IN THE COURT OF APPEAL OF NEW ZEALAND

CA143/2008
CA144/2008
[2009] NZCA 498

THE QUEEN

v

DAVID ANTHONY SAXTON
MORGAN DAVID SAXTON

Hearing: 28 and 29 July 2009

Court: William Young P, Chambers and Robertson JJ

Counsel: G J X McCoy and M Starling for Appellants
R P Bates, M J Grills and F R J Sinclair for Crown

Judgment: 22 October 2009 at 11 am

JUDGMENT OF THE COURT

A The appeals against conviction are dismissed.

B David Saxton's appeal against sentence is allowed. The sentence of two years and nine months' imprisonment imposed on him is quashed and he is now sentenced to six months' home detention. He is to go to 19 Garden Terrace, Picton, at 10am on Friday 30 October 2009 and await the arrival of a probation officer and the monitoring company. Thereafter he is to be subject to six months' home detention at that address and is to be subject to the standard home detention conditions in s 80C(2) of the Sentencing Act 2002.

C Morgan Saxton's appeal against sentence is dismissed.

REASONS OF THE COURT

(Given by Robertson J)

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Introduction

[1] The Cascade Plateau in South Westland is about as remote as any part of New Zealand. On it are substantial quantities of pounamu – a stone of great value.

[2] The Crown presented an indictment against the appellants, David Saxton and his son Morgan, containing three counts. First, that David Saxton stole pounamu from the Plateau between 1 April 1991 and 29 October 1997; second, that together with his son Morgan, David stole more pounamu between 29 October 1997 and 30 September 2003; and third, that both David and Morgan stole pounamu, between 1 October 2003 and 12 October 2004.

[3] Following a hearing in the District Court at Christchurch in May and June 2007 before Judge MacAskill sitting alone, both were convicted of the second of the three charges (all of which had been laid indictably), namely:

> That on dates unknown but between 29 October 1997 and 30 September 2003 at South Westland, did steal Pounamu (as defined in s 2 of the Ngai Tahu (Pounamu Vesting) Act 1997) valued in excess of $300,000, the property of Te Runanga o Ngai Tahu (Representative Count).

[4] On 15 February 2008, David Saxton was sentenced to two years and nine months' imprisonment, and Morgan Saxton to two years and six months' imprisonment. They were jointly and severally ordered to pay reparation of $300,000.

[5] Both men appealed against conviction and sentence. On 12 June 2008, each was granted bail pending the hearing of their appeals.

[6] Morgan David Saxton subsequently died in an accident. On 9 March 2009 this Court granted leave to his personal representative to continue his appeal: [2009] NZCA 61.

The heart of the case

[7] As with all criminal appeals, the test for appellate intervention is to be found in s 385 of the Crimes Act 1961, but it is instructive to highlight the manner in which the case was run in the District Court Judge-alone trial and presented before us. The essence of the Crown case on the second count was:

(a) All pounamu on Crown land within the takiwa ("area") of Ngai Tahu (including pounamu on the Cascade Plateau) was vested in Te Runanga o Ngai Tahu ("TRONT") with effect from 29 October 1997.

(b) During the period encompassed by this count (29 October 1997 – 30 September 2003), the appellants removed TRONT's pounamu from the Cascade Plateau.

(c) The appellants removed the pounamu without any entitlement.

(d) The appellants removed the pounamu knowing they had no entitlement, and therefore acted dishonestly.

[8] The defence response to the Crown case on this count was:

(a) During this period, the appellants had customary rights over the pounamu, which included a right to take pounamu as they did; or

(b) Alternatively, the appellants honestly believed they had such a right.

[9] Proceeding from these premises, the defence case was structured as follows:

(a) The pounamu had never been acquired by the Crown and so could not be vested in TRONT. Alternatively TRONT only acquired a formal title to the pounamu which, on either theory, remained subject to the customary title (and rights) of the members of the local hapu who, individually and at all times since 1860, have retained the right to collect pounamu using whatever technology was best suited to this purpose, including helicopters and diamond saws.

(b) Mr Cyril Cain, being a member of the local hapu, has such customary rights.

(c) Cyril Cain's daughter, Debbie Cain (who is the long-term partner of David Saxton and, in effect, the stepmother of Morgan Saxton), has such rights.

(d) Morgan and David Saxton came to have such rights as well. In the case of David, those rights were acquired by assignment (or something similar) from Cyril Cain and Morgan had such rights because he was the whangai of Debbie, meaning he had been adopted by her in accordance with Maori custom.

(e) Even if Morgan and David did not have customary rights, they honestly believed they did and thus did not act dishonestly when they removed the pounamu.

[10] There are, therefore, two primary questions on which the case turned in the District Court and on appeal:

(a) Did the Crown prove beyond reasonable doubt that the appellants were not entitled to take pounamu? and

(b) If the Crown did prove the appellants' non-entitlement beyond reasonable doubt, did it also prove beyond reasonable doubt that they acted dishonestly?

[11] The trial Judge answered both questions in the affirmative although his approach on the first question was not exactly in accord with the Crown case. In his view, the Crown never acquired title to the pounamu on the Cascade Plateau and the pounamu remained subject at all times to customary rights. However, Judge MacAskill concluded that the appellants neither had, nor honestly believed they had, customary rights to the pounamu.

[12] We also answer both the questions in this case in the affirmative, but for somewhat different reasons.

[13] There is a subsidiary point relating to the nature of the evidence which was led in the District Court. It is contended that much evidence was inadmissible and, in any event, unreliable. Because of our chain of reasoning and the basis on which we dismiss the conviction appeal, the admissibility of the contested evidence is not critical to our determination. We discuss this below, beginning at [77].

[14] In respect of sentence, the appellants contend that the terms of imprisonment were manifestly excessive and wrong in principle. There is no challenge to the reparation order.

Did the Crown prove beyond reasonable doubt that the appellants were not entitled to take pounamu?

Who owned the pounamu?

[15] The Waitangi Tribunal's *Ngai Tahu Report 1991* reviews the history of the Crown's acquisition of the West Coast of the South Island and was relied on by the Judge for the purposes of his judgment. He was entitled to do so under s 42 of the Evidence Act 1908: see *Te Runanga o Muriwhenua Inc v Attorney-General* [1990] 2 NZLR 641 (CA). We also will take our history primarily from that report.

