IN THE HIGH COURT OF AUSTRALIA

DARWIN REGISTRY **No. D23 of 2019**

BETWEEN: **JESSE CUMBERLAND**
Appellant

and

THE QUEEN
Respondent

APPELLANT'S SUBMISSIONS

Part I: Certification that the submission is suitable for publication on the internet

1. I certify that this submission is in a form suitable for publication on the internet.

Part II: Concise statement of the issue presented

2. The issues presented by the appeal are as follows:

   2.1. Did the Court of Criminal Appeal of the Northern Territory ("**the CCA**") err in failing to consider the application of the residual discretion to dismiss a Crown appeal against sentence?

   2.2. In the circumstances of this case, should the CCA have dismissed the Crown appeal in the exercise of the residual discretion?

   2.3. Did the CCA err in deciding (and announcing) that it would allow the appeal, at a point in time when circumstances relevant to the disposition of the appeal, and in particular the exercise of the residual discretion, were not yet known?

   2.4. Did the procedural course followed by the CCA involve a denial of procedural fairness to the appellant?

   2.5. Should this Court order that the appeal to the CCA be dismissed, or should the matter be remitted to a differently constituted CCA?

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Part III: Notices under s 78B of the *Judiciary Act 1903* (Cth)

3. No notice under s 78B of the *Judiciary Act 1903* (Cth) is necessary.

Part IV: Citation of reasons for judgment of primary and intermediate courts

4. The reasons for judgment of the CCA from which the appeal is brought bear the citation [2019] NTCCA 14. The sentencing remarks of the primary Judge do not have a citation but are reproduced in the Core Appeal Book ("**CAB**") at pp 12ff.

Part V: Narrative statement of the facts

The decision of the original sentencing Judge

5. The appellant pleaded guilty in the Local Court to six charges against the *Misuse of Drugs Act* (NT), arising out of a course of dealing in cannabis and MDMA (ecstasy) between April 2015 and April 2017.[1] The appellant was committed to the Supreme Court for sentence.

6. On 11 April 2018, the appellant was sentenced by Blokland J.

7. The appellant was between 20 and 22 years of age at the time of the offending. He came from a stable family and had no relevant prior criminal history. At the age of 15 he was the victim of "a serious violent assault" by a group of persons, which left him with long-term anxiety, fear and anger management problems. According to the psychological report tendered at sentencing he suffered PTSD as a result, and became involved in using drugs with young people about his own age. From there he became involved in selling cannabis and MDMA. He had a reasonable work history, work options open to him, he is intelligent and keen to get his life back on track. He was keen to be released. Blokland J found he had made good progress towards rehabilitation.[2] He was involved in the metal workshop at the prison. Prior to this matter he had never been imprisoned before.

8. In the course of the sentencing hearing, counsel for the Crown submitted:[3]

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[1] The charges are accurately identified in the sentencing remarks of Blokland J: CAB 13.

[2] Sentencing Remarks; CAB 19, line 10.

[3] Sentencing Submissions Transcript p 12, lines 6-7, Appellant's Book of Further Material ("**ABFM**") p 21. (Underlining added.)

> ... the question of suspended sentence and non-parole period ... may well be addressed by the head sentence that your Honour imposes ... Given his antecedents, if it were less serious offences my concession would certainly be that a suspended sentence is appropriate. But in my submission, the nature of this offending is so serious that your Honour's head sentence may well exceed the 5 years.

9. This was a reference to s 40(1) of the *Sentencing Act* (NT), which permits the partial suspension of a sentence of imprisonment only where the term of imprisonment imposed does not exceed five years.

10. Similarly, in written submissions, the Crown submitted:[4]

> In terms of suitability for a suspended sentence, the Crown notes that the offender has not previously served time in custody and has a relatively limited criminal history. However, the gravity of the offending is such that the head sentence imposed by the Court may well preclude a suspended sentence being imposed.
>
> *Minimum Non-Parole Period*
>
> In the event that a term of imprisonment in excess of 5 years is imposed, or it is not desirable to suspend the sentence, the Court will need to consider the imposition [of] a non-parole period. ...

11. Blokland J imposed an aggregate sentence of 4 years and 6 months' imprisonment, to be suspended after the service of two years, backdated to 27 June 2017 to take account of time spent on remand and on bail. This took into account a reduction of 25% in recognition of the appellant's guilty pleas, meaning that her Honour's starting point was six years' imprisonment. In thoughtful and well-constructed sentencing remarks, Blokland J said:[5]

> The sheer gravity of the offending points towards setting a non-parole period. However, with timely pleas of guilty, his relatively young age, the matters of life adversity and psychological issues, and importantly, good progress towards rehabilitation the Court is justified to pass a total sentence of less than five years and order partial suspension on conditions set by Corrections. ... This will involve electronic monitoring, as occurred while he was on bail.

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[4] ABFM 8, [38]-[39].

[5] CAB 19, lines 8-12, 19. Her Honour's approach was consistent with Northern Territory CCA authority: *R v Renwick* [2013] NTCCA 3 at [51]: "... this does not mean that there cannot or should not be a proper balancing with other factors, both objective and personal circumstances before a sentence is passed".

