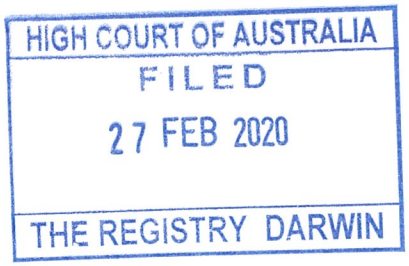
IN THE HIGH COURT OF AUSTRALIA
DARWIN REGISTRY

No. D23 of 2019

BETWEEN:




**JESSE CUMBERLAND**

Appellant

and

**THE QUEEN**

Respondent

## RESPONDENT'S SUBMISSIONS

**Part I:**

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

**Part II:**

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

   i. Was the issue of the residual discretion properly before the Court of Criminal Appeal of the Northern Territory for determination?

   ii. Does the residual discretion remain a relevant consideration for the Court of Criminal Appeal of the Northern Territory once a determination had been made to allow the appeal?

   iii. If the issue of residual discretion was properly before the Court of Criminal Appeal of the Northern Territory, was it properly considered?

   iv. If the residual discretion was properly before the Court of Criminal Appeal of the Northern Territory and was not properly considered, should this Court determine whether the residual discretion should have been exercised or should this Court remit the matter for consideration by the Court of Criminal Appeal of the Northern Territory?

Matthew Nathan SC
Director of Public Prosecutions
Level 3, Old Admiralty Tower
68 The Esplanade
DARWIN NT 0800

Telephone: (08) 8935 7500
Fax: (08) 8935 7552
Email: matthew.nathan@nt.gov.au
Ref: Matthew Nathan SC

v. If this Court is to determine whether the residual discretion should have been exercised, should the Court of Criminal Appeal of the Northern Territory have exercised the residual discretion to dismiss the Crown appeal?

vi. Did the procedural course followed by the Court of Criminal Appeal of the Northern Territory involve a denial of procedural fairness to the appellant with respect to the exercise of the residual discretion?

vii. Did the procedural course followed by the Court of Criminal Appeal of the Northern Territory involve a denial of procedural fairness to the appellant with respect to the resentencing exercise?

**Part III:**

3. The respondent accepts that no notice pursuant to section 78B of the *Judiciary Act 1903* (Cth) is necessary.

**Part IV:**

4. On 30 April 2018, the Crown filed an appeal against the sentence imposed in the Northern Territory Supreme Court on 11 April 2018.

5. On 4 July 2018, written submissions were filed by the Crown. These written submissions acknowledged that the Court of Criminal Appeal retained a residual discretion to refuse to intervene notwithstanding a finding of manifest inadequacy but stated that there were no matters known to the Crown that would enliven the exercise of the residual discretion.[1]

6. On 13 July 2018, the appellant (then the respondent) filed written submissions. These submissions did not raise the residual discretion in any way.[2]

7. On 18 July 2018 at the hearing of the appeal, the residual discretion was raised with the Crown in the following manner:

---

[1] *Respondent's Book of Further Materials* at 3-7.
[2] *Respondent's Book of Further Materials* at 8-13.

*HILEY J: In your submission about Crown appeals you're talking about the residual discretion and say in effect there is no basis for exercising it, and you're talking about Wilson's case.*

*Mr Thomas in his submissions hasn't raised that question at all, so I take it that there's no suggestion as far as you're aware that particular circumstances that would underlie this court exercising its discretion not to allow the appeal even if it was that the view that the sentence was manifestly inadequate.*

*MR NATHAN: No, that's right. It was simply put as if – we're the appellant. We weren't clear in terms of what the respondent's position would be, and so I simply raise that as a factor. We're not suggesting that there are, we're just saying that if – in fact we're suggesting the opposite, but if it is something that is sought to be raised by the respondent, we were simply, I suppose, getting our retaliation in first in that way.*

*HILEY J: As I say, I don't see anything about that in the respondent's submissions, but I would think that if that is raised, you would have an opportunity to reply.*[3]