[16] On 21 May 1860, a Deed of Purchase (usually known as "the Arahura Purchase") was signed between the Rangatira of Tai Poutonui Ngai Tahu and the Crown. Under the Deed, and subject to certain reservations which are not relevant to this case, Ngai Tahu surrendered their claim to land from Kahurangi Point in the North to Piopiotahi (Milford Sound) in the South. That includes the Cascade Plateau. Excluded from the land which was purchased was a reserve of 2,000 acres running along both sides of the Arahura River. As well there was an informal reservation to Ngai Tahu of the river to its source and a right of repurchase of any land between the end of the reserve and Mount Tahua. This right was later exercised in relation to approximately 1,000 acres. These provisions were plainly to accommodate the determination of Ngai Tahu to protect their access to pounamu which they had traditionally gathered in the vicinity of the Arahura River and its tributaries. For what may have been the same reason Ngai Tahu also wished to exclude from the sale all land between the Mawhera, Hokitika and Kotukuwhakaoho Rivers, an exclusion to which the Crown negotiator James Mackay did not agree.

[17] The English version of the Deed recorded that the Crown acquired all minerals on the land which was purchased. On its face, this would include all pounamu other than what was on the land retained by Ngai Tahu. The word in the Maori version of the Deed which corresponds to "minerals" is "kowhatu" which means stones.

[18] As we discuss below, the ultimate conclusion of the Waitangi Tribunal was that the Deed conveyed pounamu, along with the land itself, to the Crown. We agree that whether or not Ngai Tahu fully understood that pounamu was being conveyed by the Deed, that is the inevitable interpretation of the Deed within its total context. Whether the acquisition of the pounamu constituted a breach of the Treaty of Waitangi is a distinct issue from whether there was a valid legal transfer.

[19] Our conclusion that the pounamu was acquired by the Crown as part of the Arahura Purchase rests on the following premises:

(a) The Deed accommodated Ngai Tahu's concern to retain certain parts of the land. The express reservations of the banks of the Arahura River, the river to its source, and the right of repurchase of the land between the reserve and Mount Tahua are inexplicable if Ngai Tahu, at the time of the Arahura Purchase, considered that they retained ownership of, and associated rights of access to, all pounamu on the land sold to the Crown.

(b) Ngai Tahu did not seek to reserve explicitly rights of access to the pounamu.

(c) There was no provision recognising ownership by Ngai Tahu of, and access to, pounamu when land acquired by the Crown was on-sold to third parties.

(d) In the English version of the Deed, the word "minerals" appears in the following list: "trees minerals waters rivers lakes and streams and all appertaining to the said Land or beneath the surface of the said Land". The corresponding words in the Maori version are:

> Me one rakau me ona kowhatu me ona wai me ona awa me ona roto me ona awa ririki me nga mea katoa o taua whenua o runga ranei o raro ranei it e mata o taua whenua me o matou tikanga me o matou Thetake me o matou paanga katoatanga ki tau wahi ...

This language (or very similar language) was common in the land acquisition deeds of the time and it was regarded, at least by the Crown, as extinguishing native title to the relevant land and all its appurtenants.

[20] The Waitangi Tribunal report is not entirely consistent in its findings and conclusions, but overall there is no doubt that it concluded the Deed was effective to convey the pounamu to the Crown, however unjust that conveyance was. Indeed, the Waitangi Tribunal's recommendation that the pounamu be returned to Ngai Tahu is necessarily premised on the assumption that the Crown had acquired title to the pounamu by the Arahura Purchase.

[21] Turning to the findings and recommendations made by the Waitangi Tribunal, the Report relevantly said:

> 13.5.28: Pounamu is an irreplaceable treasure. Once mined and commercially exploited much of it (at present sold to foreign tourists) is gone forever. The tribunal believes that the unique nature of pounamu and its deep spiritual significance in Mäori life and culture is such that every effort should now be made to secure as much as possible of the steadily declining supply to Ngai Tahu ownership and control.
>
> Unfortunately the tribunal did not receive any significant evidence or submissions as to **the proportion of pounamu which is owned by the Crown,** on the one hand, and privately on the other. Our understanding is that the greater part is on Crown owned land. This should present no problem. We believe **all such pounamu and any other owned by the Crown** should be returned by the Crown to Ngai Tahu. Any such action would of course have to be on the basis that any current mining licences relating to pounamu should run their normal course, to ensure that those licence holders are not adversely affected. The same protection should be afforded any licensees of pounamu in the state forests which have been excepted from the provisions of the Mining Act 1971. The aim should be for the **Crown as expeditiously as possible to return to Ngai Tahu ownership and control all such pounamu within its traditional boundaries.**
>
> ...

Finding on grievance no 5

13.5.29: The tribunal finds that the Crown failed to protect the right of Ngai Tahu to retain possession and control of all pounamu:

(a) in and adjacent to the Arahura River and its tributaries;

(b) in the remainder of the Arahura purchase block; and

(c) in the Murihiku and any other Ngai Tahu blocks purchased by the Crown where pounamu was to be found.

Finding regarding breach of Treaty principles

13.5.30: The tribunal has already found, in relation to grievance no 3, that the Crown acted in breach of article 2 of the Treaty in failing to reserve to Ngai Tahu the 8000 acres requested at the Arahura River (13.5.11). The principal purpose of this request was to ensure continued Ngai Tahu ownership and control of the pounamu in the Arahura River and its tributaries. In refusing to meet the expressed wish of Ngai Tahu to retain such possession and control of all pounamu in the Arahura River and its tributaries and land adjacent thereto, and thereby failing to respect the tino rangatiratanga of Ngai Tahu over their taonga, the Crown acted in breach of article 2 of the Treaty.

The Tribunal further finds that although Ngai Tahu wished and intended to retain possession and control of all pounamu both throughout the remainder of the Arahura block and in all other blocks sold to the Crown, the Crown failed in breach of the Treaty principle requiring it to protect Ngai Tahu's right to retain this taonga and further failed to respect the tino rangatiratanga of Ngai Tahu over their taonga, contrary to article 2 of the Treaty.

Recommendation in respect of pounamu

13.5.31: ...

3 (a) That the Crown, after consultation with Ngai Tahu, negotiate for the purchase of a reasonable amount of land on either side of the Arahura River and its tributaries to their respective sources. Such land to include the banks of the rivers and to be sufficient in area to include any changes in course of such rivers and to provide access to reasonable quantities of pounamu where such may exist in or on such adjacent land.

(b) That the Crown transfer ownership of all such land so acquired any such land already owned by the

Crown to the Mawhera Incorporation or such other body as may be nominated by Ngai Tahu.