12. By s 40(8) of the *Sentencing Act*, "[a] partly suspended sentence of imprisonment is taken, for all purposes, to be a sentence of imprisonment for the whole term stated by the court".[6] Taking into account periods spent in custody and on restrictive conditions of bail, under the sentence fixed by Blokland J, the appellant was to be released from custody on 26 June 2019, on conditions that included electronic monitoring.[7]

The proceedings in the Court of Criminal Appeal

13. By notice of appeal dated 30 April 2018, the Crown appealed against the sentence imposed by Blokland J.

14. The proceedings in the CCA took an unusual course. On 18 July 2018, argument on the Crown appeal was heard by a CCA comprising Kelly, Barr and Hiley JJ. In the course of the argument no submission concerning the exercise of the residual discretion was developed by counsel for the appellant and, as matters then stood, he did not seek to rely on the residual discretion.[8]

15. At the CCA hearing on 18 July 2018 there was discussion of the appellant providing possible further evidence relevant to any re-sentencing. The matter was left on the basis that the applicant would have 14 days within which to put before the Court any further material relevant to re-sentence (with the Crown given seven days to reply).[9]

16. After hearing argument, the Court reserved its decision on 18 July 2018.

17. On 31 July 2018 (within the period of 14 days allowed for the provision of further material) the appellant's counsel sent an email to Kelly J's Associate in these terms:[10]

> Dear Associate,

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6 The courts have repeatedly and consistently emphasised that a suspended sentence is "a very real punishment": see, eg, *Elliot v Harris (No 2)* (1976) 13 SASR 516 at 527 (Bray CJ); *R v Famiglietti* [2005] SASC 489 at [32]; *Zaky v The Queen* [2015] NSWCCA 161 at [29]-[37]; *R v Evans* [2013] NTCCA 9 at [51]-[52].

7 In relation to electronic monitoring, see generally *R v Lovegrove* [2018] NTSC 2; *Lovegrove v The Queen* (2018) 331 FLR 192.

8 Transcript of proceedings before the CCA, 18 July 2018, p 60, lines 19-25 (ABFM 104).

9 Transcript of proceedings before the CCA, 18 July 2018, p 62 (ABFM 106).

10 ABFM 107.

RE: Jesse CUMBERLAND – UPDATE RE SUBJECTIVE MATERIAL

1. I write to the Court in relation to the matter raised by the Court on 18 July concerning the Respondent making a written submission in regard to subjective matters pending the resolution of this appeal.

2. I have been recently advised that positive developments have occurred in this regard. However, I am further advised that Corrections Staff will not provide a report on this subject unless there is a court order to do so.

3. I would respectfully seek such an order.

18. The Associate to Kelly J responded by email on 1 August 2018 in the following terms:[11]

> Thank you for your correspondence.
>
> Their Honours will be handing down the decision in regards to the above matter tomorrow morning, and as such, Their Honours have expressed a desire to address the matters you have raised then.
>
> I will confirm the listing orders shortly with a formal listing email.

19. Also on 1 August 2018, the appellant's counsel again emailed the Court, raising for the first time the issue of the application of s 55 of the *Sentencing Act*. (Section 55 provides that a minimum non-parole period of 70% of the head sentence must be imposed in respect of certain specified offences.) In that email, the appellant's counsel expressly stated:[12]

> … it could be argued that Mr Cumberland is penalised by being subject to the new regime if the comparison with Roe v The Queen is utilised, as the comparison is not fair – as the former case not subject to the new section 55 regime, whereas the Respondent in this case potentially is. In this regard the residual discretion referred to [in], inter alia, Wilson's case comes into play, as it does in respect to the matter that follows, in relation to rehabilitation. …

20. The matter was listed and, on 2 August 2018, was called back on. The Court sat briefly. The Court announced that it would allow the appeal, but that it had decided

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[11] ABFM 107.

[12] ABFM 110. (Emphasis added.)

to state a case for the CCA constituted of five judges as to the application of s 55 of the *Sentencing Act* to the sentencing of the appellant.[13]

21. No formal orders appear to have been made on this occasion (2 August 2018). In particular, although counsel for the appellant raised it, no orders were made in relation to the obtaining of a report from Corrections. The matter was left on the basis that a report should be obtained closer to the time when the appellant was to be re-sentenced, and that the three-member CCA would consider such matters once the CCA of five members had delivered its judgment on the legal issue.[14]

22. Further written submissions on the issue of statutory construction regarding s 55 of the *Sentencing Act* were filed by the Crown and by the appellant. In February 2019, the Court raised a further issue regarding the retrospective application of s 55, and sent a varied case stated to the parties. A further round of written submissions was filed by both parties. The matter was listed for oral hearing before the CCA comprised of five judges (Grant CJ, Kelly, Barr and Hiley JJ and Riley AJ) on 12 March 2019 ("**the five-member CCA**"). The argument on that date related to the two issues concerning the application and retrospective effect of s 55. On 12 March 2019, the five-member CCA reserved its decision.