8. The appellant's counsel then proceeded to expressly disavow reliance upon the exercise of the residual discretion by making the following submissions:

*MR THOMAS: ... A second matter is the question of residual discretion. Now, I should address this per Wilson's case that, to be clear, I do not make the submission that it applies. I think that it can be fairly said that, as I understand it, that if there was a delay, parody* [sic], *fault by the Crown, totality problems or rehabilitation, I think in those five factors, it can be triggered or at least sought to be sought to be triggered, if I concede that there is a difficulty. I do not make that submission.*[4]

---

[3] *Appellant's Book of Further Materials* at 72.
[4] *Appellant's Book of Further Materials* at 60.

9. Having been told by the appellant's counsel that the residual discretion had no application to the determination of the matter, both parties were invited to put material before that court for the limited purpose of resentencing should the appeal be allowed:

> *KELLY J: What we will do is this, Mr Thomas: we will ask you to take instructions, and if there is anything relevant that you think should be put before the court for a resentencing exercise, if you would put that in writing and I guess forward it to Mr Nathan and to my associate. And then, Mr Nathan, if there's anything that needs to be put in by way of reply, do that. A time frame would be – can you do that within 14 days, Mr Thomas?*
>
> *MR THOMAS: Yes, your Honour.*[5]

10. An email was sent on behalf of the appellant on 31 July 2018 entitled "RE: Jesse CUMBERLAND – UPDATE RE SUBJECTIVE MATERIAL" which identified that "*in relation to the matter raised by the Court ... positive developments have occurred*" and that he was seeking that the court order a report on the subject.[6]

11. A second email was sent through to the court correcting an issue regarding a submission made by counsel for the appellant during the hearing that no other co-offender had been charged in relation to the drug operation.[7]

12. A third email was sent on behalf on the appellant on 1 August 2018 entitled "RE: Section 55 of Sentencing Act" which made the following observations:

> ...

---

[5] *Appellant's Book of Further Materials* at 61-62.
[6] *Appellant's Book of Further Materials* at 107-108.
[7] *Respondent's Book of Further Material* at 14.

*9. Therefore, it is submitted that if a new sentence were to be imposed upon Mr Cumberland, that any such sentence must be careful not to offend the strictures provided by the commencement date of the new s 55.*

*...*

*12. It is arguable that because Roe v The Queen* [sic] *was imposed in the context of a sentencing regime that did not include the amended s 55, that the head sentence was increased to take into account this fact. Alternatively, it could be argued that Mr Cumberland is penalised by being subject to that new regime, if the comparison with Roe v The Queen* [sic] *is utilised, as the comparison is not fair – as the former case was not subject to the new s 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* [emphasis added].

*13. It is further argued that if a sentence that is greater than 5 years is imposed that the possible benefits of a greater period of time at liberty for the purposes of rehabilitation (under the sentence imposed by Justice Blokland at first instance) will be lost – if, in some form, a fresh sentence which at least partly embraces the amended s 55 is imposed. It is submitted that this [is] inconsistent with sentencing principles applicable to a young offender, especially one who pleaded guilty and who is without relevant prior offences and good prospects of rehabilitation.*[8]

13. The clear tenor of this email was to raise those issues that might bear upon a resentence of the appellant, in particular the application of section 55 of the *Sentencing Act 1995* (NT), consistent with the request from the court on 18 July 2018. Counsel for the appellant used the phrase "residual discretion" only in the sense of raising two distinct factors for the purpose of resentence:

---

[8] *Appellant's Book of Further Materials* at 109-110.

i. The extent to which the use of *Roe*'s case as a comparable decision, when considering the resentencing exercise, is fair taking into account the changes to the minimum non-parole period pursuant to section 55 of the *Sentencing Act 1995* (NT);

ii. The effect upon the appellant's rehabilitation should the resentence exceed 5 years' imprisonment thereby limiting the possible benefits of "time at liberty".