4 **the Crown transfer ownership and control (including the right to mine) to Ngai Tahu or such other body as may be nominated by Ngai Tahu of:**

(a) all pounamu owned by it in land within the boundaries described in the Arahura deed of purchase dated 26 May 1860, other than any pounamu already vested in Ngai Tahu or which is vested in Ngai Tahu pursuant to our recommendations numbered 1 to 3; and

(b) all other pounamu owned by it in the Murihiku and all other blocks purchased from Ngai Tahu by the Crown.

Such transfers to be subject to the condition that all existing mining or other licences should run their normal course, to ensure that the holders of such licences are not adversely affected.

...

(Emphasis added.)

[22] These findings and recommendations demonstrate the Waitangi Tribunal's two-pronged view: first, that the pounamu was conveyed to the Crown, and secondly, that such conveyance was a breach of the Treaty of Waitangi.

[23] The Waitangi Tribunal's recommendations in respect of the pounamu were given effect by legislation enacted in 1996 and 1997.

[24] The first relevant legislative enactment following *Wai 27* was Te Runanga o Ngai Tahu Act 1996. The long title of that Act provides:

An Act to provide for –

(a) The incorporation of Te Runanga o Ngai Tahu for the benefit of the members of Ngai Tahu Whanui; and

(b) The recognition of Te Runanga o Ngai Tahu as the representative of Ngai Tahu Whanui; and

(c) The dissolution of the Ngaitahu Mäori Trust Board; and

(d) The dissolution of Te Runanganui o Tahu Incorporated.

WHEREAS Ngai Tahu wishes to establish an enduring tribal structure to manage its assets and its business and to distribute benefits to the Papatipu

> Runanga and the individuals comprising the tribal membership of Ngai Tahu: And whereas Ngai Tahu wishes a body corporate, to be called Te Runanga o Ngai Tahu, to assume responsibility for the protection of the beneficial interests of all members of Ngai Tahu, being beneficial interests represented in the Papatipu Runanga of those members or in terms of the individual beneficial rights of those members: And whereas it is desired to dissolve the Ngaitahu Maori Trust Board and Te Runanganui o Tahu Incorporated and to vest their assets in Te Runanga o Ngai Tahu: And whereas legislation is the only means by which the Ngaitahu Mäori Trust Board may be dissolved and the assets of the Ngaitahu Maori Trust Board and Te Runanganui o Tahu Incorporated may be vested efficiently and economically in Te Runanga o Ngai Tahu: And whereas the objects of this Act cannot be attained otherwise than by legislation.

[25] Having defined the takiwa of the Ngai Tahu Whanui (and it is accepted that the Cascade Plateau from which the pounamu the subject of this charge was taken is within that area), by s 6 the Act established a body corporate, TRONT.

[26] The Act defined the members of Ngai Tahu Whanui as a collective of the individuals who descend from the primary hapu of Ngai Tahu and Ngatai Mamoe, namely Kati Kuri, Kati Irakehu, Kati Huirapa, Ngai Tuahuriri, and Kai Te Ruahikihiki. TRONT was to administer its assets for the benefit of present or future members of Ngai Tahu Whanui in accordance with a charter.

[27] Section 15 provided:

> **15 Status of Te Runanga o Ngai Tahu**
>
> (1) Te Runanga o Ngai Tahu shall be recognised for all purposes as the representative of Ngai Tahu Whanui.
>
> (2) Where any enactment requires consultation with any iwi or with any iwi authority, that consultation shall, with respect to matters affecting Ngai Tahu Whanui, be held with Te Runanga o Ngai Tahu.
>
> (3) Te Runanga o Ngai Tahu, in carrying out consultation under subsection (2) of this section -
>
> > (a) Shall seek the views of such Papatipu Runanga of Ngai Tahu Whanui and such hapu as in the opinion of Te Runanga o Ngai Tahu may have views that they wish to express in relation to the matter about which Te Runanga o Ngai Tahu is being consulted; and
> >
> > (b) Shall have regard, among other things, to any views obtained by Te Runanga o Ngai Tahu under paragraph (a) of this subsection; and

(c) Shall not act or agree to act in a manner that prejudices or discriminates against, any Papatipu Runanga of Ngai Tahu or any hapu unless Te Runanga o Ngai Tahu believes on reasonable grounds that the best interests of Ngai Tahu Whanui as a whole require Te Runanga o Ngai Tahu to act in that manner.

[28] The following year, after extensive negotiations between Ngai Tahu and the Crown, and the signing of the Deed of On Account Settlement, the Ngai Tahu (Pounamu Vesting) Act 1997 ("the Vesting Act") was enacted. It came into force on 29 October 1997. The short title and recitals of this provided:

> An Act to give effect to certain provisions of the Deed of "On Account" Settlement, signed on 14 June 1996 by the Crown and Te Runanga o Ngai Tahu as representative of Ngai Tahu, by vesting, in Te Runanga o Ngai Tahu, pounamu in the Takiwa of Ngai Tahu Whanui and in those parts of the territorial sea of New Zealand that are adjacent to the Takiwa of Ngai Tahu Whanui
>
> WHEREAS—
>
> A. Ngai Tahu has made claims against the Crown under the Treaty of Waitangi Act 1975, and those claims have been the subject of 2 reports of the Waitangi Tribunal, the 1991 Ngai Tahu Report and the 1995 Ancillary Claims Report:
>
> B. Since 1991 there have been a number of attempts by Ngai Tahu and the Crown to reach a negotiated settlement of Ngai Tahu's claims and to remove the sense of grievance felt by Ngai Tahu:
>
> C. The Crown and Ngai Tahu, wishing to recommence negotiations towards a comprehensive settlement of all claims made by or on behalf of Ngai Tahu or hapu, whanau or individuals within the Ngai Tahu Whanui against the Crown pursuant to the Treaty of Waitangi Act 1975, have agreed to negotiate in good faith to achieve a settlement of all Ngai Tahu's historical claims under the Treaty of Waitangi and Ngai Tahu has agreed to an indefinite adjournment of certain litigation relating to the claims to allow those negotiations to take place:
>
> D. As a sign of good faith and as a demonstration of the Crown's goodwill, and in recognition of the long process of negotiation that has already taken place between the parties, the Crown has agreed to renew and modify an offer it made to Ngai Tahu in 1994 to provide certain redress to Ngai Tahu on an "on account" basis, and Ngai Tahu has accepted that modified offer:
>
> E. Accordingly, on 14 June 1996, the Crown and Te Runanga o Ngai Tahu as representative of Ngai Tahu signed a Deed of "On Account" Settlement, in which the Crown agreed that it would present for the consideration of Parliament legislation to provide for—

(a) The vesting in Te Runanga o Ngai Tahu of the Crown's rights to pounamu in the Takiwa of Ngai Tahu and the adjacent territorial sea; and