23. The parties were advised by the Court that judgment would be delivered on 19 June 2019, in terms that suggested only the five-member CCA would be delivering judgment.[15] On the morning of 19 June 2019, the five-member CCA delivered its judgment. Immediately following this, the Court reconstituted and proceeded to deliver the judgment of the three-member CCA, allowing the appeal against sentence and re-sentencing the appellant. Prior to the morning of 19 June 2019, counsel for the appellant was not aware the three-member CCA, as well as the five-member CCA, would deliver judgment on that day.

The orders of the Court of Criminal Appeal

24. The new sentence imposed by the three-member CCA was that the appellant be

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[13] The Transcript of this hearing appears at ABFM 111-115.

[14] Transcript of proceedings before the CCA, 2 August 2018, pp 4-5 (ABFM 114-115).

[15] ABFM 116.

imprisoned for a total period of eight years, backdated to 27 June 2017.[16] This included sentences for counts 2 and 4 totalling seven years and nine months' imprisonment. Because the sentence exceeded five years, the effect of s 55 of the *Sentencing Act*, as had been determined by the five-member CCA, was that a non-parole period of not less than 70% of 7 years and 9 months must be imposed.

25. The non-parole period (ie, the minimum period to be served in custody) fixed by the CCA was 65 months and one week — or five years, five months and one week.[17] This was more than two and a half times longer than the unsuspended portion of the sentence (ie, the period to be served in custody) imposed by Blokland J.

26. The matter had been before the CCA for 13 months; the decision of the three-member CCA had been reserved for some 11 months. The effect of the judgment was to substitute a new sentence under which the appellant could not be released from custody until at least 4 December 2022, and then only upon a favourable exercise of discretion by the executive (rather than automatic release, as would have occurred under the sentence imposed by Blokland J).

27. The re-sentencing by the three-member CCA occurred one week prior to the date on which, under the sentence imposed by Blokland J (and which he was still serving up to that point), the appellant would have been entitled to be released from custody. Its effect was to extend the remaining minimum period of imprisonment from one week to three years, five months and nine days.

The judgment of the Court of Criminal Appeal

28. The judgment of the three-member CCA ran to only 32 paragraphs. It dealt separately with the issue of whether the appeal should be allowed (CCA [5]-[23]) and with the new sentence to be imposed (CCA at [24]-[32]).

29. The CCA made no reference whatsoever to the legal principles applicable to the exceptional case of Crown appeals against sentence, in either section of its judgment. In particular, the CCA did not consider whether, despite having identified what it considered to be error, it could or should dismiss the appeal in the exercise of its

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[16] CAB 44 [21]. When the 25% reduction for the appellant's guilty pleas is factored in, the effective starting point for the total sentence can be seen to be around ten years' and eight months' imprisonment.

[17] CAB 46 [32].

discretion.

30. Nor did the judgment of the CCA contain any acknowledgment of the long delay in delivering judgment, or the effect of that delay in terms of extending the appellant's custodial sentence so substantially at the point when his release date under the original sentence was imminent. The judgment of the CCA did not refer at all to the stance taken by the Crown at the sentencing hearing.

Part VI: The appellant's argument

Ground of appeal 1: the CCA's failure to apply the principles applicable to Crown appeals against sentence

Relevant general principles, statutory provisions and authority

31. In the case of Crown appeals against sentence, the Court retains a "residual discretion" to dismiss an appeal notwithstanding that it is satisfied that the sentence originally imposed was affected by error. In *CMB v Attorney-General (NSW)*,[18] Kiefel, Keane and Bell JJ approved what was said by Heydon J in *R v Hernando*. His Honour identified "two hurdles" which the Crown was required to overcome in order to succeed:[19]

> "[I]f this Court is to accede to the Crown's desire that the respondent be sentenced more heavily, it must surmount two hurdles. The first is to locate an appellable error in the sentencing judge's discretionary decision. The second is to negate any reason why the residual discretion of the Court of Criminal Appeal not to interfere should be exercised.

32. The onus lies on the Crown to establish that the residual discretion should be exercised in favour of allowing a Crown appeal against sentence. In *CMB*, Kiefel, Keane and Bell JJ also approved[20] the following statement of principle:[21]

> [T]he court entrusted with the jurisdiction to grant or refuse such leave should give careful and distinct consideration to the question whether the Attorney-General has discharged the onus of persuading it that the circumstances are such as to bring the

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[18] (2015) 256 CLR 346 at 366 [56].

[19] (2002) 136 A Crim R 451 at 458 [12] (Levine J and Carruthers A-J agreeing).

[20] (2015) 256 CLR 346 at 366 [57].

[21] *Malvaso v The Queen* (1989) 168 CLR 227 at 234-5 (Deane and McHugh JJ); *Everett v The Queen* (1994) 181 CLR 295 at 299-300 (Brennan, Deane, Dawson and Gaudron JJ).

particular case within the rare category in which a grant of leave to the Attorney-General to appeal against sentence is justified.

33. Crown appeals against sentence in the Northern Territory are governed by s 414(1A) and (1) of the *Criminal Code* (NT).[22] Section 414(1)(c) entitles a Crown Law Officer to appeal against any sentence for an indictable offence. Section 414(1A) provides:

> In exercising its discretion on an appeal made under subsection (1)(c) involving a sentence imposed after the commencement of this subsection, the Court must not take into account any element of double jeopardy involving the respondent being sentenced again when deciding whether to do either or both of the following:
>
> (a) allow the appeal;
>
> (b) impose another sentence.

