HIGH COURT OF AUSTRALIA

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Details of Filing

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IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

S126 of 2022

BETWEEN:

EMMA-JANE STANLEY
Appellant
And

DIRECTOR OF PUBLIC PROSECUTIONS (NSW)
First Respondent

DISTRICT COURT OF NEW SOUTH WALES
Second Respondent

APPELLANT'S SUBMISSIONS

Part I: Certification for publication

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

Part II: Concise statement of the issue or issues presented by the appeal

2. Did the majority of the Court of Appeal of New South Wales err in holding that a failure to undertake the assessment mandated by s 66(2) of the *Crimes (Sentencing Procedure) Act 1999* (NSW) (***CSP Act***) did not amount to jurisdictional error?

Part III: Certification that the Appellant has considered whether any notice should be given in compliance with section 78B of the Judiciary Act 1903

3. The Appellant does not consider that such notice is required to be given.

Part IV: A citation of the authorised report of the reasons for judgment of both the primary and the intermediate court in the case

4. The primary judgment is *Stanley v R* (District Court (NSW), N Williams DCJ, 17 June 2021, unrep) (**DCJ**): Core Appeal Book (**CAB**) 48. The judgment of the intermediate court is *Stanley*

v Director of Public Prosecutions (NSW) (2021) 107 NSWLR 1[1]: CAB 85.

Part V: A narrative statement of the relevant facts

5. The Appellant pleaded guilty to (and admitted further) offences against the *Firearms Act 1996* (NSW) (CA [1], CAB 94-95). A statement of agreed facts[2] stated that at some time before 18 March 2019, a co-offender, Seth Harvey (the Appellant's 27 year-old cousin), stored numerous firearms, firearm parts and ammunition in the Appellant's home in suburban Dubbo without her knowledge. The Appellant subsequently became aware of those items and allowed them to remain there until they were sold to a known person. There were discussions between the Appellant and another co-offender, Brendon Gray, concerning the price, during which the Appellant was told that she would be given $500 of the money for the items if they could be sold for $3,000. On 26 March 2019, Mr Gray and the known person met the Appellant at her home and the known person gave $6,000 in cash to Mr Gray in exchange for the items (District Court Judgment (**DCJ**) pp 5-6, CAB 52-53; CA [2], CAB 95).

6. The police later seized the items (DCJ p 6, CAB 53). On 13 November 2019 the Appellant was arrested and made full admissions to the offences. She said she had been told that only $3,000 had been paid, of which she took $50. She was granted bail pending sentence. She was sentenced in the Local Court to an aggregate term of imprisonment of three years with a non-parole period of two years (CA [5], CAB 96), but granted bail pending her appeal to the District Court (CA [4]-[5], CAB 96).

The District Court appeal

7. The Appellant appealed, as of right, to the District Court against the severity of that sentence (*Crimes (Appeal and Review) Act 2001* (NSW) (***CAR Act***), s 11).

8. Such an appeal is by way of a rehearing of the evidence given in the Local Court in addition to any fresh evidence given on the appeal (*CAR Act*, s 17). The District Court judge is required to engage in a fresh sentencing task and form their own view as to the appropriate sentence:

[1] References to paragraph numbers contained in brackets after 'CA' relate to paragraphs in the Court of Appeal's judgment.
[2] Tendered in both the Local Court and District Court sentence proceedings.

Engelbrecht v Director of Public Prosecutions (NSW) [2016] NSWCA 290 at [91]-[92]; *Wany v Director of Public Prosecutions (NSW)* (2020) 103 NSWLR 620 (***Wany***) at [22]-[28].

9. The key issue on appeal was whether or not the term of imprisonment should be served by way of an intensive correction order (**ICO**) (CA [7], CAB 96-97; CA [68], CAB 114; CA [177], CAB 153; and CA [189], CAB 157).

10. The Appellant gave evidence in the District Court and explained that, as a parent, when she became aware of the guns, she just wanted them out of her house (CA [190]-[191], CAB 157-158). She explained she did not call the police because "I didn't want to get my, my cousin into trouble and get him put in gaol" (CA [146], CAB 141).

