IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY
ON APPEAL FROM THE COURT OF CRIMINAL APPEAL (NSW)

No. 257 of 2014

BETWEEN:

CMB
Appellant

and

THE ATTORNEY GENERAL FOR NEW SOUTH WALES
Respondent

APPELLANT'S REPLY

Part I: Certification

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

Part II: Reply

2 The circumstances of the appellant's offending have never been in issue: cf. Respondent's Submission ("RS")[6], see Appellant's Submission ("AS")[13]. There was no dispute below that this "offending had never been raised by the victim and would not have come to the attention of the authorities without the confession of the offender to the counsellor and then to the NSW Police" (**AB156** ODPP "Decision from the Director of Public Prosecution in the matter of R v B" dated 17 July 2013):cf.RS[11]. The matters referred to at RS[7]- [8] were not the subject of the appeal before the Court of Criminal Appeal ("CCA"), although they were referred to the Cedar Cottage Program, as outlined in the appellant's submissions.

3 The assertions of the respondent (RS[10],[14]) that the Act "ceased" to apply and as to other alleged irregularities, were held not to be relevant, "without merit" and "precatory at best":**AB284-5** CCA[85]-[86]. They were conceded before the CCA by the respondent to not be the subject of the appeal.

4 It is probable that ground 1C was simply treated as a particular of ground 2 (manifest inadequacy):**AB285-7** CCA[87]-[89] cf.RS[23]. The appellant does not accept that the second and third sentences of RS[23] are factual matters, rather these are submissions that are in issue on the appeal and addressed below.

5 The respondent makes significant concessions in its primary position, namely:

(A) there is no onus on a respondent to a Crown appeal (this only being relied on in the alternative) (RS[28]-[30], [46]);

(B) the reference by the CCA to "onus" was a reference to a legal onus on the respondent in relation to the residual discretion (RS[27]);

(C) the principles in *Malvaso v The Queen* (1989) 168 CLR 227 and *Everett v The Queen* (1994) 181 CLR 295 continue to apply (RS[32]);

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(D) considerations of fairness to a respondent lie at the heart of the s5D *Criminal Appeal Act 1912* ("s5D") discretion (RS[53]);

(E) there was no reference to the Attorney General's conduct in consideration of the residual discretion, the discussion of the conduct of the "Crown" being limited to the conduct of the DPP representative below (RS[47], relying on **AB295-6** CCA[104]-[109]);

(F) the appellant's interpretation of s23 *Crimes (Sentencing Procedure) Act 1999* ("s23") is correct (RS[58]-[59]);

(G) the CCA did not address the appellant's assistance to the authorities in its "Consideration" of manifest inadequacy (RS[67]);

(H) s23 was only referred to by the CCA when summarising the respondent's argument below (at **AB274** CCA[51]-[53], cf. RS[60]), and then next, in re-sentencing (at **AB289-290** CCA[93]-[94], cf. RS[61]-[62], [67]-[68]).

6 As a matter of statutory construction, both arguments of the respondent, namely that there is no onus of persuasion and alternatively, that the respondent to a Crown appeal does bear such onus, ignore the requirement of "clear and unambiguous words before a statute will be construed as effecting, to the detriment of the subject, any fundamental alteration to the common law principles governing the administration of justice": *Rohde v DPP* (1986) 161 CLR 119 at 129; *Lacey v Attorney General (Qld)* (2011) 242 CLR 573 at 582-3, 591-2. The comparison of s5D to discretions as exercised in prerogative relief and other statutory constructs is inapt:cf.RS[40]-[44]. Nor is it to be equated with questions of admissibility of evidence or evidentiary burdens:cf.RS[44],[54]. The s5D discretion has a different statutory basis and quite singular origins and import (as examined in *Lacey, R v JW* (2010) 77 NSWLR 7, *DPP (Vic) v Karazisis* (2010) 31 VR 634 and *Green v The Queen* (2011) 244 CLR 462). The respondent's construction "tips the scales" against the accepted limiting purpose of Crown appeals and does so "in a way that offends 'deep rooted notions of fairness…'" (cf.*Lacey* at 583[20], *Green*). The respondent accepts that the party who asserts must prove: RS [31]. The Crown asserts that a higher sentence is warranted and it is the Crown who must show that the Court should vary the sentence in the exercise of its discretion under s5D. It is not correct to say that *Everett* at 299-300 does not apply where a Crown appeal is of right: *Police v Cadd* (1997) 69 SASR 150 at 157-159; *Hrasky v Boyd* (2000) 113 A Crim R 11 at [27]. It is also not correct to say that the burden of persuasion lies on neither party, it lies on the Crown. *R v Hernando* (2002) 136 A Crim R 451 at 458[12] was correctly decided.