34. It is apparent that s 414 excludes from consideration "any element of double jeopardy involving the respondent being sentenced again". As was explained by Spigelman CJ in *R v JW*:[23]

> When used in the context of sentencing, the principle of double jeopardy encompasses the element of distress and anxiety which a respondent suffers from being exposed to the possibility of a more severe sentence.

35. However, as Spigelman CJ also observed, "the principle of double jeopardy, now abolished by statute, is only one basis on which this discretion can be exercised".[24]

36. That is, the principles developed by the courts in relation to Crown appeals against sentence, and the residual discretion to dismiss an appeal notwithstanding a finding that the original sentence was affected by error, are not limited to the need to take into account an element of "double jeopardy" due to an offender facing the risks and uncertainty of being sentenced for a second time. Insofar as those principles extend beyond considerations of double jeopardy, they are not displaced by provisions like s 414 of the *Criminal Code*. As French, Crennan and Kiefel JJ said of s 68A of the *Crimes (Appeal and Review) Act 2001* (NSW), which is in similar (though not identical) terms to s 414 of the *Criminal Code*, "[o]n any view of its operation it does

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[22] *Criminal Code Act* (NT), Schedule 1.

[23] (2010) 77 NSWLR 7 at 19 [54].

[24] (2010) 77 NSWLR 7 at 23 [85].

not extinguish the residual discretion".[25] This was confirmed by the Attorney-General in the second reading speech for the Bill which introduced s 414(1A) of the *Criminal Code*.[26]

37. It remains that the "proper function" of Crown appeals is "to lay down principles for the governance and guidance of courts having the duty of sentencing convicted persons",[27] and they are not "concerned with the correction of judicial error in particular cases".[28]

38. These principles — and the two distinct "hurdles" identified in *Hernando* and *CMB* — have been said to apply "with equal force" irrespective of whether a Crown appeal is subject to a requirement of leave to appeal.[29]

The considerations relevant to the exercise of the residual discretion in this case

39. In *Green v The Queen*, French CJ, Crennan and Kiefel JJ observed:[30]

> Other circumstances may combine to produce injustice if a Crown appeal is allowed. They include delay in the hearing and determination of the appeal, the imminent or

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[25] *Green v The Queen* (2011) 244 CLR 462 at 472 [26] (French CJ, Crennan and Kiefel JJ); *R v Wilson* (2011) 30 NTLR 51 at 58-9 [27]. See also *CMB v Attorney-General (NSW)* (2015) 256 CLR 346 at 367-8 [62] (Kiefel, Bell and Keane JJ); *Director of Public Prosecutions v Karazisis* (2010) 31 VR 634 at 648-9 [52]-[53], 657-8 [100] (Ashley, Redlich and Weinberg JJA, Warren CJ and Maxwell P agreeing). If, as the CCA thought, there was an error which affected the exercise of the sentencing discretion, the Court was required to form its own view of the appropriate sentence, but not necessarily to resentence: see *Lehn v The Queen* [2016] NSWCCA 255 at [68]; *Kentwell v The Queen* (2014) 252 CLR 601 at [43].

[26] Second Reading speech for the Criminal Law Amendment (Sentencing Appeals) Bill 2011: Legislative Assembly of the Northern Territory, *Debates*, 23 February 2011, pp 7394-5.

[27] *Griffiths v The Queen* (1977) 137 CLR 293 at 310 (Barwick CJ). It is submitted that it is unlikely to be productive to attempt to state, in the abstract, whether provisions like s 414(1A) alter the observation that it should only be "rare and exceptional" cases in which Crown appeals are allowed. Section 414(1A) is directed only to the discrete issue of the exclusion of "double jeopardy" as a relevant consideration to be weighed in the exercise of the discretion. Because one consideration in favour of the dismissal of Crown appeals has been excluded, it is to be expected that Crown appeals will now be allowed in *some* cases when they would not otherwise have been allowed. But the frequency with which Crown appeals are allowed will depend upon the particular cases in which the Crown decides to appeal, and whether those particular cases engage considerations of the kinds that remain relevant to the exercise of the residual discretion. See discussion in *R v JW* (2010) 77 NSWLR 7 at 26 [100]ff (Spigelman J). See also *Director of Public Prosecutions (Vic) v Dalgliesh* (2017) 262 CLR 428 at 448 [61].

[28] *Green v The Queen* (2015) 256 CLR 346 at 466 [1] (French CJ, Crennan and Kiefel JJ); *CMB v Attorney-General (NSW)* (2015) 256 CLR 346 at 366 [55] (Kiefel, Bell and Keane JJ).

[29] *Police v Cadd* (1997) 69 SASR 150 at 158-9 (Doyle CJ); see also *CMB v Attorney-General (NSW)* (2015) 256 CLR 346 at 368 [63]; *R v Diep* (1994) 76 A Crim R 66 at 69-70.

[30] (2011) 244 CLR 462 at 479-80 [43]. See also, eg, *R v Kong* (2013) 115 SASR 425 at 444-5.