11. The Appellant, a 38 year old Aboriginal woman, presented a "strong subjective case" (CA [6], CAB 96; CA [189], CAB 157). She had five children, two of whom lived with their father and whom she saw every weekend, and three of whom (a 15 year old son and 4 year old twins) lived with her. She was single. During her upbringing, her stepfather was in a motorcycle club and her mother had been a heroin addict and physically abusive. The Appellant had some history of drug use. She had attended secondary school and had a "significant" employment history with long periods of continuous employment. She had some previous criminal convictions, one resulting in an ICO. She had never previously served a term of full-time imprisonment. A sentencing assessment report described her as having a medium risk of re-offending (CA [6], CAB 96). The report set out a supervision plan in the event of court ordered supervision. The plan included fortnightly Cognitive Behavioural Therapy sessions, referrals to alcohol and other drug services, and referral to a suitable mental health provider for assessment (CA [184], CAB 155-156).

12. The Appellant conceded that no penalty other than imprisonment was appropriate (*CSP Act*, s 5(1)) but argued that the sentencing judge should direct pursuant to s 7 of the *CSP Act* that the Appellant's sentence be served in the community by way of an ICO rather than by way of full-time detention (CA [7], CAB 96-97; CA [68], CAB 114; CA [177]-[181]; CAB 153-155 and CA [189], CAB 157).

13. In a judgment delivered three weeks after the appeal hearing, Judge N Williams said she gave

"very close consideration" to the submission favouring an ICO but ultimately dismissed the appeal (DCJ pp 27-29, CAB 74-76). Her Honour confirmed the sentence imposed by the Local Court and sentenced the Appellant to an aggregate sentence of three years to commence on 17 June 2021, with a non-parole period of two years (DCJ p 29, CAB 76). The Appellant is eligible for release to parole on 16 June 2023. Further analysis of her Honour's decision is set out below.

Legislative framework of ICOs

14. The District Court's exercise of the sentencing function is governed by the *CSP Act*, as well as by other statutes and the common law. A court must not sentence an offender to imprisonment unless it is satisfied, having considered all possible alternatives, that no penalty other than imprisonment is appropriate (*CSP Act*, s 5). A court that has sentenced an offender to imprisonment in respect of one or more offences may make an ICO directing that the sentence or sentences be served by way of intensive correction in the community (*CSP Act*, s 7). A court must not make an ICO unless it has obtained a relevant assessment report or is satisfied there is sufficient information to justify making an ICO without such a report (*CSP Act*, s 17D).

15. Where a sentencing court has sentenced an offender to imprisonment and is considering making an ICO pursuant to s 7 of the *CSP Act*, the court is obliged to comply with Part 5 of the *CSP Act* (*CSP Act*, ss 7(4) and 64). Division 2 of Part 5 is headed "[r]estrictions on power to make ICOs". It contains prohibitions on the making of ICOs for certain offences (*CSP Act*, s 67), sentences that exceed two years for a single offence, or an aggregate term of three years for multiple offences (*CSP Act*, s 68), and certain interstate residents (*CSP Act*, s 69).

16. Section 66 is within the same division and provides as follows:

> **66 Community safety and other considerations**
>
> (1) Community safety must be the paramount consideration when the sentencing court is deciding whether to make an intensive correction order in relation to an offender.
>
> (2) When considering community safety, the sentencing court is to assess whether making the order or serving the sentence by way of full-time detention is more

likely to address the offender's risk of reoffending,

(3) When deciding whether to make an intensive correction order, the sentencing court must also consider the provisions of section 3A (Purposes of sentencing) and any relevant common law sentencing principles, and may consider any other matters that the court thinks relevant.

