IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA584/2021
[2023] NZCA 5

BETWEEN	JOSHUA PERA VAN SILFHOUT Appellant
AND	UDAYA LAKSHMAN AGAS PATHIRANNEHELAGE Respondent

Hearing: 13 October 2022

Court: Miller, Brown and Katz JJ

Counsel: D A Ewen for Appellant
V E Casey KC as counsel to assist the Court

Judgment: 8 February 2023 at 11.00 am

JUDGMENT OF THE COURT

The appeal is dismissed.

REASONS OF THE COURT

(Given by Brown J)

Introduction

[1] The appellant, Mr van Silfhout, appeals from a judgment of the High Court[1] dismissing his appeal from a decision of the Victims' Special Claims Tribunal (the Tribunal),[2] in which the Tribunal awarded the respondent compensation under the Prisoners' and Victims' Claims Act 2005 (the PVCA).

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1 *Van Silfhout v Pathirannehelage* [2021] NZHC 2268 [High Court judgment].
2 *Pathirannehelage v Van Silfhout* [2021] NZVSC 3.

[2] Section 64 of the PVCA provides that the limitation period for a victim of an offence making a claim[3] (which commences on the date of the offending) ceases to run while an offender is serving a sentence of imprisonment. The sole issue on this appeal is whether time spent in pre-sentence detention by an offender who is subsequently sentenced to imprisonment for their offending counts to extend the limitation period for a victim's claim.

Factual background

[3] On 9 July 2010 Mr van Silfhout entered a Mobil service station armed with a weapon. He threatened the respondent, who was the sole worker there, and robbed the premises of money and cigarettes. Eventually Mr van Silfhout was arrested and charged. He was remanded in custody on 30 January 2013. On 13 May 2014 he was sentenced to four years and three months' imprisonment, by which time he had already served approximately one year and three and a half months in custody on remand. On 2 May 2017, his sentence expiry date, he was released.[4]

[4] On 21 January 2020, the Department of Corrections agreed to pay the appellant $12,000 (GST included) compensation for an alleged breach of privacy. On 2 April 2020 the respondent lodged with the Tribunal a claim for $10,000 compensation for emotional harm arising out of the robbery. Judge Blackie awarded the respondent $5,000 compensation.

[5] The material chronology is depicted in the chart below.

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3 Pursuant to s 4(1)(d) of the Limitation Act 1950, which applied to Mr Pathirannehelage's claim, the relevant limitation period is six years.

4 He had been released on parole on 21 November 2016 but was recalled to prison on 1 March 2017.

Limitation running	Contested period	Limitation suspended
09.07.2010–29.01.2013 Offender at large		
	30.01.2013–12.05.2014 1 year and 3½ months Remand in custody	
		13.05.2014–20.11.2016 2 years and 6 months Imprisonment
21.11.2016–01.03.2017 On parole		
		02.03.2017–02.05.2017 Recall to prison
02.05.2017–02.04.2020 Time between release and filing of claim[5]		

[6] The question is whether the limitation period continued to run on the respondent's claim while Mr van Silfhout was remanded in custody (for the period of one year and three and a half months depicted in the middle column). If it did, then the respondent's claim was time-barred.[6] However if during that time the limitation period was suspended, the respondent's claim was filed within time.[7] Because the respondent did not participate in the appeal, as in the High Court Ms Casey KC was appointed as counsel assisting to present reasonable argument in opposition to the appeal.

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5 During this period there was a further suspension of at most two months pursuant to s 64B of the Prisoners' and Victims' Claims Act 2005 (PVCA). Section 64B suspends the limitation period until the standard deadline under s 28(3) for filing a victim's claim, which in this case fell six months after the date on which notice was sent to the respondent advising him of the compensation payable to Mr van Silfhout. It is unclear when notice was sent. The earliest possible date would have been 31 January 2020, when the compensation was paid into the victims' claims trust account. Hence the maximum suspension under s 64B would have been for the period between 31 January 2020 and the filing of the respondent's claim on 2 April 2020.