> past occurrence of the respondent's release on parole or unconditionally, and the effect of re-sentencing on progress towards the respondent's rehabilitation. They are relevant to the exercise of the residual discretion. The guidance afforded to sentencing judges by allowing the appeal should not come at too high a cost in terms of justice to the individual.

40. Notably, each of the three particular considerations identified by French CJ, Crennan and Kiefel JJ was of relevance, and ought to have informed the exercise of the discretion, in the present case.[31] These considerations are not excluded by statutory provisions which, like s 414 of the *Criminal Code*, preclude the appellate court from taking into account any element of "double jeopardy".

The CCA did not consider the principles applicable to Crown appeal against sentence

41. As indicated above, the judgment of the CCA in the present case made no reference at all to the principles that apply to Crown appeals against sentence. It contains no articulation, consideration or application of relevant principles. It does not even contain a reference to any cases, whether in the Northern Territory or elsewhere, concerning or even merely acknowledging the existence of distinct principles applicable to Crown appeals.

42. Nor is there to be found in the judgment any reference to any of the positive considerations that are normally said to justify the allowing of a Crown appeal against sentence. There is no statement in the CCA's judgment that standards of sentencing for drug-related offending are being eroded in any general sense, nor that the present case was seen as an appropriate vehicle to provide general guidance to sentencing courts. Indeed, the appellant's very young age distinguished the present case from the ordinary run of cases of drug dealing on the same scale and, if anything, made it an inappropriate vehicle for that purpose.

43. It is apparent that the principles concerning Crown appeals were not taken into account or applied by the CCA. That may be explained by the fact that counsel for the appellant, on 18 July 2018, had not sought to rely upon the residual discretion. However, the substantial delay in determining the appeal meant that circumstances had changed and the residual discretion was now highly relevant.

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[31] As to the significance of release being "imminent", see also *Munda v Western Australia* (2013) 249 CLR 600 at 624 [72] and 625 [77].

44. The judgment of the CCA does not address, or even recognise, the question of whether the CCA could or should dismiss the appeal in the exercise of the "residual discretion". Rather, the judgment of CCA at [22]-[23], by its use of the word "accordingly", expressly indicates that the CCA regarded its conclusion that "the starting point of 6 years imprisonment" chosen by Blokland J "was manifestly inadequate" as *sufficient* to require that the appeal be allowed. In other words, the CCA erroneously treated the establishment of "judicial error in [the] particular case[]"[32] as sufficient reason to allow the appeal.

45. This was a case where, by the time the re-sentencing occurred, there were several relevant factors pointing to the need to "give careful and distinct consideration"[33] to the exercise of the residual discretion. The absence of any reference to the principles concerning Crown appeals cannot be explained on the basis that it was obvious that the discretion must be exercised in favour of allowing the appeal.

The discretion ought to have been exercised by dismissing the Crown sentence appeal

46. The CCA had a discretion to dismiss or allow the Crown appeal, notwithstanding its view that the sentence under appeal was manifestly inadequate.[34] It was for the Crown to persuade the CCA that this was one of those special cases where allowing the appeal was appropriate.[35]

47. The following considerations, which ought to have been taken into account but were not, indicate that, in the circumstances of this case, the proper course was to exercise the "residual discretion" in favour of dismissing the appeal.

48. First, by the time the three-member CCA delivered its reasons for judgment and made orders on the appeal, the expiration of the unsuspended portion of the sentence fixed by the primary Judge was "imminent".[36] By 19 June 2019, the appellant had

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[32] *Green v The Queen* (2015) 256 CLR 346 at 466 [1] (French CJ, Crennan and Kiefel JJ); *CMB v Attorney-General (NSW)* (2015) 256 CLR 346 at 366 [55] (Kiefel, Bell and Keane JJ).

[33] *Malvaso v The Queen* (1989) 168 CLR 227 at 234-5 (Deane and McHugh JJ); *Everett v The Queen* (1994) 181 CLR 295 at 299-300 (Brennan, Deane, Dawson and Gaudron JJ).

[34] *Green v The Queen* (2011) 244 CLR 462 at 466 [4], 477 [36]-[37] (French CJ, Crennan and Kiefel JJ); *Director of Public Prosecutions v Karazisis* (2010) 31 VR 634 at 648 [52] (Ashley, Redlich and Weinberg JJA, Warren CJ and Maxwell P agreeing).

[35] *CMB v The Queen* (2015) 256 CLR 346 at 370 [66], 371 [69] (Kiefel, Bell and Keane JJ).

[36] See *Director of Public Prosecutions v Karazisis* (2010) 31 VR 634 at 658 [105]-[107].

served all but seven days of the custodial portion of the original sentence.

49. The expiration of the custodial portion of the appellant's sentence was no less imminent by reason of the fact CCA had already indicated on 2 August 2018 that it proposed to allow the appeal.[37] Up until the point when the CCA made its orders on 19 June 2019, the only basis for the appellant to be kept in custody was the sentence imposed by Blokland J. He was still serving that sentence, and only that sentence. Had another week elapsed before the CCA made its decision, those detaining the appellant would have been required to release him in accordance with the terms of the sentence he was serving.