17. Thus, in cases where the issue properly arises (CA [174], CAB 151), if a court has determined that imprisonment is appropriate, and the length of term does not exceed two years for a single offence or three years for an aggregate term, a court has a choice: to order the term of imprisonment be served by way of an ICO or in full-time detention. In making that choice, community safety is the "paramount" consideration (s 66(1)). That consideration is informed by s 66(2) which requires a court to undertake an assessment of which of the two modes of imprisonment will more likely address the offender's risk of reoffending. Section 66(2) gives effect to Parliament's recognition that in some instances an offender's risk of reoffending is more likely to be reduced through intensive rehabilitation and supervision in the community rather than through incarceration (CA [175]-[176], CAB 151-152; *Wany* [3]-[11]). A court is also obliged to have regard to the provisions of s 3A and any relevant common law sentencing principles (s 66(3)).

The Court of Appeal judicial review proceedings

18. By summons filed on 17 September 2021 the Appellant sought relief in the nature of certiorari to quash the sentence imposed by Judge Williams and return the matter to the District Court to be dealt with according to law. The Court of Appeal's supervisory jurisdiction was limited to review for jurisdictional error, taking account of the privative clause in s 176 of the *District Court Act 1973* (NSW)[3] (***DC Act***) (CA [28]-[32], CAB 101-102, CA [65]-[66], CAB 113).

19. The Appellant argued that Judge Williams, in considering an ICO: (1) had not undertaken the process of assessment required by s 66(2) of the *CSP Act*; and (2) the failure to do so amounted

[3] Section 176 of the *DC Act* is a very generally framed privative clause which states that "No adjudication on appeal of the District Court is to be removed by any order into the Supreme Court" (cf the more constrained language of s 179(1) of the *Industrial Relations Act 1996* (NSW) considered in *Kirk v Industrial Court of New South Wales* (2010) 239 CLR 531 and described at [42]). A privative clause in similar terms to s 176 of the *DC Act* was first contained in s 3 of the *Justices Summary Jurisdiction Act 1835* (NSW) 5 Will No 22. It was then re-enacted with various minor amendments in s 26 of the *Criminal Law and Evidence Amendment Act 1891* (NSW) 55 Vic No 5, s 18 of the *Justices Acts Amendment Act 1900* (NSW) and s 146 of the *Justices Act 1902* (NSW) No.27. See also NSW Law Reform Commission, *Criminal Appeals*, Report 140 (2014), p 19 at [2.34]ff.

to jurisdictional error. As to the latter point, the Appellant called in aid in support of that argument the judgment of McCallum JA (Simpson JA agreeing) in *Wany* (CA [20], CAB 99; CA [148], CAB 143), which held that the District Court's failure to consider the matter, as required by s 66(2), amounts to jurisdictional error, either because it was a condition of the jurisdiction or a misconception as to the nature of the function that was being performed (*Wany* [67]-[69]). After hearing the application, but before giving judgment, the Court of Appeal gave judgment in *Quinn v Commonwealth Director of Public Prosecutions* (2021) 106 NSWLR 154 (***Quinn***) which held that *Wany* was wrong insofar as it held that a failure to undertake the mandatory task in s 66(2) amounted to jurisdictional error (CA [21], CAB 99-100; CA [148], CAB 143). Following the judgment in *Quinn*, the Appellant and First Respondent provided further written submissions.

20. On 21 December 2021 the Court of Appeal, by majority, dismissed the application on the basis that a failure to perform the task mandated by s 66(2) of the *CSP Act* did not amount to jurisdictional error: it was not a condition of the exercise of the discretion to order that a sentence of imprisonment not be served by way of an ICO (CA [51], CAB 108 per Bell P; CA [138]-[139], CAB 139-140 per Basten JA; CA [157], CAB 145 per Leeming JA; CA [193], CAB 159 per Beech-Jones JA), nor did a failure to engage with the task mean that the judge fundamentally misconceived her function (CA [60]-[63], CAB 112-113 per Bell P; CA [150]-[157], CAB 144-145 per Leeming JA; CA [195], CAB 160 per Beech-Jones JA; McCallum JA dissenting at CA [185], CAB 156).

21. Indeed, it follows from the Court of Appeal decision that a failure to engage with any of the subsections of s 66 of the *CSP Act* would not amount to jurisdictional error (CA [140], CAB 140 per Basten JA).

