at [18]–[19]; and Sentencing Act, ss 7 and 8.

appropriate having regard to the purposes of sentencing under the Sentencing Act.[51] In particular, it would be sufficient to meet the objectives referred to in s 86(2) of holding Mr Matara accountable for the harm done by his offending, denouncing his conduct, deterring him and others from committing such offences, and protecting the community from the offender.

[66] It follows that the additional six years of ineligibility for parole is not justified by those objectives, or by any other sentencing purpose. That is, Mr Matara is denied the possibility of parole for an additional six years even though there is no rational connection between that denial and the purposes of sentencing identified in the legislation under which the order was made.

[67] Nor is this difference in treatment capable of being justified by the fact that in 2012 Mr Matara received a first warning under s 86B of the Sentencing Act. The sentence that would otherwise have been imposed by the sentencing Judge takes into account Mr Matara's previous offending, and the fact that he has continued to offend despite the sentence previously imposed on him. And whatever the relevance of such warnings might be in other cases, Mr Matara's mental illness and psychosis go to the heart of his ability to understand, and act on, warnings of this kind. It could not reasonably be suggested that Mr Matara deserves to be punished substantially more severely because in May 2016, at a time when he was mentally unwell and probably psychotic, he did not turn his attention to, and act on, the warning given to him some four years earlier.

[68] The additional severity of the sentence imposed on Mr Matara under s 86C has a number of facets. Most obviously, it denies Mr Matara the possibility of parole for an additional six years. Even if he is sufficiently rehabilitated at some point after the four-year mark so that his release would pose no material risk to the safety of the community, he will continue to be detained in prison. Moreover because he was not eligible for parole after four years, Mr Matara has not been provided with the same rehabilitative support that he would have otherwise received in the initial years of his sentence. And he will have less incentive and less encouragement to take measures of

---

[51] At [21].

his own directed towards rehabilitation, or to take full advantage of any rehabilitative support that might be offered to him, throughout his sentence. Nothing he does by way of rehabilitation can make any difference to the length of time he serves in prison.

[69] The Crown did not argue that loss of the opportunity to be considered for parole was of little or no significance for Mr Matara in this case because there was little or no prospect that he would be granted parole. So we need not embark on the inherently difficult exercise of making predictions of that kind. Rather, we proceed on the basis that we are not in a position to assess the prospect of parole being granted by the Parole Board at some point after he has served 40 per cent of his sentence. We make no assumptions that he will be granted parole. Nor, however, can we assume that the opportunity of parole is of no practical significance for Mr Matara.

[70] In short, we accept Mr Ellis' submission that the effect of the non-parole order is to deprive Mr Matara of the hope, encouragement and support that are important features of New Zealand's parole system for some six years beyond what can rationally be justified.

[71] Because the sentence imposed on Mr Matara is more severe than the (proportionate) sentence that the Judge would otherwise have imposed, it is disproportionate. Is it so disproportionate that it crosses the s 9 threshold?

[72] The threshold for assessing whether a sentence is disproportionately severe for the purposes of s 9 of NZBORA has been expressed in different ways. There is a consensus that it is a high threshold. It has variously been described as treatment so excessive as to outrage contemporary standards of decency, conduct so severe as to shock the national conscience, treatment grossly disproportionate to the circumstances or such as to shock the national conscience.[52] A majority in the Supreme Court assumed that because the threshold is so high, such cases would be rare.[53]

---

52 *Fitzgerald* (SC), above n 4, at [163]–[166] per O'Regan and Arnold JJ, referring to the approaches adopted by the Supreme Court in *Taunoa v Attorney-General* [2007] NZSC 70, [2008] 1 NZLR 429 at [91]–[92] per Elias CJ, [176] per Blanchard J and [288] per Tipping J.

53 At [219], [231] and [236] per O'Regan and Arnold JJ and [245] per Glazebrook J.

[73] Experience since *Fitzgerald* suggests that in practice such cases are not rare. Third strike sentencing is capable of producing grossly disproportionate outcomes whenever the otherwise appropriate sentence for the index offending is a fraction of the maximum penalty. The Crown has conceded that s 9 was breached in the two third strike appeals brought since *Fitzgerald.*[54]

[74] In the present case we consider that denial of parole for an additional six years is grossly disproportionate to the circumstances, especially having regard to Mr Matara's mental illness and psychosis at the time of offending. The loss of opportunity for rehabilitation and release — the loss of hope — for a period two and a half times what would otherwise be justified is both exceptionally harsh and without rational justification.