10 50. The effect of the CCA's re-sentencing, as has been noted, was to increase the custodial portion of the sentence, at a point when all but a week of that custodial portion had been served, by a further three years and five months.[38] The unfairness to the appellant of altering the sentence in that way, at that stage, is manifest.

51. Secondly, by the time the judgment of the CCA came to be delivered, a substantial delay had occurred in the appellate proceedings. This was due to the need to resolve an issue about the operation of s 55 of the *Sentencing Act*, being the issue eventually resolved by the delivery of the judgment of the five-member CCA. (It is not suggested that the delay that arose in the present case was the fault of the prosecution but, as *Green* makes clear,[39] the fact of the delay itself is a relevant consideration.)

20 52. Thirdly, the appellant had already demonstrated positive rehabilitation. A substantial further period had elapsed and the appellant had indicated a desire to put before the Court further material evidencing his progress towards rehabilitation.

53. Fourthly, the stance taken by the Crown prosecutor before the sentencing Judge (as to which no criticism is made) — suggesting that the Judge *may* consider the offending too serious to impose a sentence of less than five years' imprisonment, but

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[37] For reasons advanced in [56]-[61] below, the CCA should not have done so.

[38] The extreme extension of the custodial portion of the sentence resulted from the combination of:

(a) the decision of the CCA to impose sentences of imprisonment exceeding five years on each of counts 2 and 4, and to make 12 months of the sentence for count 2 cumulative upon the sentence on count 4, resulting in a total period of 7 years and 9 months imprisonment attributable to those two counts; and

(b) the operation of s 55 of the *Sentencing Act* upon that period of 7 years and 9 months' imprisonment.

[39] *Green v The Queen* (2011) 244 CLR 462 at 466 [4], 488 [77] (French CJ, Crennan and Kiefel JJ).

suggesting that that was a matter for her judgment[40] — is a factor counting against both (a) allowing the appeal and (b) imposing a longer sentence of imprisonment that would preclude the partial suspension of the term of imprisonment.[41]

Conclusion

54. The Crown appeal in the present case should have been dismissed. This is a case where the unfairness of the new sentence to this individual — imposed but seven days before he was entitled to be released (without any acknowledgment that that was so), and requiring him to serve a further three years and five months in custody — meant that the discretion should have been exercised against allowing the appeal. The CCA could have adequately identified any concerns about the inadequacy of the sentence, and articulated relevant sentencing principles, while nevertheless dismissing the appeal.[42]

55. In the alternative, if it were nevertheless thought appropriate to allow the appeal and re-sentence the appellant, given the Crown's stance at the sentencing hearing and the proximity of his release date (which has, of course, now passed) due to the delay in the CCA, any new sentence should have taken into account up-to-date information concerning the progress of the appellant's rehabilitation, should not have exceeded five years' imprisonment for any single count, and (as would then have been consistent with s 55 of the *Sentencing Act*) ought to have been partially suspended. The portion of the sentence to be served in custody should not have been substantially extended.

Ground of appeal 2: error in separately determining that the appeal should be allowed when principles and circumstances applicable to re-sentencing were not known

56. The staged decision-making approach adopted by the CCA in this case was

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[40] See [8]-[10] above. It is respectfully submitted that it was implicit in the Crown's submission that a total head sentence of less than five years or more than five years may be within the range of sentencing discretion open to the sentencing Judge, and that whether suspension was appropriate was likely to depend upon the length of the term of imprisonment to be imposed. The Crown was not "conceding" that a suspended sentence should be imposed, but nor, the appellant respectfully submits, could the submission be interpreted as suggesting that a sentence of less than five years, partially suspended, would be outside the sentencing Judge's discretion.

[41] *CMB v The Queen* (2015) 256 CLR 346 at 368-9 [63]-[66]; *Everett v The Queen* (1994) 181 CLR 295 at 302-5 (Brennan, Deane, Dawson and Gaudron JJ).

[42] See, eg, *R v Hallcroft* (2016) 126 SASR 415 at 434 [79].

unsatisfactory, and effectively disabled the CCA from properly addressing the residual discretion in the context of this appeal.

57. Having heard argument on 18 July 2018, on 2 August 2018 the three-member CCA indicated that it would allow the appeal (though it did not make any formal order at that time). However, the CCA then adjourned for a protracted period — until 19 June 2019 — before actually making orders allowing the appeal and re-sentencing.

58. The delay meant that the balance of the considerations bearing on whether the appeal should be allowed or dismissed (as well as bearing upon the sentence to be imposed) was quite different at the time when the CCA announced that it intended to allow the appeal and at the time when the Court actually made its orders. By June 2019, the discretionary factors against allowing the appeal, and *a fortiori* against increasing the sentence beyond five years, were overwhelming.