14. The Court responded to the counsel for the appellant's emails by indicating that it would hand its decision down and address the matters raised in his correspondence the following day. The Court of Criminal Appeal next sat on 2 August 2018. At this time, the decision in the appeal was announced:

> *KELLY J: Now, in this matter the appeal is allowed for reasons which we will publish in due course. Sorry, I should mention first Hiley J has authorised Barr J and me to hand down the decision of the court and that is the decision of the court. We have determined to resentence the respondent and we're* [sic] *determined that that sentence will be or is very likely to be in excess of 5 years' imprisonment; and will therefore require the fixing of a non-parole period.*[9]

15. Kelly J then identified that with respect to the issues raised about the need to fix a non-parole period in the email sent by the appellant's counsel that "*some of the issues ... have been dealt with in the decision of Hardy*".[10]

16. The decision referred to by Kelly J was *TRH v The Queen*[11]. Among other questions of law, the decision addressed the retrospective application of section 55A of the *Sentencing Act 1995* (NT), which like section 55, increased the minimum non-parole period from 50 to 70 percent of the head sentence in relation to specified offences.

---

[9] *Appellant's Book of Further Materials* at 112.
[10] *Appellant's Book of Further Materials* at 112.
[11] [2018] NTCCA 14.

17. The Court acknowledged that the appellant's counsel had wanted the court to order a report with Barr J suggesting that if the court ordered a report immediately "*it might be out of date by the date by the time of the resentencing exercise*". This was acknowledged by the appellant's counsel and no suggestion was made that the report sought was relevant for anything other than for the purposes of resentence.[12]

18. The appellant's counsel was then invited to raise any other matters of relevance. The appellant's counsel took this opportunity to raise three further points arising from his previous email correspondence:

    i. Firstly, that he was instructed that the appellant was making good progress in prison; however, he needed to seek an institutional report.

    ii. Secondly, counsel for the appellant sought to correct a previous submission made during the hearing to the effect that no other person had been charged.

    iii. The third and final matter that was sought to be raised with the court arising from the previous email correspondence, related to issues with the application of non-parole periods subject to an application of section 55 of the *Sentencing Act 1995* (NT). The court informed the appellant's counsel, and indeed it was accepted by him, that this matter would be dealt with by the referral to the Full Court.

19. Importantly, no submission was made at this point by the appellant's counsel that his previous disavowal of reliance upon the exercise of the residual discretion during the hearing of the appeal was now rescinded and that such material was sought to be obtained in furtherance of this issue and not purely to assist the court in the resentencing exercise.

---

[12] *Appellant's Book of Further Materials* at 113.

**Part V:**

20. The references made by the appellant to Northern Territory statutes is accepted. The respondent relies upon the *Sentencing Act 1995* (NT), in particular, sections 55 and 55A.

**Part VI:**

***Principles concerning the exercise of the residual discretion***

10

21. It is accepted that on a prosecution appeal the appellant bears the onus of negating any reasons raised as to why the residual discretion should be exercised.[13]

22. It will only be necessary to negate reasons raised as to why the residual discretion should be exercised where there are matters raised by the respondent in support of the exercise of the residual discretion.

23. The express disavowal by the appellant's counsel of reliance on any matters
20 that might raise the residual discretion in effect informed the Court of Criminal Appeal that it was unnecessary to consider the residual discretion.

24. For the reasons advanced above, the appellant's counsel did not revive the issue of the residual discretion by his email on 1 August 2018, especially when this email is considered within the context of the invitation extended by the Court of Criminal Appeal on 18 July 2018 to provide further material relevant to resentence.

25. If the appellant's counsel wished to re-agitate the application of the residual
30 discretion, then it was incumbent upon him to state this clearly to the Court of Criminal Appeal. The fact that he did not do so cannot be attributed to any

---

[13] *CMB v The Attorney-General of New South Wales* (2015) 256 at 359 [34] per French CJ and Gageler and at 371 [69] per Kiefel, Bell and Keane JJ.

failure of the Court of Criminal Appeal to extend this opportunity to him, either on 18 July 2018, 2 August 2018 or on 19 June 2019.

