HIGH COURT OF AUSTRALIA

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Details of Filing

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IN THE HIGH COURT OF AUSTRALIA

SYDNEY REGISTRY

BETWEEN: **JONG HAN PARK**

Appellant

and

THE QUEEN

Respondent

RESPONDENT'S OUTLINE OF ORAL ARGUMENT

Part I: These submissions are in a form suitable for publication on the internet.

Part II:

1. The majority of the Court of Criminal Appeal ("CCA") correctly held that a sentencing court should apply the s. 22 discount to a sentence as a part of the sentence assessment, and that, if the result of that assessment is a sentence of two years or more, the jurisdictional limit imposed by s. 268(1A) of the *Criminal Procedure Act* 1986 (NSW) of imprisonment for 2 years would then be the sentence imposed.

2. The issue in this appeal cannot be resolved simply by construing s.22 of the *Crimes (Sentencing Procedure) Act, 1999 ("Sentencing Procedure Act")* alone. Rather it is necessary to construe s.22 as it operates in the broader context of the jurisdictional limit prescribed by s.268(1A).

The proper construction of the interaction of the two provisions (**RS [18]-[28]**)

3. It is well-established that a provision that prescribes a jurisdictional limit takes effect at the final stage of the sentencing process: *R v Doan* (2000) 50 NSWLR 115 at [35] and the authorities cited therein; (**JBA 310-311**). In other words, where a jurisdictional limit applies, the sentencing court must first assess the appropriate sentence for an offence within the context of the maximum penalty, synthesising all relevant facts and circumstances: CCA judgment at [174], [182] and [197] (**CAB 113, 116, 120**) per Hulme J; see also at [24] and at [30] (**CAB 69 and 71**), per Bathurst CJ.

4. The use of the words "*otherwise imposed*" in s. 22 of the *Sentencing Procedure Act* does not signify that an approach contrary to this accepted practice should be adopted where a court is applying a discount for a plea of guilty (when sentencing an offender for a summary offence being dealt with on indictment). The word "*imposed*" in s. 22 must be read in the context of the provision as a whole. Section 22 provides that whilst a sentencing court "*must*" take into account various aspects of the plea, the court "*may accordingly*" impose a lesser penalty. The text of s. 22 does not indicate a legislative

intention that the utilitarian purpose of saving court time should prevail over other considerations of justice, such as the need for offenders to receive sentences that are proportionate to the objective gravity of their offending: *R v Thomson and Houlton* (2000) 49 NSWLR 383 at [160(iv)] (**JBA 470**).

The legislative history and purpose of the provisions (**RS [29]-[40]**)

5. The majority's construction is also consistent with the legislative history and purpose of the two provisions. In particular, the history of these provisions demonstrates that discounts for pleas of guilty and the use of the summary jurisdiction for indictable offences are complementary measures that each serve the goal of increasing efficiency in the criminal justice system, whilst ensuring that offenders receive sentences that reflect the objective gravity of their offending.

6. The majority's interpretation has the advantage of ensuring consistency of approach with regard to sentencing between indictable offences in the higher courts and indictable offences disposed of summarily – subject to the requirement not to impose a sentence above the jurisdictional limit, which forms a final discrete adjustment, separate from the exercise of the sentencing discretion. An approach to sentencing that follows an identical approach in different jurisdictions, with the proviso only that on summary disposition the endpoint cannot exceed the jurisdictional limit, is both clear and logical.

7. In contrast, the appellant's construction would have impacts that are not consistent with the purposes of s. 22 and s. 268(1A). It would mean that an offence sentenced on indictment in the District Court following an early guilty plea could attract a sentence of 2 years imprisonment, whereas the same indictable offence, dealt with summarily, would receive 18 months' imprisonment, even though a sentence of 2 years' imprisonment is within the jurisdictional limit.

8. Contrary to the appellant's contention, it is not essential to the purpose of s. 22 to ensure the visibility of discounts for pleas of guilty when indictable offences are finalised summarily; cf AWS at [46]. Section 22 was not introduced in order to provide an additional incentive for offenders charged with indictable offences that are being dealt with summarily. Those offenders already have the benefit of the jurisdictional ceiling in the Local Court. The effect of these benefits is visible in the Local Court sentencing examples referred to by R A Hulme J: CCA judgment at [185] – [186] (**CAB 116**).

9. The appellant's interpretation places an unnecessary constraint on the Local Court's sentencing powers by prioritising an asserted need for visible discounts at the expense of the Local Court being able to make full use of its jurisdiction to impose sentences that are appropriate to the objective and subjective characteristics of the offending and the offender, provided only that the sentence not exceed the jurisdictional limit of 2 years imprisonment.

Judicial consideration of the interaction of the provisions (**RS 41-48**)

10. The majority's approach is applied in respect of similar provisions in Western Australia and the Northern Territory, and accords with authority in New South Wales dating back to 2008. In particular, in *Lapa v The Queen* [2008] 192 A Crim R 305 (**JBA 359**), the CCA rejected a contention that the sentencing judge's approach "*exceeded his Honour's jurisdiction, because* [the] *starting point was greater than the maximum sentence available to him*": *Lapa* at [15] and [17] (**JBA 362 and 363**). A decade later, *Lapa* was affirmed in *Mundine v R* [2017] NSWCCA 97 at [19] and [92] (**JBA 381 and 401**).

11. As both Bathurst CJ and Hulme J observed in the CCA judgment, courts in New South Wales exercising summary jurisdiction at all levels (Local Court, District Court and Supreme Court) have followed the decisions of *Lapa* and *Mundine* and sentenced offenders in the manner prescribed by those decisions on a daily basis over the past two decades: CCA judgment at [33] (**CAB 73**), per Bathurst CJ, and at [167] and [183] – [195] (**CAB 111 and 116 – 119**), per Hulme J.

Subsequent legislative history (**RS 49-64**)

12. Further, during this period, the legislature has given significant consideration to sentencing, encouraging guilty pleas and the jurisdiction of the Local Court, without any intervention in the method of sentencing approved in *Lapa*. This history demonstrates that there is no indication that the existing sentencing practice, as supported by the majority interpretation, frustrates the purpose of promoting the efficient use of resources or otherwise causes difficulties for the administration of justice. Further, the Court may draw an inference from this legislative history that the legislature has approved the interpretation of the interaction of ss. 22 and 268 as determined by the CCA in *Lapa*.

Dated: 2 September 2021

H Baker SC
Deputy Director of Public Prosecutions
T: 02 9285 8606
hbaker@odpp.nsw.gov.au

B K Baker
Deputy Senior Crown Prosecutor
T: 02 9285 8606
bbaker@odpp.nsw.gov.au

K Jeffreys
Crown Prosecutor
T: 02 9285 8606
kjeffreys@odpp.nsw.gov.au