6 It would have been at least 10.5 months out of time.

7 With at most five months to spare.

Relevant statutory provisions

[7] The PVCA was the legislative response to the judgment of the High Court in *Taunoa v Attorney-General*,[8] awarding damages for breaches of the New Zealand Bill of Rights Act 1990 in favour of certain prisoners who had been subjected to the Behaviour Management Regime. As counsel for the appellant, Mr Ewen, explained, there was a perception that something had gone very far awry when prisoners were being awarded large amounts of compensation on their claims without the ability for victims to make claims against that sum. The PVCA provides that an award of, or agreement to pay, compensation to a prisoner triggers a right for a victim affected by that prisoner's offending to make a claim intercepting the award of compensation to the prisoner.

[8] Part 2 of the PVCA has three subparts. The purpose of subpt 1 is to restrict and guide the awarding of compensation to prisoners for breaches of or interference with specified rights.[9] Subpart 2 then provides for the interception of compensation awarded to prisoners under subpt 1. It establishes the process under which victims of a prisoner's offending are able to make claims against that prisoner and have access to the sum awarded as compensation, that would otherwise be payable to the prisoner, to satisfy their claims. Section 3(2) identifies the purpose of subpt 2 of pt 2 as being to:

> (a) establish, require payments into, and regulate the operation of, a victims' claims trust bank account; and
>
> (b) provide a procedure for the making and determination of victims' claims.

[9] Subpt 3 has the purpose of suspending the running of limitation periods for certain claims by victims.[10] It includes s 64, which is the focus of this appeal:

> **64 Limitation periods suspended while offender serving sentence of imprisonment**
>
> (1) The limitation periods to which this section applies cease to run while the offender is serving a sentence of imprisonment in a penal institution, prison, or service prison.

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8 *Taunoa v Attorney-General* (2004) 8 HRNZ 53 (HC).
9 Section 3(1).
10 Section 3(3).

(2) In this section, ***serving a sentence of imprisonment in a penal institution, prison, or service prison***—

(a) means serving in a penal institution, prison, or service prison—

(i) the sentence of imprisonment for the offence (as defined in section 5(1)(a)(ii)); and

(ii) any earlier sentence of imprisonment on which the sentence of imprisonment for the offence is directed to be served cumulatively; and

(iii) any later sentence that is directed to be served cumulatively on the sentence of imprisonment for the offence; and

(b) includes spending time in a penal institution or a prison following a related recall application (as defined in section 59 of the Parole Act 2002), but only if a final recall order (as defined in section 4(1) of that Act) is made following the recall application.

[10] The cross-reference in s 64(2)(a)(i) is to the definition of "offender" in s 5(1)(a), which states:

(1) In this Act, **offender**, in relation to a victim, means—

(a) for the purposes only of subpart 3 of Part 2, a person—

(i) convicted (alone or with others) by a court or the Court Martial of the offence that affected the victim; and

(ii) on whom a court or the Court Martial has, because of the person's conviction for that offence, imposed a sentence of imprisonment (the **sentence of imprisonment for the offence**); …

[11] Central to the contest on the interpretation of s 64 is the question whether regard may be had to certain provisions of the Parole Act 2002 and the Sentencing Act 2002. In determining how much of a sentence an offender has served, the Parole Act provides that an offender is deemed to have been serving the sentence during any period spent in pre-sentence detention:

90 Period spent in pre-sentence detention deemed to be time served

(1) For the purpose of calculating the key dates and non-parole period of a sentence of imprisonment (including a notional single sentence) and an offender's statutory release date and parole eligibility date, an

> offender is deemed to have been serving the sentence during any period that the offender has spent in pre-sentence detention.
>
> (2) When an offender is subject to 2 or more concurrent sentences,—
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> (a) the amount of pre-sentence detention applicable to each sentence must be determined; and
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> (b) the amount of pre-sentence detention that is deducted from each sentence must be the amount determined in relation to that sentence.
>
> (3) When an offender is subject to 2 or more cumulative sentences that make a notional single sentence, any pre-sentence detention that relates to the cumulative sentences may be deducted only once from the single notional sentence.
>
> **91 Meaning of pre-sentence detention**
>
> (1) ***Pre-sentence detention*** is detention … that occurs at any stage during the proceedings leading to the conviction or pending sentence of the person, whether that period (or any part of it) relates to—
>
> (a) any charge on which the person was eventually convicted; or
>
> (b) any other charge on which the person was originally arrested; or
>
> (c) any charge that the person faced at any time between his or her arrest and before conviction.
>
> …

[12] However, pre-sentence detention must be ignored in sentencing. Section 82 of the Sentencing Act states:

> In determining the length of any sentence of imprisonment to be imposed, the court must not take into account any part of the period during which the offender was on pre-sentence detention as defined in section 91 of the Parole Act 2002.