(b) The continuation of all current mining privileges relating to that pounamu until they expire; and

(c) The payment by the Crown to Te Runanga o Ngai Tahu of any royalties received by the Crown in respect of any such mining privileges; and

(d) A regime for access to land in which the pounamu is situated in the same manner as is provided for in the Crown Minerals Act 1991 for persons holding a permit in respect of a mineral under that Act:

F. To give effect to a recommendation of the Waitangi Tribunal, Te Runanga o Ngai Tahu intends to execute a deed vesting in the Mawhera Incorporation all pounamu within the catchment area of the Arahura river:

[29] The Vesting Act had five sections. Section 2 defined pounamu, the takiwa of Ngai Tahu Whanui, Te Runanga o Ngai Tahu and "existing privilege" (which was given the meaning ascribed to that term in the Crown Minerals Act 1991). Section 3 provided as follows:

3 Ownership by Ngai Tahu of certain minerals

Notwithstanding any other enactment, all pounamu occurring in its natural condition in:

(a) The Takiwa of Ngai Tahu Whanui; and

(b) Those parts of the territorial sea of New Zealand (as defined by section 3 of the Territorial Sea, Contiguous Zone, and Exclusive Economic Zone Act 1977) that are adjacent to the Takiwa of Ngai Tahu Whanui and the seabed and subsoil beneath those parts of the territorial sea –

that, immediately before the commencement of this Act, is the property of the Crown, ceases, on the commencement of this Act, to be the property of the Crown and vests in and becomes the property of Te Runanga o Ngai Tahu.

[30] Section 4(1) provided that, notwithstanding the vesting prescribed by s 3, existing rights or privileges in respect of the pounamu were unaffected. Section 5 provided that notwithstanding the Crown Minerals Act the Minister of Energy must not grant any new permits under that Act.

[31] Finally, on this fundamental question of the legal ownership of pounamu at the time covered by the count, there is a passage in the Waitangi Tribunal's report which suggests that Ngai Tahu may not have assented to the transfer of the pounamu to the Crown, and therefore that the Deed may have been ineffective in that regard.

[32] On the question whether the word "minerals" in the Deed included pounamu, the Waitangi Tribunal said (at 13.5.26):

> But there is no mention of pounamu as such in the deed. The tribunal is satisfied that there would have been a clear demarcation in Ngai Tahu thinking between ordinary stones and greenstone, so great were the spiritual and cultural values attached to its possession. Was not the island inhabited by Ngai Tahu known as Te Wai Pounamu. We believe that since pounamu was not mentioned by name in the deed and since Ngai Tahu were so clearly concerned to retain it, there is every reason to believe that Ngai Tahu did not realise that they might be thought to be assigning it to the Crown. The tribunal is satisfied that Poutini Ngai Tahu did not consciously agree to part with their pounamu and that the language of the deed was not sufficient to convey to the Crown.

[33] The final sentence of that passage is a general statement. It is at odds with the balance of the Waitangi Tribunal's findings (outlined in relevant part above, at [21]). It is also at odds with the Waitangi Tribunal's recommendations that ownership of pounamu ought to be transferred by the Crown to Ngai Tahu, and with the Vesting Act subsequently agreed between the Crown and Ngai Tahu. In those circumstances, the final sentence is properly viewed as an aspirational expression and does not influence the effect of the Waitangi Tribunal report as a whole.

The appellant's position

[34] One of the major planks of the case as advanced by the Saxtons both at trial and before us is the argument that when the Crown acquired the land on the West Coast of the South Island, including the Cascade Plateau, it did not acquire a complete bundle of property rights to the pounamu (despite it forming part of the land which was purchased). The appellants say that during the period from 1861 to 1997, there were at least customary rights to take and exploit pounamu which Ngai Tahu Whanui individually enjoyed, notwithstanding the Crown ownership of the resource. Therefore, when the Crown transferred its rights to TRONT, this did not

alter the customary rights of Ngai Tahu individuals, which had continued during that period of about 125 years. The appellants submitted that, in terms of the jurisprudence of this Court in *Ngati Apa v Attorney-General* [2003] 3 NZLR 643 (CA), such customary rights were never extinguished and have continued down to the present time.

[35] It is, conceptually, possible for customary rights to have survived the conveyance of the pounamu to the Crown although that would seem improbable, for the reasons stated above at [19]. However, whatever issues could arise from the conveyance of 1860, subsequently-enacted legislation removed any doubt that the Crown had complete ownership of and control over the pounamu.

[36] Judge MacAskill found in favour of the Saxtons when he concluded that the Crown did not acquire pounamu as part of the Arahura Purchase of 1860. Accordingly, he concluded that the Vesting Act was ineffective to transfer ownership of pounamu to TRONT.

[37] We disagree. All mining legislation enacted after 1860 makes plain that under New Zealand law, pounamu (along with other minerals) in its natural state was vested in the Crown. Any sensible interpretation of this legislation removes any doubt that, if not at the time of the Deed, then certainly by the mid-to-late 19th century, all property rights to pounamu were vested in the Crown. That is to say, customary rights, even if they had survived the Deed, were extinguished by legislation.

[38] Customary rights, once extinguished, cannot revive (see Graham *The Legal Reality of Customary Rights for Maori* (Treaty of Waitangi Research Unit, Victoria University of Wellington, 2001)). This feature of customary rights is important because it means that it was not possible for the Saxtons to argue that customary rights may have revived once the pounamu was vested in TRONT. TRONT could not be subject to customary rights that were previously extinguished. The rights vested in TRONT were those that the Crown had to give and no derogation from them occurred.

[39] The first mining legislation dealing with minerals other than gold was the Mines Act 1877. This Act defined the word “mine” in such a way as to include collecting pounamu (see s 5). Section 36 provided for the issuing of what were in effect prospecting licences over Crown land in relation to minerals other than gold. Section 37 provided for what were referred to as “mineral leases” which permitted the extraction of minerals from Crown land. The primary focus of the 1877 Act was on gold mining and the offence provision which backed up the licensing regime was confined to unauthorised gold-mining (see s 172). This lacuna was addressed in the Mining Act 1886 which was in more general terms. Under s 93 of that Act, it was an offence to engage in mining operations (an expression which encompassed the collection of pounamu) without a “miner’s right”.

[40] The Mines Act 1877 and the Mining Act 1886 were expressed in general terms. The latter statute particularly is totally inconsistent with the continuation of any customary rights to collect pounamu on Crown land. That statute is premised on the clear assumption that title in pounamu in its natural state was vested in the Crown.