26. The Court of Criminal Appeal was under no duty to advise the appellant's counsel how to present the case on behalf of the appellant and discharged its duty of procedural fairness (in that respect) by providing him with an opportunity to place his submissions squarely before the court.[14] As *Pantorno v The Queen* identifies, this obligation and opportunity continues even after the pronouncement of judgment:

> *Failure to argue a point before a court of criminal appeal presents a considerable obstacle to an appellant who seeks special leave to argue it in this Court. Even if the point emerges clearly only when a court pronounces its judgment, it should be appreciated by counsel who receive judgment that they are under a duty to draw the court's attention to issues which, in the light of judgment, require further consideration by that court and to move the court to consider any such issues before the formal order of the court is perfected. On occasions, a court of criminal appeal may have to give further consideration to issues which were relegated to the margin of attention during the argument, though it is not required to consider new grounds which counsel abstained from raising on the appeal.*[15]

27. The appellant's counsel did not raise the issue of the residual discretion with the Court of Criminal Appeal at any time between the pronouncement of the intention to allow the appeal on 2 August 2018 and the handing down of its decision on 19 June 2019, or between the handing down of its decision and the perfection of the order.

28. In all of the circumstances, it is respectfully submitted that the Court of Criminal Appeal was under no obligation to give consideration to the exercise of the

---

[14] *Pantorno v The Queen* (1989) 166 CLR 466 at 472-473 per Mason CJ and Brennan J, citing *Sullivan v Department of Transport* (1978) 20 ALR 323 at 343 per Deane J.
[15] *Pantorno v The Queen* (1989) 166 CLR 466 at 474 per Mason CJ and Brennan J.

residual discretion and has not fallen into error in electing not to make reference to the residual discretion in its published judgment.

***Consideration of the exercise of the residual discretion***

29. In the event that this Honourable Court finds that consideration of the residual discretion had in fact been revived by the appellant's counsel, then it may be concluded that the Court of Criminal Appeal have failed to turn its mind to this issue and have therefore erred.

10

30. In previous instances where a finding has been made that the Court of Criminal Appeal has erred either in their application of the residual discretion or in failing to consider it altogether, this Honourable Court has remitted the matter to the appropriate intermediate appellate court so that the residual discretion can be properly considered and applied.[16]

31. If this Honourable Court determines that the Court of Criminal Appeal has fallen into error in this way, it is appropriate to remit the matter to the Court of Criminal Appeal in circumstances where the Crown has not yet been called upon to
20 negate any reasons advanced in support of the exercise of the residual discretion and in the absence of material relevant to the rehabilitation of the appellant.

32. While the respondent submits that this matter should be remitted to the Court of Criminal Appeal in the event that this Honourable Court finds that the Court of Criminal Appeal have erred in failing to consider the residual discretion, it is acknowledged that specific consideration was given to the factors relevant to the exercise of the residual discretion in *Munda v Western Australia* ("*Munda*")[17] within the context of that particular case.

30

---

[16] *Bugmy v The Queen* (2013) 249 CLR 571 at 596-597 [24] per French CJ, Hayne, Crennan, Kiefel, Bell, Keane JJ; *CMB v Attorney-General for the State of New South Wales* (2015) 256 CLR 346 at 360-361 [39] per French CJ and Gageler J.

[17] *Munda v Western Australia* (2013) 249 CLR 600

33. The majority judgement in *Munda* demonstrates that the manifestly inadequate nature of a sentence is itself relevant to the residual discretion as an intermediate appellate court will "*perpetuate a manifest injustice by declining to intervene*".[18]

34. On this basis, the extent to which a sentence is manifestly inadequate is directly relevant to the appropriateness of exercising the residual discretion.

35. The decision of the Court of Criminal Appeal in this respect in both allowing the appeal and the extent of the increase in sentence was indicative of the extent to which intervention was warranted to avoid perpetuating a manifest injustice. In this regard, it should be noted that the appellant has not contended that the resentence imposed by the Court of Criminal Appeal was manifestly excessive.