The High Court judgment

[13] Cooke J commenced by acknowledging two errors in the Tribunal's approach: first, in deducting from the limitation period the total sentence of four years and three months' imprisonment imposed on Mr van Silfhout; and secondly, in concluding that further periods of imprisonment imposed thereafter also needed to be deducted. Mr Ewen, counsel for Mr van Silfhout in both the High Court and this Court, and Ms Casey were in agreement that the period to be excluded from the running of the

limitation period was only the period when the offender was actually serving a sentence of imprisonment in respect of the offending involving the claimant, unless one of the exceptions in s 64 of the PVCA applied.[11]

[14] The Judge proceeded to address what he described as the ultimate issue, namely whether a period of pre-sentence detention is a period "while the offender is … serving in … prison … the sentence of imprisonment for the offence" under s 64(2)(a)(i).[12] Applying the well-established text-in-light-of-purpose analysis,[13] the Judge:

(a) identified dual statutory purposes for the suspension of the limitation period: (i) the futility of seeking to sue prisoners while in prison; and (ii) a nexus between the relevant imprisonment and the offending against the victim;[14]

(b) acknowledged the immediate attraction in Mr Ewen's argument that the ordinary meaning of the relevant words would suggest the suspension of the limitation period only covered the period of time the prisoner was in prison after being sentenced;[15]

(c) recognised that an ordinary meaning needs to be applied in the particular circumstances in which the words of the legislation are used, noting that the present context involves legislative provisions in a technical area;[16]

(d) accepted Ms Casey's submission that recourse to provisions in other statutes did not involve applying the definition of words from other legislation, but rather the provision of a starting point for understanding the regime established by the PVCA;[17]

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11 High Court judgment, above n 1, at [25].
12 At [28].
13 Legislation Act 2019, s 10; see also *Commerce Commission v Fonterra Co-operative Group Ltd* [2007] NZSC 36, [2007] 3 NZLR 767.
14 High Court judgment, above n 1, at [39].
15 At [42]–[43].
16 At [43].
17 At [53].

(e) rejected the argument that s 64 is self-contained and that recourse to the general law of sentencing as set out in other legislation is not contemplated;[18] and

(f) as a cross-check viewed the interpretation, that pre-sentence detention should be included in the period of suspension, as sensible and avoiding unusual outcomes.[19]

[15] The Judge summarised his conclusions in this way:

> [74] My key conclusions are that: the ordinary or natural meaning of the legislation suggests that pre-sentence detention is included in the period of time while the limitation period is extended as it forms part of the period when the prisoner is serving a sentence of imprisonment for the offending; that this is consistent with the apparent purpose of the provisions; that the provisions contemplate that the normal principles of sentencing will apply for the purposes of making the assessment; and that this appears to give the legislation an interpretation that makes sense. I accept that pre-sentence detention is included in that period contemplated by s 64.

Grounds of appeal

[16] The specific grounds of appeal were formulated as follows:

> 1. The [Judge] erred in the interpretation and effect of sections 5(1)(a) and 64 of the [PVCA], (which modify and extend the 6-year limitation on actions under the Limitation Act 1950), and in particular the terms "offender" and "serving a sentence of imprisonment".
>
> 2. As a result the [Judge] erred by determining pre-sentence detention, as that term is defined and used in the Parole Act 2002, was included in the meaning of "serving a sentence of imprisonment" to the extent the respondent's claim was filed within time.

[17] In the course of his submissions Mr Ewen refined those grounds by placing emphasis on the further phrase "in a penal institution, prison, or service prison". The significance of the amendment was said to lie in the fact that "service prison" can only relate to a sentence of imprisonment imposed by the Court Martial under the Armed Forces Discipline Act 1971, which expressly ousts the application of both the Sentencing Act and the Parole Act.[20]

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18 At [60]–[61].
19 At [70]–[73].
20 Armed Forces Discipline Act 1971, ss 3(1A) and 168(2).