[41] The reasons we disagree with Judge MacAskill’s conclusions on both the ownership of, and customary rights to, the pounamu can be summarised:

(a) The Waitangi Tribunal’s (generalised) statement that the Arahura Purchase Deed was not sufficient to convey the pounamu to the Crown is inconsistent with the balance of the Waitangi Tribunal’s findings and with its recommendations;

(b) Whatever the position in respect of customary rights at 1860, the mining legislation of the late 19th century is inconsistent with continuing customary rights to mine pounamu;

(c) That legislation proceeds at least by assumption on the basis that the minerals on Crown land acquired from Maori (including the pounamu on the Cascade Plateau) were vested in the Crown;

(d) The Waitangi Tribunal did not advert to the implications of the mining legislation to which we have referred;

(e) The recommendations made by the Waitangi Tribunal were premised on the assumption that pounamu on Crown land was vested in the Crown;

(f) The recommendation of the Waitangi Tribunal was that the "Crown transfer ownership and control (including the right to mine) to Ngai Tahu" in respect of the pounamu, thereby envisaging that any right to mine pounamu should be subject to the control of Ngai Tahu (however constituted); and

(g) This recommendation was implemented by transferring ownership of the pounamu to TRONT, a transfer which must have been intended to have meant that, from time to time, any right to mine pounamu was subject to obtaining permission from TRONT.

[42] We recognise that both the mining legislation to which we have referred and the Vesting Act assume Crown ownership of pounamu on Crown land, and legislative assumptions of that kind are not necessarily decisive. But in this case, there is the reality that the mining legislation is completely inconsistent with a continuation of customary rights to collect pounamu on Crown land.

[43] The associated grievances of Ngai Tahu were comprehensively addressed, through the vesting legislation, in a way which essentially would be negated if we rejected the assumption of Crown ownership. We would be reluctant to conclude that, in the Vesting Act, Parliament missed its mark entirely.

[44] This approach accords with the position taken in *Glenharrow Holdings Limited v Attorney-General* [2003] 1 NZLR 236 (HC), although we recognise that the point was not argued in that case.

A customary right to gather?

[45] The conclusion that customary rights to pounamu were extinguished either by the 1860 deed, or, at the latest, by the mining Acts of 1877 and 1886, disposes of the appellants' claim to have exercised customary rights. The proposition that, once extinguished, customary rights cannot revive, renders immaterial the question whether TRONT acquired the land subject to customary rights in the Vesting Act. It did not because by that time any customary rights had been extinguished.

An authorisation from Te Runanga o Makaawhio?

[46] Te Runanga o Te Koeti Turanga was incorporated in 1988 as the legal representative of the Ngati Mahaki ki Makaawhio, a hapu of Ngai Tahu. In 1996, its name was changed to Te Runanga o Makaawhio (TROM), to reflect constitutional changes to its membership rules.

[47] TROM is one of 18 constituent papatipu runanga under Te Runanga o Ngai Tahu Act 1996. According to the Te Runanga o Ngai Tahu (Declaration of Membership) Order in Council 2001, the takiwa of TROM is:

> ... centred at Makaawhio and extends from the south bank of the Pouerua River to Piopiotahi and inland to the Main Divide together with a shared interest with Te Runaka o Katiwaewae in the area situated between the north bank of the Pouerua River and the south bank of the Hokitika River.

[48] In December 1999, Cyril Cain's wife wrote to Mr Gerard O'Regan (who was the Heritage Development Manager for Ngai Tahu Development Corporation) asking to whom she ought to speak about a permit for collecting pounamu in the South Westland area. Mr O'Regan responded that, at that time, under Te Runanga o Ngai Tahu Act 1996, both Kati Waewae and TROM had kaitiaki responsibility for South Westland, and that authorisation to collect pounamu was required from both Kati Waewae and TROM. Mr O'Regan also stated in his letter that "at present there is no facility for spouses to collect pounamu", and he recited the "interim rule" for such collection to be:

> A member of Ngai Tahu can collect as much pounamu as he/she can **individually** carry on his/her person providing he/she has a letter of authorisation from the kaitiaki Runanga.

[49] Judge MacAskill recorded that TROM, subsequent to that correspondence, agree to Cyril Cain continuing to collect pounamu "as before". However, the Judge was of the view that this assent to Cyril Cain's continuation of activity could not realistically be regarded as extending to large-scale commercial extraction:

> [271] ... I am satisfied that [the executive of Makaawhio] was not aware of any significant commercial element in Mr Cain's activities and [the executive] had no knowledge of any mining that he might have carried out on the Cascade Plateau.

[50] The pounamu in question was on Crown land. The Vesting Act did not, of itself, confer a right of access on to Crown land to gather the pounamu vested in TRONT. Rather, access was permissible only in terms of the Crown Minerals Act 1991 as amended by the Crown Minerals Amendment Act 1997, which came into force on the same day as the Vesting Act and was to be read as an incident of the Vesting Act: Recital E(d) of the Vesting Act.

[51] Section 61A of the Crown Minerals Act provided that no person could "prospect, explore, or mine in any Crown land in respect of any mineral that is not the property of the Crown otherwise than in accordance with an access arrangement entered into under s 61B".

[52] In the absence of an access arrangement agreed under s 61B, Mr O'Regan of the Ngai Tahu Development Corporation, whether he thought he had it or not, did not have the authority to allow Cyril Cain to enter onto Crown land to collect pounamu. Neither at trial nor in the appeal did the Crown advert to s 61A or s 61B of the Crown Minerals Act. We can safely assume that there was no relevant access arrangement in terms of s 61B; for if there had been, the Crown or the defence would have produced it in evidence.

[53] In the absence of an access arrangement conferring authority on Mr O'Regan or on TROM to confer rights to collect pounamu, s 61A applies and any collecting would have been unlawful.

[54] The focus of both Crown and defence submissions was upon whether or not TROM in fact conferred upon Cyril Cain the right to take pounamu in the manner it was taken by the Saxtons. As a matter of law, it is almost certainly the case that TROM had no legal authority to confer any collecting rights, because there was no relevant access arrangement. However, *even if* TROM had legal authority to say what it did to Mr Cain, it is clear that the Saxtons' subsequent pounamu takings were outside the bounds of TROM's purported authorisation.

The Saxtons had no right to take the pounamu

[55] We conclude that the Crown proved beyond reasonable doubt that the appellants were not entitled to take pounamu. This conclusion is based on our interpretation of the Deed and the relevant statutes, and the fact that no relevant authorisation had been conferred by TRONT or TROM.