36. While the extent of the manifest inadequacy itself creates a justification for intervention, it is accepted that the Crown is required to negate reasons raised for declining to intervene.

37. It is respectfully submitted that when the circumstances of the case are viewed in their entirety, the following considerations now raised by the appellant and said to be in favour of exercising the residual discretion were strongly outweighed by the prima facie obligation to correct the sentence imposed at the sentencing hearing.

*Imminence of release*

38. On 2 August 2018, the appellant was placed on notice that he would be resentenced and that this resentence would realistically involve a non-parole period as the head sentence would exceed five years.

39. As a consequence of the resentence and the requirements of section 55 of the *Sentencing Act 1995* (NT), it was clear that the non-parole period to be imposed

---

[18] *Munda v Western Australia* (2013) 249 CLR 600 at 625 [76] per French CJ, Hayne, Crennan, Kiefel, Gageler and Keane JJ.

would be significantly greater than the two-year unsuspended portion of his existing sentence.

40. It would also have been readily apparent to the appellant that a five-judge bench would be sitting to consider the application of section 55. His counsel would have advised him that they were not sitting as part of an abstract exercise but to determine what principles would apply to his resentence.

41. In circumstances where the appellant knew that his sentence would be increased on 2 August 2018, the appellant's previous release date held no claim upon the residual discretion as at the time of resentence the appellant had no reasonable basis for an expectation that his release would be imminent.

*Delay*

42. For similar reasons as those applying to the consideration of imminence, the question of delay was not a matter that established a basis for the exercise of the residual discretion.

43. While the respondent concedes that considerations of delay may be relevant to the exercise of the residual discretion independently of any fault on the part of the Crown, the fact that the Crown did not cause the delay is nonetheless relevant.[19]

44. It cannot be argued that there was any delay in the Court of Criminal Appeal determining and informing the appellant that the Crown appeal against his sentence would be allowed. This decision was communicated less than four months after the original sentence on 11 April 2018.

45. The resentence in this matter was then adjourned *sine die* to allow the question of the interpretation of section 55 to be referred to the Full Court of the Court of Criminal Appeal. In a jurisdiction without a permanent Court of Criminal Appeal

---

[19] *Munda v Western Australia* (2013) 249 CLR 600 at 77

and where there are a total of six permanent judges of the Supreme Court, convening a five-judge bench to determine this question was always going to provide logistical challenges impacting directly upon the timeliness of the hearing.

46. The question of delay was also arguably less relevant in circumstances where the appellant remained in custody. The position of the appellant may be contrasted with a respondent to a Crown appeal who is on bail pending appeal or who had avoided a term of actual imprisonment at first instance.

10

47. For a respondent in such a position, a resentence raises the prospect that the commencement or recommencement of their sentence will be deferred by the period of time that has elapsed between the sentence imposed at first instance and their resentencing. This will also mean that the expiration of the non-parole period and the full term will be correspondingly delayed. The potential unfairness in such a situation is readily apparent.

48. The position of the appellant is clearly different as he continued to serve his sentence whilst awaiting the outcome of the Crown appeal and was placed on
20 notice that his sentence would be extended on 2 August 2018.

49. This is not to say that delay cannot be a relevant feature for a respondent who is continuing to serve a sentence while the outcome of a Crown appeal is pending. Rather, it is an acknowledgement that the degree of prejudice experienced by such a respondent will be a consideration ordinarily much less deserving of weight than if a respondent is at liberty pending the outcome of a Crown appeal.

*Demonstration of positive rehabilitation*

30

50. The respondent respectfully submits that this submission is inconsistent with the argument that the appellant was deprived of procedural fairness by not being given an opportunity to put material in relation to rehabilitation before the Court of Criminal Appeal.

51. If the material before the Court of Criminal Appeal on the rehabilitation of the appellant was such as to properly inform the exercise of the residual discretion, it cannot be said that the appellant was deprived of procedural fairness. Conversely, if the Court of Criminal Appeal lacked the relevant material because of procedural unfairness, the absence of this material was not available to be considered as a matter in the exercise of the residual discretion.