Common ground

[18] As our exchanges with counsel revealed, the construction of the PVCA presents some challenges. At least in part that is an inevitable consequence of the different roles that the three subparts play, as evidenced by their discrete purpose provisions.[21] Indeed in the context of the single appeal issue raised by subpt 3, Ms Casey cautioned us against endeavours to obtain guidance from provisions in the other subparts,[22] advice which Mr Ewen wholeheartedly endorsed.

[19] It is convenient to note certain other matters on which we apprehend counsel were agreed. First, the limitation period for claims by victims in tort for exemplary damages against the perpetrators of offences against them is six years.[23] Secondly, a claim by a victim to the Tribunal under subpt 2, described in the course of submissions as a "fast track", is an alternative route to pursuing a civil proceeding for exemplary damages in the District Court or the High Court, and thus requires an election to be made.[24] Thirdly, the limitation period applies to claims by either route, although subject to the provisions in subpt 3.

[20] The focus of the appeal is the period of time during which the limitation period ceases to run on a victim's claim, namely the period defined by the composite phrase "while the offender is serving a sentence of imprisonment in a penal institution, prison, or service prison". That phrase must necessarily be read as a whole. However, solely as an aid in identifying the scope of the opposing interpretations, it can be conveniently dissected into four components:

(a) the offender

(b) is serving [a sentence of imprisonment]

(c) a sentence of imprisonment

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21 Prisoners' and Victims' Claims Act, s 3(1), (2) and (3).

22 Ms Casey's point was not that subpts 1 and 2 were irrelevant to gaining a sense of how the Act works, but that subpt 3 stands alone from the other subparts and does something she described as "actually bigger".

23 Limitation Act 1950, s 4(1)(a).

24 Prisoners' and Victims' Claims Act, s 28(1)(c).

(d) in a penal institution, prison or service prison

[21] The third component is uncontroversial. Subject to the conjunction of any cumulative sentence,[25] the relevant sentence of imprisonment is that imposed on the offender for the offence that affected the victim making the claim. That is made clear by the definition provided in s 64(2)(a)(i) which refers to the sentence of imprisonment for the offence as defined in s 5(1)(a)(ii). Similarly there is no issue concerning the meaning of the fourth component. The limitation period is not suspended while an offender is subject to some form of detention other than imprisonment, such as home detention or confinement to an institution for the purposes of receiving medical treatment. Hence, as reflected in the first specific ground of appeal, the focus of counsel's engagement concerned the implications of the words "offender" and "serving" (the latter in conjunction with the phrase "a sentence of imprisonment").

Submissions

Appellant's submissions

[22] Mr Ewen contended that the Judge erred in importing "time-served" concepts from the Parole Act when concluding that pre-sentence detention suspended the limitation period. His argument that, in the absence of a specific statutory definition, "serving" should bear its ordinary meaning by reference to the wider statutory scheme comprised two primary planks.

[23] First, Mr Ewen submitted that the ordinary meaning of "serving a prison sentence" obviously requires that a prison sentence has been imposed by a Court. In the absence of very specific statutory language mandating such an effect, a prison sentence cannot commence before it is imposed.[26] Secondly, Mr Ewen submitted that the s 64(1) suspension only commences once there is an "offender" within the meaning of the specific limitation-related definition in s 5(1)(a). Thus a person only becomes an offender once two conditions precedent are met:

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[25] Specified in s 64(2)(a)(ii) and (iii).

[26] Citing *Prince v Chief Executive of the Department of Corrections* [2019] NZHC 3381, [2020] 2 NZLR 260.

(a) a conviction has been entered for the offence giving rise to the claim; and

(b) a prison sentence has been imposed for that offence.

[24] It logically followed, in Mr Ewen's submission, that during any period antecedent to the imposition of the requisite prison sentence the person is not yet an "offender" under either ss 5 or 64. Hence the limitation period is not suspended. Emphasising that only very clear statutory language could displace that interpretative consequence, Mr Ewen submitted there can be no resort to the necessary implication doctrine as the PVCA can operate perfectly well without the importation of the Parole Act's operation in respect of pre-sentence detention.