Did the Crown prove beyond reasonable doubt that the Saxtons acted dishonestly?

The approach of the Judge

[56] The Judge concluded that the Crown had proved beyond reasonable doubt that neither David nor Morgan Saxton believed that they were authorised by TRONT to take pounamu. He also concluded that they did not believe that they had a customary right to take the pounamu. He gave extensive reasons for the latter conclusion in respect of David and rather less extensive reasons in respect of Morgan.

[57] We are satisfied that these conclusions were inevitable.

[58] Neither David nor Morgan Saxton ever asserted that they believed they had a right to take the pounamu. That is not to overlook the onus on the Crown to prove all elements of the case. However, it may well seem significant to a trier of fact that the appellants did or said nothing personally to assert an honest belief defence,

especially when that is viewed alongside the evidence of the appellants' activities at the relevant time.

[59] Mr McCoy made particular reference to the decision of the High Court of Australia in *Walden v Hensler* (1987) 163 CLR 561. We accept that, in situations of honest belief, it is unnecessary to state either the claim or its basis when the (in fact) prohibited act is done (*Walden* at [11]). But there must be evidence that such a belief was actually held at that time. There is no such evidence in this case.

[60] The facts of the present case are quite dissimilar to those in *Te Weehi v Regional Fisheries Officer* [1986] 1 NZLR 680 (HC). Although Mr Te Weehi did not advance his claim of right when he was apprehended, there was evidence that he had first obtained permission. There was a realistic evidential basis in that case for a claim of honest belief. That is not the position in this appeal.

[61] To support a claim of honest belief, there must be something to suggest that the appellants had an honest, even if mistaken, belief in an unfettered right to take any pounamu they wished.

[62] Neither David nor Morgan Saxton asserted that they had any authorisation from Ngai Tahu. In fact, Ngai Tahu was the complainant in respect of the criminal charges.

[63] There was evidence that David Saxton had, on occasions, mentioned that he had some pre-existing mining authority. Upon investigation it was found that in 1997 he had made an application for a mining licence, although it was not pursued. David Saxton also raised with Ngai Tahu office-holders questions of authorisation, but the inquiries were not pursued to a conclusion. Counsel before us responsibly accepted that any exchange between David Saxton and either the Crown or TRONT could not possibly have furnished him with an honest belief in his right to take pounamu without authority. David Saxton did not have any authorisation, formal or informal, and his application for, or inquiries about, such authorisation are not consistent with an assertion of an honest belief in a right to take and exploit

pounamu without it. Rather, such application and inquiry points to an acceptance by David Saxton that he did not have the necessary permission, and needed approval.

[64] In terms of the takings themselves, it is most revealing that the operation to take pounamu by David and Morgan Saxton on Cascade Plateau was carried out in a deliberately concealed manner. Scrub was placed across equipment and steps were taken to hide activities on the Plateau. David Saxton did not disclose what he was doing to the Executive Committee of TRONT or anyone else in Ngai Tahu. All activities were furtive.

[65] Some pounamu was initially removed from the Plateau to holding bays where it was carefully camouflaged. No explanation was provided for this extraordinary manoeuvre. The photographs and evidence of the pounamu being hidden in the midst of a large stand of trees, camouflaged with undergrowth and generally covertly dealt with speak for themselves. Counsel's submission (which lacked an evidential basis) that this was a means of hiding the pounamu from others who might try to take it is unpersuasive given the geography and isolation of the area.

[66] Pounamu was then moved from those hideouts to the Saxton farm where again it was secreted rather than being placed in outbuildings which were available for storage. Later, some pounamu was taken to the home property of Lisa Saxton (the daughter of David Saxton), near Christchurch and hidden in a field after David Saxton had asked that it be removed from the shed where it was being stored.

[67] The recordkeeping and financial accounts with regard to the pounamu were misleading and fallacious. Some income was recorded, but it was not an accurate reflection of the entire enterprise. What were in fact pounamu sales were recorded as other forms of revenue. This strongly tells against the possibility that the appellants had a reasonably held belief.

[68] During the period of the interception of private conversations (which also involved Harvey Hutton, who was, in a separate proceeding, himself convicted of stealing pounamu), discussions were replete with various reactions to the police investigation. There was never any indication that the Saxtons considered there was

nothing to worry about because either or both of them had customary rights to take the pounamu. Rather, the conversations demonstrate frustrated resignation on the part of the Saxtons that they had been caught out, and concerns about the possible consequences.

[69] David Saxton's high state of anxiety about the police activities on the Cascade Plateau culminated when he organised someone to hide on the Plateau and report to him on what the police were doing. This strongly suggests a very worried man and is inconsistent with an honestly held belief that what he had been doing was his right.

[70] In this context, bald and not very plausible assertions of assumed customary rights, whether taken by assignment from Cyril Cain or as a whangai of Debbie Cain, cannot counter the probative value of the evidence of the covert activities on the part of the Saxtons, the lack of assertion of right, and the panic-driven response to the instigation of the police operation. The evidence is consistent only with the anxiety and acceptance of people who know they have been doing something wrong and have been caught out. In all that was going on, Morgan Saxton was integrally involved with his father in the covert operation. If he had any thought, let alone held an honest belief that he was a whangai and thereby entitled to take pounamu as he did, it is more than surprising that such a belief was never expressed.

[71] Cyril Cain's evidence on his own understanding of his asserted customary right to take pounamu was not strong. He described his right to take pounamu as being descended from, and explained to him by, his mother. He said that when his health declined David Saxton collected pounamu for him. As to the discovery of pounamu on the Cascade Plateau, Mr Cain advanced different propositions at different points in the court process, but the compelling conclusion from his evidence was that he went to the Cascade Plateau after David Saxton discovered there was pounamu there. Finally, and most problematic for Mr Cain's asserted belief in his customary right, he accepted in cross-examination that he had signed a letter to Ngai Tahu, written by his wife, to enquire into his right to collect pounamu. The fact Mr Cain had applied for (although not pursued) a mining licence prior to 1997 refutes his claim that he believed he could fossick and collect as of right.