[75] It is not necessary for us to consider, in this case, whether the unexpressed qualification that must be read into s 86C(4) extends to inconsistency with other provisions of NZBORA, as suggested by O'Regan and Arnold JJ, and whether other NZBORA provisions are engaged in this case.[55] It might be arguable that the three strikes regime discriminates against Mr Matara on the basis of mental disability.[56] It might also be arguable that the non-parole order required by s 86C(4) limits the enjoyment of other rights affirmed by NZBORA (in particular, rights to freedom of movement and freedom of association) in a manner that — because it is not rationally connected to the purposes of sentencing under the Sentencing Act — is not demonstrably justified in a free and democratic society, as required by s 5 of NZBORA.[57] These issues would require careful consideration after full argument and evidence, possibly involving intervenors.

---

54 *Phillips v R* [2021] NZCA 651 at [4] and [34]; and *Mitai-Ngatai v R* [2021] NZCA 679 (result), [2021] NZCA 695 (reasons).

55 *Fitzgerald* (SC), above n 4, at [220] per O'Regan and Arnold JJ.

56 See NZBORA s 19; Human Rights Act 1993, s 21(1)(h).

57 The report presented to the House of Representatives by the Attorney-General in respect of the original three strikes regime, under s 7 of NZBORA, concluded that the Sentencing and Parole Reform Bill 2009 (17-1) appeared to be inconsistent with NZBORA for a number of reasons including disparities between offenders that were not rationally based: See *Fitzgerald* (SC), above n 4, at [189], quoting from Christopher Finlayson *Report of the Attorney-General under the New Zealand Bill of Rights Act 1990 on the Sentencing and Parole Reform Bill* (18 February 2009) at [15].

Barnes adjustment not appropriate

[76] The Crown submitted that if the Court considered that Mr Matara's sentence was not consistent with s 9 of NZBORA, any inconsistency could be addressed by applying *Barnes*. We do not consider that a modest adjustment of the term of imprisonment to which Mr Matara was sentenced, in circumstances where he would be required to serve that sentence without parole, would address the disproportionality we have identified above. Even if his sentence were to be reduced by as much as one year, that would still mean serving a sentence of some nine years' imprisonment without the possibility of parole. That would not answer the concerns we have identified above.

The appropriate sentence in this case

[77] We have concluded that s 86C(4) is subject to an unexpressed qualification that an order under that provision need not be made if the result would be inconsistent with s 9 of NZBORA. And we have concluded that making a non-parole order was inconsistent with s 9 in the present case. It follows that the sentencing Judge was not required to make an order under s 86C(4) requiring Mr Matara to serve his sentence without parole. Such an order should not have been made. In saying this, we emphasise that there can be no criticism of the Judge. The sentencing took place before this Court had decided *Barnes* or *Wipa*, and some years before the Supreme Court decided *Fitzgerald*. None of the arguments that have succeeded before us was advanced before the Judge at Mr Matara's sentencing. But in light of the subsequent jurisprudence, we are satisfied that the sentence imposed was wrong and must be set aside.

[78] Because the sentencing Judge identified the MPI that she would have imposed but for the operation of s 86C(4), we are in a position to impose the sentence that ought to have been imposed on Mr Matara: a sentence of 10 years and two months' imprisonment, with an MPI of 40 per cent.

[79] Mr Ellis argued that because this MPI has already elapsed, and Mr Matara has lost the opportunity to be considered for parole at the earliest practicable opportunity, we should go further and make orders that would result in Mr Matara's immediate

release. We do not consider that it would be appropriate for us to set aside Mr Matara's conviction, as suggested by Mr Ellis, or to impose a sentence equal to time served. Mr Matara was properly convicted of a very serious offence — attempted murder. There was no error in the sentence of imprisonment of 10 years and two months imposed by the Judge for that offending. Nor, as already mentioned, can it be assumed that Mr Matara would have qualified for parole when he first became eligible.[58] To the contrary, his rehabilitative needs could well have taken longer to address. Many serious offenders who are eligible for parole are not granted parole when the Parole Board first considers their case.

[80] We must impose the sentence that ought to have been imposed, not some other sentence contrived to achieve the result of Mr Matara's immediate release. It would be quite wrong for us to pre-empt the parole process, and risk undermining the focus of the Parole Act on ensuring the safety of the community. Rather, we will impose the sentence that ought to have been imposed on Mr Matara. He can then be considered for parole. Whether he is released on parole, and when, and the conditions on which he is released, will be matters for the Parole Board to determine in the usual way.

Result

[81] An extension of time to appeal is granted.

[82] The appeal is allowed.

[83] The sentence imposed in the High Court is set aside.

[84] Mr Matara is sentenced to imprisonment for a term of 10 years and two months with an MPI of 40 per cent.

Solicitors:
Crown Law Office, Wellington for Respondent

---

58 See [69] above.