[25] Mr Ewen argued that the Judge erred in accepting the proposition that the words in the phrase should be given a technical rather than their ordinary meaning.[27] He submitted that such an interpretation involved a departure from this Court's approach in *Barrie v R*:[28]

> Unless expressly adopted, the meaning given to a word in one piece of legislation is not affected by the meaning given to that same word in a different enactment. The courts have warned against the dangers of reasoning by analogy in statutory interpretation, especially between statutes dealing with different subject-matter.

[26] Mr Ewen was critical of the Judge's reasoning that reference to the prior legislation (revealing how sentence administration occurred in practice) was necessary in order to understand the effect of s 64 and his conclusion that the technical meaning did not involve adopting defined terms from the Parole Act.[29] Mr Ewen submitted that the approach of the High Court was a novel one in the field of statutory interpretation and perilously close to "the vibe".

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27 High Court judgment, above n 1, at [43].
28 *Barrie v R* [2012] NZCA 485, [2013] 1 NZLR 55 at [36] (footnotes omitted).
29 High Court judgment, above n 1, at [51]–[53].

Submissions of counsel assisting

[27] Ms Casey supported the Judge's interpretation, essentially on the basis that the legislation had used technical words rather than everyday language. Her submissions were primarily structured around the following propositions:

(a) serving a sentence of imprisonment is a statutory construct which has no meaning separate from the statutory regime for lawful imprisonment;

(b) the Judge's interpretation did not involve improperly implying a definition from one statute to another; and

(c) the terms of s 64 of the PVCA support an inference that it was Parliament's intention that it should operate together with the provisions in the Parole Act.

[28] Ms Casey framed the issue as a choice between two available interpretations, being either:

(a) the principles in the Sentencing and Parole Acts (and the Armed Forces Discipline Act) that are used to calculate how many days of a person's detention count towards serving the relevant sentence should apply to the equivalent calculation under the PVCA, except to the extent they are expressly excluded or modified by the PVCA; or

(b) (as the appellant argues) the principles in those Acts have no application to the operation of the PVCA, except to the extent that they are expressly incorporated by the PVCA.

[29] In view of the focus in argument on ordinary and technical meanings and the debate whether recourse may be had via "context" to the sentencing and parole statutory regimes, we will first comment briefly on the principles governing the interpretation of legislation before analysing the competing contentions.

The interpretation of legislation

[30] Many cases concerning the interpretation of statutory language refer to the meaning of words as "ordinary", "natural" or "plain". As Lord Simon remarked, the parliamentary drafter, who knows what objective the legislative promoter wishes to attain, will normally and desirably try to achieve that objective by using language of the appropriate register in its natural, ordinary and primary sense.[30] But the Judge also noted that words and phrases of the English language have an extraordinary range of meaning.[31] Indeed, as the author of *Burrows and Carter Statute Law in New Zealand* observes, there are not many words in the English language that have only one ordinary meaning: most words have several shades of meaning, all of them perfectly "ordinary".[32]

[31] The task of discerning the relevant shade of meaning will often be facilitated by an appreciation of the purpose and context of the legislation. The role of purpose has long been recognised. In *Commerce Commission v Fonterra Co-operative Group Ltd* the Supreme Court emphasised that, even if the meaning of the text may appear plain in isolation of purpose, that meaning should always be cross-checked against purpose in order to observe the dual requirements of then s 5 of the Interpretation Act 1999.[33]

[32] The significance of context in the interpretative task has also been acknowledged by the courts. Thus in *Port Nelson Ltd v Commerce Commission* Cooke P observed that the principle that plain words should be given their plain meaning has to be applied with due regard to the context in which they appear, the other provisions of the particular statute and the history of the relevant statutory provisions.[34] In *Fonterra* the Supreme Court described the requirement to have regard to both the immediate and the general legislative context as part of the determination

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30 *Stock v Frank Jones (Tipton) Ltd* [1978] 1 WLR 231 (HL) at 237.
31 At 236.
32 Ross Carter *Burrows and Carter Statute Law in New Zealand* (6th ed, LexisNexis, Wellington, 2021) at 399.
33 *Commerce Commission v Fonterra Co-operative Group Ltd*, above n 13, at [22].
34 *Port Nelson Ltd v Commerce Commission* [1994] 3 NZLR 435 (CA) at 437.

of purpose.[35] The significance of context was colourfully expressed by Lord Wilberforce in the course of construing United Kingdom gaming legislation:[36]

> My Lords, before one attempts to apply the so-called definition, it is necessary to establish the climate, or atmosphere in which it has been given birth.