[72] Finally, a lack of honest belief in a personal right is underscored by Cyril Cain's involvement in an extensive project, undertaken by Te Runanga o Makaawhio, to develop a Pounamu Resource Management Plan. The plan was worked on for five years, in consultation with Ngai Tahu whanau, other iwi, community representatives and the commercial pounamu industry. In both the first draft issued in October 2002 and the final draft issued in 2004, it was expressly stated that the position in respect of fossicking for, or collection of, pounamu prior to the passage of the Vesting Act was governed by the mining licences regime. The drafts described "customary collection" of pounamu as being "collection of pounamu up to what an individual can carry". Importantly, the final draft stated that:

> The plan is an amalgamation of the work of the Makaawhio Pounamu Committee over five and a half years and the Ngai Tahu Pounamu Resource Management plan and its policies...
>
> This battle was won when Te Runanga o Ngai Tahu accepted the recommendations from the Ngai Tahu Pounamu Management Group in May 2002 which empowered Makaawhio (along with other Kaitiaki Runanga) **total control and management of the Pounamu that lies within their respective takiwa,** thus re-establishing our tino rangitiratanga.
>
> (Emphasis added)

[73] Directly below this statement of Makaawhio's "total control and management" of pounamu within its takiwa, was the name "Cyril Cain", who was acknowledged as a kaumatua who had been involved in the "development of [the] plan".

[74] In the absence of a contrary explanation, this indicates that Mr Cain knew of the new centralised management plan for pounamu, and critically undermines any claim by him that he had a contrary understanding of the rights of Ngai Tahu members to fossick for, or collect, pounamu in a traditional way.

[75] Having assessed the totality of the material, including particularly the acts and omissions of those who were present at the relevant time, there can be no conclusion other than that an assertion of customary right or whangai was never in the contemplation of either David Saxton or Morgan Saxton.

[76] The Crown overwhelmingly displaced the possibility that the Saxtons believed that they were exercising customary rights.

Admissibility of evidence

[77] At the depositions hearing for the three charges initially laid, evidence was called which put in contention the two issues which have now emerged as the grounds on which the appeal against the present conviction is advanced. Mr Withnall QC (who then acted for the Saxtons) made clear that the trial would involve issues as to whether there was an ongoing customary right for individuals who were part of Ngai Tahu to take and exploit pounamu, together with whangai rights, and whether the Saxtons believed those rights impacted on their position.

[78] In the trial before Judge MacAskill, without comment, objection or complaint, first the Crown and then the defence led evidence from a number of witnesses who deposed to customary practice. Mr McCoy before us submitted that this was all inadmissible because it did not strictly comply with the provisions in the Evidence Act 1908 as amended by the Evidence (Amendment) Act No 2 1980. Counsel accepted that such evidence would be admissible under the Evidence Act 2006, but that Act does not apply to this case.

[79] Mr McCoy considered the evidence as to custom may have been properly received in a civil case, or in an application to the Maori Land Court for a declaration as to the existence of a custom under the Te Ture Whenua Maori Act 1993. However, this was a criminal case and hearsay evidence was inadmissible unless it came within a recognised exception.

[80] The Crown's case against the appellants stands even if all the evidence as to customary rights is excluded. The Crown case is based wholly on statutory sources and statutory interpretation (bolstered in part by the Waitangi Tribunal Report which, it is agreed, is admissible). It is the appellants that rely on evidence as to custom, which means that if the evidence is excluded the effect is only to remove the appellants' hope of establishing a defence based on customary entitlement.

[81] That means that the question of admissibility of evidence is moot. However, in deference to the extensive argument advanced on the issue, we make some brief observations.

[82] Section 13 of the Evidence (Amendment) Act (No 2) 1980 (now repealed), under the general heading, "oral hearsay in criminal proceedings", provided that:

> **13 Statement relating to public or general rights, or Maori custom**
>
> Subject to section 8 of this Act, a statement qualifies under this section for admission if the statement relates to the existence of a public or general right or of Maori custom.

[83] Mr McCoy acknowledged this exception, but he submitted that any evidence admitted pursuant to it must be "scrupulously examined" for reliability. He submitted Judge MacAskill failed to evaluate the evidence to this standard, and that the basis upon which he admitted the evidence was too vague.

[84] It is helpful to consider the approach taken to evidence of aboriginal or indigenous custom in cases such as this.

[85] In the Supreme Court of Canada in *R v Van Der Peet* [1996] 2 SCR 507, the majority observed at 558:

> Courts must approach the rules of evidence in light of the evidentiary difficulties inherent in adjudicating aboriginal claims.
>
> In determining whether an aboriginal claimant has produced evidence sufficient to demonstrate that her activity is an aspect of a practice, custom or tradition integral to a distinctive aboriginal culture, a court should approach the rules of evidence, and interpret the evidence that exists, with a consciousness of the special nature of aboriginal claims, and of the evidentiary difficulties in proving a right which originates in times where there were no written records of the practices, customs and traditions engaged in. The courts must not undervalue the evidence presented by aboriginal claimants simply because that evidence does not conform precisely with the evidentiary standards that would be applied in, for example, a private law torts case.

[86] To like effect are the more recent comments of McLachlan CJ in *R v Marshall; R v Bernard* [2005] 2 SCR 220at [68] when she said:

> Underlying all these issues is the need for a sensitive and generous approach to the evidence tendered to establish aboriginal rights, be they the right to title or lesser rights to fish, hunt or gather. Aboriginal peoples did not write down events in their pre-sovereignty histories. Therefore, orally transmitted history must be accepted, provided the conditions of usefulness and reasonable reliability set out in *Mitchell v MNR* [2001] 1 SCR 911, 2001 SCC 33, 199 DLR (4th) 385 are respected. Usefulness asks whether the oral history provide as evidence that would not otherwise be available or evidence of the aboriginal perspective on the right claimed. Reasonable reliability ensures that the witness represents a credible source of the particular people's history. In determining the usefulness and reliability of oral histories, judges must resist facile assumptions based on Eurocentric traditions of gathering and passing on historical facts.

[87] We accept Mr McCoy's point that any case turning on questions of custom give rise to inherent evidentiary difficulties, and that in criminal cases judges must be careful not to allow evidentiary vagueness to emasculate the prosecution's burden of proof.

[88] However, in a case where the parties are represented by senior counsel, and they mutually request the Court to deal with a case on a particular basis, it would be unusual for an appellate court to adopt a stricter approach to admissibility contrary to what the parties in their mutual interests expected to have adjudicated in the first instance hearing.

[89] If Mr McCoy's thesis is correct, then a substantial part of the testimony included in the record of the District Court trial has to be disregarded. The defence of the accused in their trial was heavily dependant on evidence they called, which would not meet the rigorous demands of this test any more than that called by the Crown. Mr McCoy did not shrink from that, but submitted that in a criminal case the parties could not vary the applicable regime and that whatever acquiescence there may have been, what occurred was not sustainable.

[90] As we have reached our conclusions in this appeal without reference to the evidence now in contention, the issue is no more than academic. It arises in respect of a statutory regime which no longer exists and will not be relevant for future cases.

