HIGH COURT OF AUSTRALIA

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Details of Filing

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Important Information

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IN THE HIGH COURT OF AUSTRALIA S126 of 2022
SYDNEY REGISTRY

EMMA-JANE STANLEY

and

DIRECTOR OF PUBLIC PROSECUTIONS (NSW)

APPELLANT'S OUTLINE OF ORAL ARGUMENT

This outline is in a form suitable for publication on the internet.

The appeal to the District Court

1. The Appellant was sentenced in the Local Court to an aggregate sentence of imprisonment of three years with a non-parole period of two years (CAB 45-46). She appealed the sentence to the District Court (CAB 47; s 11 of the *Crimes (Appeal and Review) Act 2001* (NSW) (***CARA***)). Such an appeal is a full rehearing; the District Court judge sentences afresh (s 17 of *CARA*). There is no appeal from the District Court decision. Judicial review remains available (s 69 of the *Supreme Court Act 1970* (NSW) and *Kirk* at [88]) but is subject to a privative clause (s 176 of the *District Court Act 1973* (NSW); AS footnote [3]).

2. The only issue on the appeal was whether the term of imprisonment to be imposed should be served by way of an intensive correction order (**ICO**) (ABFM 141).

The nature of the task when imposing an ICO

3. ICOs were introduced into the *Crimes (Sentencing Procedure) Act 1999* (NSW) (***CSP Act***) in 2010; the provisions relating to ICOs were substantially amended by the *Crimes (Sentencing Procedure) Amendment (Sentencing Options) Act 2017* (NSW) (***Amending Act***) (*Wany* at [3]-[9]; CA [175]-[179], CAB 151-154 per McCallum JA; Second Reading Speech at JBA 920).

4. The *CSP Act* mandates a three-staged approach to the imposition of an ICO (*Wany* at [18]-[21]). It engages a discrete exercise (CA [172]-[173], CAB 150-151 per McCallum JA; note s 62(4) of the *CSP Act* which refers to "action being taken under Part 5 in relation to the making of an ICO").

5. Section 66 in its current form was introduced by the *Amending Act*. It was inserted into Division 2 of Part 5 of the *CSP Act*, which provides for restrictions on the power to make ICOs (s 35(1) of the *Interpretation Act 1987* (NSW)). Division 2 includes that an ICO cannot be imposed for certain offences (s 67); or for sentences longer than three years (s 68); and the court must have regard to sentencing assessment reports (ss 17D(1) and (2) and 69).

6. Section 66 replaced s 67 of the previous version of the Act which contained a non-invalidity clause (s 67(5)). Section 66 does not include such a clause (cf ss 17I, 17J and 73A(1B)), which is otherwise utilised throughout the *CSP Act* (cf CA [54]-[55], CAB 109-110 per Bell P; RS [26]). Such clauses in the *CSP Act* are not limited to notice/reasons (eg ss 22(4), 25F(8) of the *CSP Act*). Such clauses have their limits (*FCT v Futuris Corp Ltd* at [55]-[56]; note s 101A of the *CSP Act* concerning identification of error on appeal).

7. Compliance with s 66 is mandatory (RS [2]-[3], but cf RS [28]). Community safety is specified as "the paramount consideration" – it is at least a fundamental element of the decision and the strength of the language suggests it is the most important element. Section 66(2) requires a forward-looking assessment about the offender's (future) risk of reoffending (CA [190], CAB 157-158).

8. To be seized of an ICO, the court needs to be armed (*inter alia*) with the considerations in s 66. Once seized of the subject, the contemplated outcome is an ICO *or* full-time detention with a non-parole period, but full-time detention is not the default position (cf RS [26]).

Judge Williams did not undertake the task

9. The imposition of an ICO was the sole issue on appeal; submissions were made about community safety and the prospects of rehabilitation, and were central to the case put (ABFM 25, 29-30; CA [181], CAB 155 per McCallum JA; cf CA [155], CAB 145 per Leeming JA). Her Honour made positive findings about prospects of rehabilitation (CAB 72).

10. Judge Williams did not undertake the 66(2) assessment (CA [161], [183]-[184], CAB 146, 155-156 per McCallum JA; CA [190]-[192], CAB 157-159 per Beech-Jones JA; CA [24]-[25], CAB 100-101 per Bell P). Her Honour did not refer to s 66 of the *CSP Act* nor did she assess or even refer to how the two alternative methods of imprisonment would address the likelihood of reoffending nor how that was factored into her decision (CA [184], CAB 155-156; cf RS [54]). The passages identified by the Respondent do not assist it (at CAB 56, 62-63, 72-74, 75-76).

11. If her Honour did undertake this exercise then she fundamentally misconceived it. Her Honour referred to community safety as the paramount consideration but prefaced it with "[i]n my view". The words that follow do not address s 66(2). Community safety was not assessed in any forward-looking manner or by reference to the Appellant's risk of reoffending (CAB 75).

Jurisdictional error

12. The question of whether a failure to comply with s 66(2) is jurisdictional cannot be determined by sole consideration of the negative definition of jurisdictional error in *Craig* (AS [46]-[49]; cf CA [49], CAB 108 per Bell P). Nor is it adequate description merely to call it "jurisdiction to determine a sentence appeal" (cf CA [61], CAB 112 per Bell P and CA [151], CAB 144 per Leeming JA) or jurisdiction to impose a sentence according to an instinctive synthesis (CA [139], CAB 139-140 per Basten JA; CA [153], CAB 144 per Leeming JA; *Quinn* at [98]).

13. It is not necessary to characterise the non-compliance as falling within one of the three examples instanced in *Craig* at 177, and *Kirk* at [72]-[75]. But the failure to undertake the assessment in s 66(2) can be characterised as both a failure to comply with a condition of jurisdiction (as ss 4B, 17D, 67, 68 and 69 would be; cf *Quinn* at [127]-[131] per Leeming JA) and/or a misconception of the function (CA [162] and [185], CAB 146-147 and 156 per McCallum JA). To impose full-time imprisonment is to incarcerate an individual where there is no power to do so absent engaging with the exercise in s 66(2) (*Kirk* at [74]).

14. That the mandatory assessment is not (or may not be) determinative (cf CA [193]-[194], CAB 159-160 per Beech-Jones JA; RS [22]) is no barrier to a finding of jurisdictional error but, at most, goes to the question of materiality (which was not an issue in the Appellant's case).

15. Similarly the suggested adverse "consequences" which featured predominantly in the reasons of the Court of Appeal (CA [56], CAB 110-111 per Bell P; [99], [104] and [135]-[137], CAB 126, 127-128 and 138-139 per Basten JA) are misplaced (cf RS [41]-[43]). The question of whether an order of an inferior court is valid until set aside is by no means settled (CA [199], CAB 160-161 per Beech-Jones JA; *Bhardwaj* at [45]-[46]) and flows from the absence of a right of appeal. In any event a finding of invalidity here would entail no more than the Appellant would be returned to bail pending hearing of the appeal to the District Court.

16. The Appellant does not contend for an excessively broad approach to jurisdictional error (RS [17]) – see *Bhardwaj* at [48], *Hossain* at [20]. The broad approach to construing the privative clause advanced by the Respondent would leave little scope for jurisdictional error in sentencing and a large criminal jurisdiction not subject to review for significant or even fundamental legal error, other than procedural unfairness, bias and the like.

TA GAME

T QUILTER

CE O'NEILL

15 November 2022