[33] Explicit statutory recognition of the role of context is now found in the Legislation Act 2019,[37] s 10(1) of which states:

> **10 How to ascertain meaning of legislation**
>
> (1) The meaning of legislation must be ascertained from its text and in light of its purpose and its context.

Statutory purpose

[34] Like the Judge, we begin by identifying the statutory purpose. The purposes of subpts 1 and 2 broadly align with the two main objectives recited in the explanatory note to the Prisoners' and Victims' Claims Bill.[38] By comparison the statement of purpose for subpt 3 is perfunctory[39] and, as the Judge fairly observed,[40] does not provide much assistance. Following a review of the legislative history,[41] the Judge discerned dual statutory purposes for subpt 3, stating:

> [39] That seems to me to be the relevant purpose of the provisions concerning the limitation period — the limitation period is extended, and the running of limitation period suspended, whilst the prisoner is serving the sentence of imprisonment for the offending involving that victim. That is because it is usually futile to seek to sue prisoners whilst in prison, and there is also a nexus between the relevant imprisonment and offending against that victim.

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35 *Commerce Commission v Fonterra Co-operative Group Ltd*, above n 13, at [22].

36 *Seay v Eastwood* [1976] 1 WLR 1117 (HL) at 1121.

37 Belatedly implementing a recommendation in the Law Commission's 1990 Report: Law Commission *A New Interpretation Act: To Avoid "Prolixity and Tautology"* (NZLC R17, 1990) at [66]–[72].

38 Prisoners' and Victims' Claims Bill 2004 (241-1) (explanatory note) at 1. The two main objectives were (a) to ensure that compensation is treated as a remedy of last resort for prisoners, available only where other possible remedies have been explored and have failed to, or could not, provide effective redress; and (b) to strengthen the rights of victims to make civil claims against offenders and, in particular, recognise that victims should have first claim against any such compensation awards to prisoners.

39 Simply echoing the heading of subpt 3.

40 High Court judgment, above n 1, at [30].

41 Including the comments directed to limitation in the speech of the Minister of Justice, the Hon Phil Goff, at the first reading of the Bill: (14 December 2004) 622 NZPD 17986. See High Court judgment, above n 1, at [30]–[38].

> [40] I observe that these two purposes would apply equally to pre-sentence and post-sentence detention. The prisoner would have been difficult to sue while in prison, and there is a nexus between that imprisonment and the particular offending because the offender has been detained in custody for that offending.

[35] We agree with the Judge's analysis in [39]. Indeed Mr Ewen acknowledged that, as a general proposition, that paragraph described what subpt 3 was designed to achieve. However Mr Ewen emphasised that those purposes cast no light on the issue at the heart of the appeal, namely whether a period of pre-sentence detention is to be included in the calculation of the period of suspension of the limitation period. To that issue we now turn.

Analysis

[36] In developing the submission that a prison sentence cannot commence, and hence cannot begin to be served, before it is imposed, Mr Ewen emphasised the use in the PVCA of the present participle "serving" which he described as current and/or continuous but in either case "future directed". He contrasted the use in the Parole Act of the past tense "served".

[37] Mr Ewen developed the submission by referring to the expressions "offender" and "sentence of imprisonment for the offence" defined in s 5(1)(a), noting that those limited-purpose definitions were used exclusively in s 64:

> (1) In this Act, **offender**, in relation to a victim, means—
>
> (a) For the purposes only of subpart 3 of Part 2, a person—
>
> (i) convicted (alone or with others) by a court or the Court Martial of the offence that affected the victim; and
>
> (ii) on whom a court or the Court Martial has, because of the person's conviction for that offence, imposed a sentence of imprisonment (the **sentence of imprisonment for the offence**); …

[38] Mr Ewen submitted that both terms have two conditions precedent that take effect as "temporal qualifiers". They are both dependent on two consecutive events: conviction of the offence giving rise to the claim and the imposition of a prison sentence in respect of that conviction. Mr Ewen submitted:

> Until both events have occurred, s 64 has no application and there is no suspension on the limitation period. Until both conviction and prison sentence exist there is no "offender" for limitation purposes, and by extension, no suspending [of the] "sentence of imprisonment" …

[39] We agree that the trigger (or, to use Mr Ewen's phrase, condition precedent) for a suspension of the limitation period comprises the dual events of conviction and sentence in respect of the offence which affected the victim making a claim. However we do not accept the second step of Mr Ewen's argument, reflected in the "by extension" proposition, that the period of any suspension must post-date the occurrence of those dual events.