52. In the absence of any further material to this Honourable Court, there is nothing presently available to be relied upon for the purposes of considering the residual discretion beyond the submissions of the appellant's counsel before the Court of Criminal Appeal that the appellant had been making "*good progress*" whilst on remand.

53. It is noteworthy that the term "*good progress*" was first used by the learned sentencing judge on 11 April 2018[20]. In this respect, the rehabilitation of the appellant whilst he had been serving his sentence took the matter no further than what was identified at the sentencing hearing and simply accorded with the expectations that had already been identified. Further, the importance of this factor for the purposes of the residual discretion is significantly tempered by the weight that is attached to the prospects of rehabilitation in cases involving the ongoing commercial enterprise of the supply of schedule 1 drugs.[21]

*The asserted stance of the Crown prosecutor*

54. The respondent respectfully disagrees with the contention that the Crown originally adopted a stance (whether expressly or impliedly) to the effect that a sentence of less than five years was open in the circumstances.

55. The circumstances in this case are distinguishable from those in *CMB* in two respects. Firstly, the Crown prosecutor in *CMB* made positive submissions on

---

[20] *Core Appeal Book* at 19.
[21] *The Queen v Roe* [2017] NTCCA 7 at [53] and [101].

two occasions that a custodial sentence would be inappropriate.[22] Secondly, when the sentencing judge indicated the proposed form of sentencing order, the Crown prosecutor failed to submit that such a sentence would be manifestly inadequate.[23] In this case, the Crown prosecutor did not make a positive submission that the imposition of a suspended sentence would be appropriate in the circumstances and the sentencing judge gave no indication as to her intention to impose a suspended sentence.

56. Whether a submission made by the Crown can properly be said to amount to a concession will depend upon a consideration of all of the circumstances in which the submission is made.[24]

57. The submission that the head sentence "*may well exceed the 5 years' imprisonment*" needs to be considered in the context of the preceding statement, namely:

> *Given his antecedents, if it was 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 5 years.*[25]

58. Viewed in that context, it becomes clear that the Crown prosecutor was in fact indicating that such a concession was inappropriate in the circumstances and was being withheld because of the seriousness of the offending.

59. Further, the assertion that any concession was made by the Crown prosecutor is inconsistent with the following considerations:

---

[22] *CMB v Attorney-General for the State of New South Wales* (2015) 256 CLR 346 at 354 [21] per French CJ and Gageler J. See also *The Queen v Wilton* (1981) 28 SASR 362 at 368.
[23] *CMB v Attorney-General for the State of New South Wales* (2015) 256 CLR 346 at 354 at 369 [64] per Kiefel, Bell and Keane JJ.
[24] *CMB v Attorney-General for the State of New South Wales* (2015) 256 CLR 346 at 369 [64] per Kiefel, Bell and Keane JJ.
[25] *Appellant's Book of Further Materials at 21.*

(i) The identification of the offending as "*objectively serious examples of those offences*" in the context of offence provisions which carried maximum penalties of 14 and 25 years' imprisonment respectively;

(ii) The reliance upon the decisions of *Winstead v The Queen*[26] (in which a head sentence of six years' imprisonment was imposed) and *The Queen v Indrikson*[27] (in which a head sentence of eight years' imprisonment was imposed) as providing a basis for sentencing an offender where large commercial quantities of cannabis are supplied, in circumstances where the appellant was being sentenced both in relation to the supply of a large commercial quantity of cannabis and for the supply of a large commercial quantity of a schedule 1 drug;

(iii) The reliance in written submissions on *The Queen v Roe*[28] to establish an appropriate indicative starting point for the offence of supplying a schedule 1 drug;

(iv) The identification of the appellant as the "*principal ... participating really at the highest level*"[29] and "*running a supply operation*"[30].

60. The appellant's counsel neither sought to rely on the submissions of the Crown prosecutor as a basis for justifying a sentence of less than five years' imprisonment at the sentencing hearing, nor contended before the Court of Criminal Appeal that the stance taken by the Crown prosecutor was such as to warrant the exercise of the residual discretion.