59. It is submitted that the proper course is for a court of criminal appeal hearing a Crown appeal not to make a final determination as to whether the appeal should be allowed, and not to announce an intention to allow the appeal, until it has been able properly to consider all the factors that might weigh against allowing the appeal and re-sentencing. That can only properly be done at a time reasonably proximate to the point in time when it would deliver its judgment. Only at that point can it be known how those factors may bear on the exercise of the residual discretion.[43]

60. The proper approach is reflected in the way the Victorian Court of Appeal handled the situation that arose in *Director of Public Prosecutions (Cth) v Masange*.[44] In that case the prisoner Kachunga was released on parole while a Crown appeal against his sentence was pending. The Court was only informed of that fact at the point when it had intended to deliver judgment. Because the prisoner's release was relevant to the exercise of the residual discretion, the Court refrained from delivering its judgment and considered further submissions regarding the residual discretion. While the Court was justifiably critical of the parties for bringing the relevant matter to the Court's attention so late, the Court recognised that it could not properly decide how the residual discretion should be exercised without considering circumstances relevant at

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[43] *Director of Public Prosecutions v Clunie* [2016] VSCA 216 at [23]. See also *Director of Public Prosecutions v Karazisis* (2010) 31 VR 634 at 661-2 [121]-[122].

[44] (2017) 325 FLR 363 at 381 [55]-[73] (Maxwell P and Redlich J).

the time when the appeal was to be decided.

61. Further, the CCA should not have simply proceeded to re-sentence the appellant after such a substantial delay without permitting counsel to adduce further evidence or make any further submissions relating to the circumstances then prevailing, particularly in the light of counsel's earlier email correspondence. Counsel had indicated on behalf of the appellant a desire to put more evidential material before the Court, and Kelly J's associate had responded by indicating that the Court had "expressed a desire to address the matters" raised by counsel.

Ground of appeal 3: Denial of procedural fairness to the appellant

10 62. After the CCA hearing on 18 July 2018, it was contemplated that the appellant would have an opportunity to provide a written submission concerning further matters relevant to sentence. On 31 July 2018, the appellant, via his counsel's email, had reiterated his desire to put before the CCA updated information on personal matters relevant to the appellant's sentence — particularly developments since the original sentencing — and identified the need for orders from the CCA to facilitate this.

63. On 2 August 2018, the Court sat briefly and announced that the appeal would be allowed. The Court indicated that the matter would be adjourned because of the s 55 issue, and with that issue to be determined by a five-member bench. Counsel raise the need for a court order to obtain a report from Corrections. The Court evidently
20 contemplated making such an order, but the Court appeared to suggest that the obtaining of such a report might sensibly be deferred until after the five-member CCA had determined the issues concerning s 55 of the *Sentencing Act*.[45]

64. The matter was thus left on the basis that the applicant's counsel had raised the possible relevance of the residual discretion, that he had indicated that he wished to seek an order for a report from Corrections, and that there was further material he wished to obtain and put before the Court relevant to sentencing. The first of those could not occur without further submissions and consideration. The Court had indicated that it would deal with the issues raised, but then adjourned the appeal (to obtain a ruling from the five-member Court) without yet having resolved it.

30 65. On 19 June 2019, the matter was listed for the five-member Court to hand down its

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[45] Transcript of proceedings before the CCA, 2 August 2018, pp 4-5 (ABFM 114-115).

judgment. It was only on that morning that counsel for the applicant was informed that the three-member Court also intended to hand down its judgment immediately following the delivery of judgment by the five-member Court. It was apparent that the three-member Court had already determined to deliver its judgment and no opportunity was given to the applicant to make any further submission before the judgment was delivered. The appellant was not given notice that the judgment of the three-member CCA (as opposed to the judgment of the five-member CCA) was to be delivered until the morning of 19 June 2019.

66. In light of the expectation created by the exchange of emails and the course of the hearing on 2 August 2020, procedural fairness to the appellant required that he at least be given the opportunity to seek and argue for orders facilitating the provision of further information relevant to sentence, and to make submissions in relation to sentencing, before the delivery of judgment by the three-member CCA.

67. Moreover, given the substantial period of time that had elapsed since the submissions on 18 July 2018, fairness to the appellant required in any event that the CCA provide him with an opportunity to advance submissions as to the personal circumstances of the appellant before either determining any new sentence or delivering its judgment. The effect (although obviously not the intent) of the unusual procedure adopted was that appellant was denied the opportunity to advance to the CCA relevant evidence and submissions concerning personal matters relevant to the fixing of the sentence.[46]

68. This resulted in a miscarriage of justice. The appellant's sentence was drastically increased in circumstances where he was effectively denied the opportunity to put relevant material and submissions before the Court. The CCA ought, with respect, to have appreciated this. It cannot be said that the error could not have made any difference to the outcome or "could not possibly have produced a different result".[47]

Conclusion and orders

69. For the reasons advanced in respect of each of the three grounds of appeal, it is

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[46] See generally *HT v The Queen* (2019) 93 ALJR 1307 at [17]-[18]. As to the potential for departure from a foreshadowed course to result in denial of procedural fairness, see *Minister for Immigration and Border Protection WZARH* (2015) 256 CLR 326 at 336 [31], 337 [35], 340 [47] (Kiefel CJ, Bell and Keane JJ).

[47] As was the case in *DL v The Queen* (2018) 92 ALJR 764 at [40]. See also *Stead v State Government Insurance Commission* (1986) 161 CLR 141 at 145-7.

submitted that the appeal should be allowed. What further orders should be made?