[40] In our view the response to Mr Ewen's contention, and the resolution of this appeal, lies in the bespoke definition which is provided solely for the purposes of s 64:

> **64 Limitation periods suspended while offender serving sentence of imprisonment**
>
> …
>
> (2) In this section, ***serving a sentence of imprisonment in a penal institution, prison, or service prison***—
>
> (a) means serving in a penal institution, prison, or service prison—
>
> (i) the sentence of imprisonment for the offence (as defined in section 5(1)(a)(ii)); and
>
> (ii) any earlier sentence of imprisonment on which the sentence of imprisonment for the offence is directed to be served cumulatively; and
>
> (iii) any later sentence that is directed to be served cumulatively on the sentence of imprisonment for the offence; and
>
> (b) includes spending time in a penal institution or a prison following a related recall application (as defined in section 59 of the Parole Act 2002), but only if a final recall order (as defined in section 4(1) of that Act) is made following the recall application.

[41] The role of this definition is to provide a formula for calculating the duration of the suspension of a limitation period. Four points may be noted. First, the formula is not confined to the "sentence of imprisonment for the offence" as defined in

s 5(1)(a)(ii). It extends to related cumulative sentences and to particular instances of prison detention consequent upon recall from parole.

[42] Secondly, the relevant period of time is not confined to "future directed" service of the sentence but, by dint of s 64(2)(a)(ii), will include the serving of any earlier sentences of imprisonment on which the victim-affected sentence of imprisonment is directed to be served cumulatively.

[43] Thirdly, it is inherent in the extended definition that the calculation of the period of any suspension will inevitably involve a hindsight or retrospective analysis. That is evident from both the scenario of a subsequent cumulative sentence envisaged in s 64(2)(a)(iii) and from the inclusion in the calculation of time spent in detention on recall from parole but only in circumstances where a final recall order is made.

[44] Finally, the reference in that bespoke definition to such concepts which are the subject of the sentencing and parole legislative regimes necessarily imports those concepts into subpt 3. It follows in our view that the sentencing and parole regimes are thereby a part of the subpart's context, in the light of which the meaning of s 64(1) is to be ascertained.

[45] In the High Court Mr Ewen contended that the only provisions from the sentencing and parole legislation which were relevant to the interpretation of s 64 were those specifically identified. The Judge rejected the argument that s 64 is a self-contained code, reasoning:

> [65] Perhaps more importantly it seems to me that the complications that s 64 are so addressing presume that the normal principles of sentencing apply. It is dealing with complications against that very background. That is clearly so in s 64(2)(a)(ii) and (iii) which presume the applicability of ss 83 and 84 of the Sentencing Act. So I do not accept that it shows a legislative intent to only apply some of the provisions of the Sentencing and Parole Acts. All principles which identify when a prisoner is serving a sentence of imprisonment for the offence would seem to apply unless otherwise modified by s 64.

We agree with that analysis. It follows that the meaning of s 64(1) is to be ascertained in the light of the sentencing and parole regimes, including the principle that an offender is deemed to have been serving a sentence during any period for which the offender was in pre-sentence detention.

[46] While, as Mr Ewen submitted, the particular definition of "offender" specific to subpt 3 comprises both the elements of conviction and imposition of a sentence, we do not consider that the use of the term in s 64(1) supports the proposition that only post-sentence detention is intended to suspend the limitation period. The section in its entirety presumes the scenario whereby suspension of the limitation period has occurred. Consequently the term "offender" was the obvious term for the parliamentary drafter to employ.