7 Contrary to the respondent's submission and the approach of the CCA, there is no requirement in a Crown appeal for the CCA to resentence "unless" satisfied by a respondent that the residual discretion should be exercised:cf.RS[23], *Bugmy v The Queen* (2013) 249 CLR 571 at 588[24]; *Karazisis* at 657-8[100]; *JW* at 25[95], 41[205], 42[209]; *Hernando* at 458[12]. The removal of double jeopardy considerations left this aspect "untouched": *JW* at 25[95] cf.RS[37]-[39], [52]. The quote relied on at RS[52] from Spigelman CJ in *JW* at 20[64] carries an important qualification which has not been quoted by the respondent, namely: "There are however, discretionary considerations which arise as the words 'may in its discretion' in s5D make clear…". The removal of the element of 'double jeopardy' on a Crown appeal, has been settled conformably in *JW*, *Karazisis*,

Munda v Western Australia (2013) 249 CLR 600 and *Green.* While the discretion of the executive to bring an appeal under s5D is not constrained by any prior reference to 'rarity', the exercise of the discretion not to intervene remains a matter for the Court with the focus on the conduct of the executive informing the residual discretion and, as the respondent concedes, on considerations of fairness to the individual:cf.RS[38],[39]. As the plurality held in *Karazisis* at 660[115] "[t]he right given to the Crown to appeal against the sentence is not designed to permit it to raise, for the first time, matters that should have been ventilated at first instance". While rarity as a sentencing principle may no longer apply, Crown appeals remain "subject to particular discretionary obstacles which the Crown must overcome": *Karazisis* at 661-2[120]-[123] (emphasis added). Just as there is no suggestion for example, that on an offender's appeal under s6(3) *Criminal Appeal Act 1912*, the Crown bears an onus of persuasion that some other sentence is not warranted in law, there is no onus on a respondent to a Crown appeal. It is not correct to say that the CCA should first determine the sentence that should be imposed and a respondent is then under some burden, legal or evidentiary, to persuade the CCA that such sentence should not be imposed.

8 The appellant notes that the Crown did not argue before the CCA any of the positions that it now advocates and did not speak against the correctness of *Hernando*. It is only in exceptional circumstances that the power of this Court to entertain a point taken for the first time before it, should be exercised, it being a court of last resort: *Crampton v The Queen* (2000) 206 CLR 161. Litigants being bound by the conduct of their counsel is an important underpinning of the adversarial system: *Crampton* per Gleeson CJ at 172-173[14]-[20], Kirby J at 206-207[122] and Hayne J at 216-219[154]-[163]. The change in position of the Attorney General at this level raises a question for this Court as to whether the respondent's arguments should be entertained.

9 This aspect of the adversarial system and the role of the Crown in it, is reflected in this Court's decision in *Everett* at 302-3, 307 applying *R v Wilton* (1981) 28 SASR 362 at 367-8. Consideration of the conduct of the Crown in the exercise of the discretion was specifically addressed and affirmed as an important aspect of the discretion involving considerations of fairness apart from double jeopardy: *JW* at 24-5[92]-[93]. The Crown has continuing obligations in this respect: *Matthews v The Queen* [2014] VSCA 291 at [25]. The CCA, in casting an onus on the appellant, erred in failing to take into account the unfairness occasioned by the Attorney General's extraordinary change in position from that of the DPP, maintained by the DPP at the point of appeal:cf.RS[47], see AS[34]-[36], **AB156**. The executive had set up and concurred in a diversionary process, with which the appellant had faithfully participated and complied. A different arm of the executive (the DPP) also concurred with the process and sentencing outcome, however the Attorney General now demanded an increase in the sentence, in the knowledge that this would have the effect of ending the applicant's diversion and potentially jailing him on his compliance. The conduct of the Crown, in addition to, for example, parity and delay are all matters that may arise from the record, in relation to which a respondent bears no onus (see also AS[27]):cf. RS[43]-[45] The discretion may be exercised without any evidence from a respondent to a Crown appeal. It is for the Crown to satisfy the court that the purpose of the appeal cannot be achieved by "a statement of this Court that the sentences imposed

upon the respondent were wrong and why they were wrong": *R v Borkowski* (2009) 195 A Crim R 1 at 18[70], *Green* at 477[37].

10 The s5D discretion as to whether to intervene should not be confused with the discretion exercised at the time of resentencing, these are "different discretions":*Green* at 476-477[35], 479-480 [43], [45], *JW* at 33[145]-[146], cf. RS[29]-[30]. "If the Court does decide to allow an appeal under s5D it will, in exercising its re-sentencing discretion, have regard to the matters to which it must have regard by virtue of ss3A and 21A of the Sentencing Act": *Green* at 480[45]. Tests of whether a respondent can "outweigh the patent seriousness of his offending", or outweigh "the corresponding propriety of imposing a sentence upon him that reflects it" (cf.**AB296** CCA[109]) are not reflected in any jurisprudence on Crown appeals. Yet both were imposed on the appellant by the CCA. It is also contrary to s5D, to hold, as the CCA did, that where the sentencing discretion has miscarried, there is a mandated correction on a Crown appeal:cf.**AB297** CCA[110]. These statements obscure both the purpose of Crown appeals and this Court's statements of principle in *Green* as to the exercise of the s5D discretion.