70. It is submitted that, having regard to all the circumstances, this was a case where, in the exercise of the residual discretion to dismiss a Crown appeal, the original sentence imposed by Blokland J ought not to have been disturbed. The residual discretion should now be exercised in favour of dismissing the appeal, notwithstanding the view of the CCA that the sentence imposed by Blokland J was inadequate. The considerations that support that conclusion include the following:

a. the lengthy delay in the CCA determining the appeal and re-sentencing;

b. the additional period of time that has now passed as a result of the application for special leave and the appeal to this Court;

c. that the effect of that elapse of time is that, if the appeal was to be allowed and the appellant resentenced, he would now fall to be re-sentenced at a point in time well after the date on which the custodial portion of the original sentence would have expired (being 26 June 2019), and in circumstances where the appellant has now served, in custody, a substantially longer period than was authorised and required by the original sentence — that is, the disparity between the time actually served by the appellant in custody and the minimum time which the CCA evidently considered the appellant should serve in custody is now be substantially reduced;

d. the appellant's young age[48] and the sentencing Judge's findings as to relevant mitigating factors including, importantly, that the appellant had good prospects of rehabilitation, his progress towards rehabilitation, and the probable effects on such rehabilitation of the imposition of a significantly longer period to be served in custody; and

e. that the submission made by the prosecution at the time of the original sentencing had implied that a term of imprisonment not exceeding five years was one that was potentially open to the sentencing Judge, even though it was obviously not favoured by the prosecution.

71. It is submitted that, if the Court were to conclude that it was able to decide, on the basis of the evidence already available, that the residual discretion should be exercised in favour of dismissing the appeal to the CCA, then an order to that effect

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[48] See, eg, *R v Mills* [1998] 4 VR 235 at 241-2; *Azzopardi v The Queen* (2011) 35 VR 43 at 53-5 [34]-[36].

should be made by this Court, rather than remitting the matter to the CCA for further consideration. That course is supported by the following considerations:

71.1. First, if the Court considered that the appropriate order was to dismiss the appeal to the CCA in the exercise of the residual discretion, the Court would not itself need to fashion a new sentence; it would simply substitute an order that the appeal to the CCA is dismissed, which would leave in place the sentence originally imposed by Blokland J. This Court would not perform the function of a (re-)sentencing court, exercising a sentencing discretion.[49]

71.2. Secondly, by the time this appeal is heard, the appellant will have served in custody the entirety of custodial portion of the original sentence (which would otherwise have ended on 26 June 2019), plus a significant further period in custody. In those circumstances, it is preferable that, if possible, the appeal be finally determined as soon as possible, rather than the matter being remitted to the CCA for a further hearing and, necessarily, at least some further delay.

72. Moreover, if this Court were to allow the appeal and remit the matter to the CCA, that would necessarily involve the orders of the CCA being set aside. The effect would be that, unless and until he was again re-sentenced by the CCA at some future date, the appellant would then be serving the original sentence imposed by Blokland J. The immediate consequence of setting aside the orders of the CCA would, therefore, be to entitle the appellant to immediate release from custody (since, under the original sentence, he was entitled to automatic release on 26 June 2019).

73. It follows that, on any further consideration by the CCA, it would be faced with the prospect of returning to custody a person who had already served the entire custodial portion of the sentence originally imposed on him (plus some further months in custody) and had already been released as required by the original sentence. "To resentence [the appellant] at this stage with the consequence of imposing more time in prison ... would require him to be taken from the community setting and reincarcerated."[50] In other words, the considerations in favour of dismissing the appeal in the exercise of the residual discretion would then be even stronger.

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[49] Cf *Bugmy v The Queen* (2013) 249 CLR 571 at 596 [49].

[50] Cf *R v Mamarika* [2019] NTCCA 24 at [18].

74. The appellant accepts that if he is successful only on ground 3 of the appeal, or if the Court finds itself unable to conclude, on the material available to it, that the residual discretion is properly to be exercised by dismissing the Crown appeal, then it would be necessary for the matter to be remitted to the CCA.

75. If the matter were to be remitted to the CCA, the appellant would wish to obtain further evidence (in particular, evidence of his behavior, rehabilitation and progress during the period of his incarceration, of the kind which he was prevented from obtaining relying on due to the denial of procedural fairness by the CCA) and to advance further submissions to the CCA in relation to both the exercise of the residual discretion and (in the event the CCA was to exercise the discretion against the appellant) to the new sentence that should be imposed.

76. Should this Court consider that the appropriate course is to remit the matter to the CCA, it is respectfully submitted that the remitted appeal should be determined by a differently constituted CCA.

Part VII: Orders sought

77. The appellant respectfully seeks the following orders:

77.1. The appeal is allowed.

77.2. The orders of the Court of Criminal Appeal are set aside and in lieu thereof, it is ordered that the appeal to the Court of Criminal Appeal be dismissed.

Part VIII: Estimate of time for oral hearing

The appellant estimates that up to one and a half hours will be required for the presentation of the oral argument on his behalf.

Dated: 29 January 2020

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Marie Shaw QC	**Stephen McDonald**	**Mark Thomas**
Frank Moran Chambers	Hanson Chambers	John Toohey Chambers

Counsel for the appellant