[47] We turn now to consider Mr Ewen's supplementary argument to the effect that the inclusion of the phrase "service prison" in the s 64(2) definition is a complete answer to the question whether the regimes created by either the Sentencing or Parole Acts can apply. Observing that the defined phrase is an indivisible term, Mr Ewen argued that the civil sentencing and parole regimes cannot be applied to the s 64(2) definition "as a whole" for the reason that the military justice regime in the Armed Forces Discipline Act ousts both those statutes. Consequently he submitted that, contrary to the Judge's finding, the civil sentencing and parole regimes cannot "work together" with the s 64(2) definition.[42]

[48] It is plain in our view (and we consider that it is implicit in Mr Ewen's submission) that the several references in the PVCA to the Armed Forces Discipline Act, particularly in the interpretation section (s 4), indicate that that Act is part of the context of the PVCA for the purposes of s 10(1) of the Legislation Act.[43] In response, Ms Casey drew attention to the fact that s 178 of the Armed Forces Discipline Act empowers the making of an order that a later sentence be served consecutively upon an earlier sentence. She also observed that s 177A of that Act provides, in terms similar to s 90 of the Parole Act, as follows:

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42 That reference was to the concluding statement at [68] of the High Court judgment, above n 1, that the legislation was expected to work together.

43 The phrase "service prison" in the s 64(2) definition is defined in s 4 of the PVCA as having the same meaning as in s 2(1) of the Armed Forces Discipline Act.

> **177A Effect of period spent in custody before being sentenced**
>
> (1) For the purpose of determining the date on which an offender will become eligible for remission of sentence, the offender shall be deemed to have been serving the sentence during the whole of any period that the offender was held in custody, as is required to be specified on the committal order by the Court Martial under section 81A or by a disciplinary officer under section 117Y.
>
> …

[49] In our view, a construction of s 64 of the PVCA which permits pre-sentence detention to be factored into the period of suspension of the limitation period results in parity with the consequences of s 177A of the Armed Forces Discipline Act in relation to sentences imposed under the military justice regime. On the face of it, the argument advanced by Mr Ewen would give rise to an anomalous situation where pre-sentence detention would be taken into account in the context of the military justice regime but not the civilian justice regime.

[50] The High Court judgment concluded by considering as a cross-check whether the interpretation reached was a reasonable one:[44]

> [71] If an interpretation makes sense — particularly when interpreted in its context, and in light of its purpose — it is more likely to be the correct one. An interpretation that leads to an unusual outcome is not. Based on the appellant's suggested approach two prisoners who committed exactly the same offence, sentenced to exactly the same period of imprisonment, and released having served exactly the same period of time under that sentence would nevertheless be treated differently. If prior to sentencing one of them had been released on bail but the other remanded in custody, the period of suspension of the limitation period would be different. For the person remanded in custody the suspension of the limitation period would operate for a shorter period because the pre-sentence detention would be excluded. In my view this peculiarity counts against this interpretation being the correct one.

[51] Mr Ewen acknowledged this inconsistency but submitted that it was no greater an inconsistency than one caused by including pre-sentence detention in other scenarios. He drew attention to the observation of the majority of the Supreme Court in *Booth v R* that the application of s 90 of the Parole Act can create anomalies.[45] He submitted that anomalous results do not justify a departure from the ordinary meaning of the language in the PVCA.

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44 High Court judgment, above n 1.

45 *Booth v R* [2016] NZSC 127, [2017] 1 NZLR 223 at [28].

[52] However, as we have explained we do not accept that the bespoke definition in s 64(2) has the "ordinary meaning" advanced for the appellant. Nor do we consider that on proper analysis it gives rise to an anomalous result.

[53] Finally we note that the reasons for our conclusion are similar but not identical to those of the Judge. Heeding the caution of counsel with reference to obtaining guidance from provisions in other subparts,[46] our conclusion has focused on subpt 3, its purpose and context. Consequently we have not engaged with, and prefer to express no opinion on, the Judge's reasoning in respect of the technical meaning and his analysis of the provisions in s 64(2)(a)(ii) and (iii) and s 64(2)(b) as amounting to "exceptions" to a starting point.[47]

Result

[54] The appeal is dismissed.

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46 Discussed at [18] above.

47 Ms Casey submitted that the Judge's approach might be better seen as clarification of how the sentencing and parole regime principles are intended to apply in the PVCA context rather than the identification of true exceptions.