11 The respondent's alternative position in relation to the s5D discretion is that the statement "We take the law to be that 'the onus lies upon the respondent to establish that that discretion ought be exercised in his or her favour'" (**AB296** CCA [110]) was obiter dictum:RS[46]. On the contrary, this was an erroneous construction of the Court's power under s5D. It is "the opposite approach in relation to onus" of a proper construction of s5D, and not simply a "misplaced" reference:**AB 83** CCA[81], cf. RS[46]. The Attorney General had not argued for this interpretation of the law before the CCA. Moreover, the appellant was said to have "identified and analysed an impressive collection of factors pertinently informing the exercise of that discretion":**AB 296-7** CCA[110]. However it was held that those matters did not "satisfy us" that correction was not mandated and as such the discretion should not be exercised:**AB297** CCA [110]. The Attorney General's conduct was thus not addressed, the CCA failing to "recognise in a real and practical way", the Crown's responsibility for the proper administration of justice: *JW* at 25[95].

12 The failure to apply *Hernando* on even the "first obstacle" (*House* error), is also evidenced in the manner the CCA considered grounds 1C and 2 (manifest inadequacy):**AB 287** CCA [89], see AS [37]. The respondent appears to rely on **AB274** CCA[52]-[53] (RS[60], [67]) to suggest that s23 was taken into account on manifest inadequacy, however this passage is the CCA's summary of the Attorney General's submissions below (commencing at **AB268** and continuing to **AB277**, followed by a summary of the respondent's submissions at **AB277-283**, before the "Consideration" by the Court of the assertions of error at **AB283-287**). Apart from the summary of its own submissions below, the respondent points only to the CCA referring to a significant added element of leniency in re-sentencing, following receipt into evidence of new material from both parties:cf.RS[61]-[62], [64], [67]-[68] **AB289** CCA [93]. Contrary to the respondent's assertion, this was not an application of s23 in the consideration by the CCA of manifest inadequacy or the discretion:cf.RS[67]. It was not "open" to the CCA to find that the sentences were manifestly inadequate having regard to evidence tendered on re-sentence:cf.RS[65]. Nor was it open to the CCA to substitute their own factual findings on this issue on the determination of manifest

inadequacy:cf.RS[65]. The respondent's reliance on this passage highlights the danger of intermingling the re-sentencing process with what should have been a separate and preceding determination, namely the determination of whether last category *House* error had been established.

13 It is not correct to say that the offences "required a substantial prison sentence":cf.RS[65]. The appellant notes that in making the assertion that a substantial prison sentence was required, the respondent relies on three cases decided prior to this Court's decision in *Muldrock v The Queen* (2011) 244 CLR 120, by application of *R v Way* (2004) 60 NSWLR 168 in a manner later disapproved by this Court. The three cases did not consider *Ellis,* nor did s23 apply. Moreover, the offences committed in the matter of *ABS* were significantly more serious. The complex considerations before both the sentencing judge and the CCA did not preclude either the result below or the dismissal of the Crown appeal. The respondent accepts that the proscription of unreasonably disproportionate sentences in s23 is different to the proscription of disproportionate sentences, in the manner described in *C* (1994) 75 A Crim R 309 at 315 (quoted at AS[44]):RS[58], [59]. The CCA however, failed to properly assess manifest inadequacy, either not taking into account s23 at all, or not applying *Ellis* as explained in *C, Ryan, York* and *AB.* There was no reference by the CCA to the public policy considerations highlighted in those cases:see AS[47]-[48], cf.**AB 296** CCA [108].

14 Even in re-sentencing and consideration of the discretion, the CCA imposed a test of whether the appellant had established circumstances "sufficient to outweigh the patent seriousness of the offending and the corresponding propriety of imposing a sentence on him that reflects it":**AB296** CCA[109], **AB292** CCA[99]. This is contrary to a proper application of *C* and s23: see AS [44], [49], [50]. The error of principle in the application of s23 underpinned the reasoning of the CCA on Grounds 1A and 2 (see AS [51]) and is evidenced in resentencing in the failure to accord with s23(4) and the imposition of accumulated sentences:AS[52]. The sentences imposed by the sentencing judge were within the proper exercise of the sentencing discretion (see AS[53]). Alternatively, the residual discretion should have been exercised to dismiss the Attorney General's appeal.

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