[91] For the avoidance of doubt we note, however, that the submission appears to be unduly legalistic. A number of women and men who knew of the background

activities of Ngai Tahu in particular, and Mäori culture in general, were not testifying as to the truth of what had happened in the past, but to the reality of a historical perspective of life as they had known it. That need not be hearsay.

[92] Some of the experts called by each side may have had ties or connections which, it could be argued, might have influenced the view they held on a particular matter. It is to be remembered that the Court was being engaged about customary rights which attach to a tiny group of people. Obtaining witnesses who were totally independent and unaffected was probably unrealistic. In a circumstance such as this, the weight or value of testimony will need to be carefully assessed, rather than being seen as a disqualifying factor.

[93] Whenever the court receives oral evidence of custom, particularly from a group where the oral tradition has predominated over any written record, the need for the judge to be alert to the possibilities of lack of detachment, misinterpretation and misconception is real.

[94] That said, where parties choose to deal with the evidential issues by placing before the Court from both perspectives oral testimony as to customary right, we can see no basis for an appellate court to intervene and reimpose rules which the parties have chosen to have applied in a flexible manner. When the two features present in this case – use of, and acquiescence in use of, evidence of custom by *both* the prosecution and the defence at trial, and the inescapable (although manageable) difficulties inherent in evidence of this type – are taken together, there is no reason for this Court to criticise Judge MacAskill's decision to admit the evidence.

Result on conviction appeal

[95] We are satisfied that the Judge's conclusion in respect of the second count in the indictment was correct, although we reach that conclusion on a different basis. The appeal against conviction is accordingly dismissed.

Appeal against sentence

[96] At the sentencing, Judge MacAskill noted:

> [37] Your counsel has submitted that imprisonment is neither necessary nor appropriate. He emphasises that you are first offenders and otherwise of good character. You are highly regarded in your local community and by many outside it. You have contributed much to your community. He submitted that it is not necessary for the safety of the community that you must be removed from it. That is the essence of his submissions.
>
> [38] Counsel for the Crown and the defence recognise that there are no truly comparable decisions that are of assistance as sentencing precedents, other than the sentencing of your associate, Harvey Hutton, by Judge MacDonald on 30 May 2006 for related offending. I will come to his case shortly.
>
> [39] The other sentencing cases referred to by the Crown are of some guidance with respect to appropriate sentencing levels. I accept that none of them concern the theft of natural resources. However, I do not regard the theft of natural resources, such as pounamu, as any less serious than the theft of other property. It is at least as serious, especially when it is recognised that natural resources cannot be restored and when they have cultural values to the owners that are infringed. The fact that pounamu may have a modest economic value *in situ* is not a factor that should be given significant weight. The owners of natural resources are entitled to keep them in their natural state, whatever their economic value.

[97] Having analysed the position of Mr Hutton, the Judge determined a starting point of four years and six months' imprisonment for the offending by David and Morgan Saxton, saying he considered that their proven offending was substantially greater in scale than that of Mr Hutton. He considered that sentences of home detention or community work would be an insufficient response to the offending which he regarded as serious.

[98] The Judge made various allowances and reached the effective sentences of two years and nine months' imprisonment, and two years and six months' imprisonment for David and Morgan Saxton respectively.

[99] A number of matters have changed since that time. First, both David and Morgan Saxton were imprisoned for a few days short of four months until bail was granted some 14 months ago.

[100] Second, Morgan Saxton has since died.

[101] The Crown, in its submission on the sentence appeal, noted:

> The Crown submitted that there was overall little to differentiate the offending in *Hutton* from the present case and issues of parity did arise. On that basis although somewhat below the general sentencing level for this level of theft the Crown submitted that appropriate range of sentence was between 18 months to two years' imprisonment.

[102] Mr Bates also noted:

> As the sentencing was dealt with on 15 February 2008, it is accepted that the Court would not have been aware of the approach subsequently taken by this Court in cases such as *R v Hill* [2008] 2 NZLR 381.

[103] We are satisfied that, in light of all the circumstances, a community based sentence in respect of David Saxton is now appropriate. We accept the Crown's submission that, bearing in mind the sentence imposed on Mr Hutton and upheld in this Court ([2008] NZCA 126), the proper and effective starting point of 18 months to two years' imprisonment was appropriate. This is after a substantial allowance is made for the fact that Mr Saxton was a first offender, in middle age with an outstanding record of community contribution and that a significant reduction was therefore appropriate.

[104] It is a situation in which the approach subsequently adopted by this Court in *R v Hill* [2008] 2 NZLR 381 has to be considered. We are satisfied that the case comes within that category, more so now after the time that has passed since the offending and the original sentencing.

[105] The Department of Corrections has confirmed that there is an appropriate address available in Picton at which a sentence of home detention could be served. We are satisfied that the necessary prerequisites exist to impose such a penalty.

[106] In an extraordinarily sympathetic and supportive report, the Court was again reminded of the ability of Mr Saxton to contribute to the South Westland community and the possibility of the imposition of a term of community work.

[107] Although we are cognisant of the sterling service which Mr Saxton has provided to his community in particular, and search and rescue in general, the level of culpability in this offending means that a sentence at the more restrictive end of the hierarchy prescribed by s 10A of the Sentencing Act 2002 is essential. The only issue is whether, in light of all that has occurred, the interests of justice can now be satisfied by something less than a full time custodial sentence.

[108] This was serious offending over a sustained period of time carried out covertly and at a substantial loss to the complainant, even allowing for the unchallenged reparation order.

[109] The maximum period of home detention that may be imposed under s 80A(3) of the Sentencing Act is 12 months. In our judgment, the maximum term of 12 months' home detention would have been a proper and sufficient response to the circumstances of the offence and the offenders. Having regard to the period that has already been spent in custody, we are satisfied that the least severe sentence which can now be imposed is six months' home detention.

Result on sentence appeals

[110] Mr David Saxton's appeal against sentence is allowed. The sentence of two years and nine months' imprisonment is quashed. Mr Saxton is sentenced to six months' home detention. He is to go to 19 Garden Terrace, Picton, at 10am on Friday 30 October 2009 and await the arrival of a probation officer and the monitoring company. Thereafter he is to be subject to six months' home detention at that address and is to be subject to the standard home detention conditions in s 80C(2) of the Sentencing Act.

[111] We permitted the personal representative of Morgan Saxton to continue with the appeal against both conviction and sentence – the latter because of the substantial reparation order. That aspect of the appeal has been abandoned and necessarily Morgan Saxton's appeal against sentence is dismissed.

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