61. It is noteworthy in this respect that the disavowal of reliance on the exercise of the residual discretion was made some three months after the submissions made at the sentencing hearing by the Crown prosecutor and that this matter is being raised for the first time before this Honourable Court.

---

[26] [2009] NTCCA 12 at [13].
[27] [2014] NTCCA 10 at [27].
[28] [2017] NTCCA 7 at [97]-[99]. See also *Barbi v The Queen* [2019] NTCCA 19 at [31] and *Appellant's Book of Further Materials* at 19.
[29] *Appellant's Book of Further Materials* at 20.
[30] *Appellant's Book of Further Materials* at 33, referring to the agreed facts in the matter.

62. Finally, there is no suggestion by the appellant that the submissions made by the Crown prosecutor contributed to the imposition of a manifestly inadequate sentence.[31]

***Procedural fairness on resentence***

63. It is conceded by the respondent that the appellant was entitled to place further material before the Court of Criminal Appeal for the purpose of resentencing and it is clear from the appellant's counsel that there was a desire to do so.

10

64. Specifically, the appellant's counsel was seeking an institutional report by email on 31 July 2018 and before the Court of Criminal Appeal on 2 August 2018 in the anticipation that this would show that the appellant had been making good progress since being sentenced on 11 April 2018.

65. In this respect it must be accepted that the appellant has been denied procedural fairness by the Court of Criminal Appeal in the resentencing exercise. A breach of procedural fairness will found a basis for allowing an appeal where it has led to a miscarriage of justice.

20

66. A breach of procedural fairness will not produce a miscarriage of justice if it is the case that there would have been no different result had the breach of procedural fairness not occurred.[32]

67. The appellant was originally sentenced on the basis that he was making "*good progress*" towards his rehabilitation. This finding was not disturbed by the Court of Criminal Appeal, who specifically identified that *"[w]e take into account the matters of mitigation identified by the sentencing judge*"[33].

---

[31] *The Queen v Tait* (1979) 24 ALR 473 at 467-477 as cited in *The Queen v Wilton* (1981) 28 SASR 362 at 368.
[32] *Stead v State Government Insurance Commission* (1986) 161 CLR 141 at 145-146. See also *Nobarani v Mariconte* (2018) 359 ALR 31.
[33] *Core Appeal Book* at 40.

68. There is good reason to believe that any material that could have been obtained on behalf of the appellant would have been unlikely to have any impact on resentencing given the fact that the appellant was already expected to make good progress towards his rehabilitation. In that sense, it may be said that any change to the appellant's anticipated trajectory could only have been detrimental to the appellant.

69. Furthermore, such material would be unlikely to have a significant impact upon the resentencing exercise because as outlined in *Roe*:

> *For offenders whose crimes fall into the second or third categories of offending described above, the weight to be given to punishment, denunciation and deterrence usually significantly outweighs the weight to be given to rehabilitation. Indeed, in these kinds of cases the prospects of rehabilitation do not carry much weight at all. ...*[34]

70. Notwithstanding this, the respondent concedes that in the absence of the opportunity to obtain this material and place before the court, a procedural unfairness arose. This is particularly the case in circumstances where the Court of Criminal Appeal accepted the potential relevance of this material and indicated a willingness to receive and consider the institutional report and allow the parties to make further submissions before proceeding to resentence.

71. This being the case, the respondent concedes that it may be necessary for this matter to be remitted to the Court of Criminal Appeal by this Honourable Court for the purpose of resentence.

---

[34] *The Queen v Roe* [2017] NTCCA 7 at [101].

**Part VIII:**

72. The respondent estimates that it will require one-and-a-half hours for the presentation of the oral argument.

DATED this 27th day of February 2020.

10 .....

Name: Matthew Nathan SC
Telephone: (08) 8935 7500
Facsimile: (08) 8935 7552
Email: matthew.nathan@nt.gov.au

**Annexure: Statutory instruments referred to by the respondent**

*Sentencing Act* (NT) (As in force 18 July 2016)