Part VI: The Appellant's argument

22. The Court of Appeal erred in concluding that a failure to perform the assessment mandated by s 66(2) of the *CSP Act* did not amount to jurisdictional error for the reasons which follow.

The decision of the District Court Judge

23. Beech-Jones JA (CA [189]-[192], CAB 157-159) and McCallum JA (CA [161] and [183],

CAB 146 and 155) concluded that Judge Williams erred by failing to conduct the mandatory assessment prescribed by s 66(2). Bell P did not finally determine the issue but was inclined to the view that the sentencing judge did not engage in the assessment process contemplated by s 66(2) (CA [24]-[26], CAB 100-101).

24. Notwithstanding the centrality of such a finding to a determination about whether Judge Williams committed jurisdictional error, Basten and Leeming JJA (CA [87] and [140] CAB 121 and 140; CA [141], CAB 140) did not determine the issue.

25. The Appellant's appeal to the District Court was heard on 28 May 2021. The Appellant's solicitor sought to persuade Judge Williams that an ICO was more likely to address the Appellant's risk of reoffending (CA [179]-[182], CAB 153-155 per McCallum JA; cf CA [147], CAB 142-143 per Leeming JA).

26. By judgment on 17 June 2021, after referring to the charges and facts of the matter, Judge Williams determined that no penalty other than imprisonment was appropriate in accordance with s 5(1) of the *CSP Act* (DCJ pp 9 and 28, CAB 56 and 75).

27. Her Honour summarised the Appellant's subjective case and some of the submissions made by the Appellant's solicitor and the prosecutor, although she did not, in direct terms, record the submission on behalf of the Appellant that community safety is more appropriately met by allowing the Appellant to engage in the process of an ICO.

28. Her Honour referred to various authorities regarding "the law which prescribes the availability of an ICO" (DCJ p 28, CAB 75) but did not specify in what regard these authorities applied to the Appellant's case. Each of the cases referred to by her Honour addresses a range of issues and the cases are not without some differences[4]. She made no reference to *Wany*, the decision which at the time most closely focused on s 66(2), despite the fact the Appellant's solicitor made pointed reference to it and relied on it in his submissions (CA [178]-[181], CAB 153-155).

[4] *Karout v R* [2019] NSWCCA 253 and *Casella v R* [2019] NSWCCA 201 both questioned one interpretation of the *CSP Act* articulated in *R v Fangaloka* [2019] NSWCCA 173. *Karout* was a decision where the Court divided on the outcome. An aspect of the majority's reasoning in *Karout* was questioned, if not criticised, in *Wany* (at [56]).

29. Her Honour then stated her concurrence with the Local Court Magistrate that the length of the aggregate term of imprisonment should be three years (DCJ p 28, CAB 75). Despite s 7(1) of the *CSP Act* which stipulates that the question of an ICO arises only after the offender has been *sentenced* to imprisonment in respect of one or more offences, her Honour did not at that time impose a sentence of imprisonment, and did not indicate the sentences that would have been imposed for each offence had separate sentences been imposed instead of an aggregate sentence (*CSP Act*, s 53A(2)(b)). However, her Honour later did confirm the indicative sentences imposed in the Local Court (DCJ p 29, CAB 76).

30. Judge Williams then proceeded to consider whether or not an ICO was appropriate "taking into account all of the factors including community safety and rehabilitation". Her Honour stated (DCJ p 28, CAB 75):

> *In my view community safety is of paramount consideration. There are a substantial number of firearms. The firearms in my view pose a significant risk to the people of Dubbo.*

31. Her Honour then concluded that "[t]aking into account all of those matters" she was not of the view that an ICO was appropriate (DCJ pp 28-29, CAB 75-76).

32. By notice of contention, the First Respondent contends that the sentencing judge undertook the assessment required by s 66(2) of the *CSP Act*.

33. While Judge Williams indicated that she had given "very close consideration" to the appropriateness of an ICO, citing a number of cases that advert to the principles to be applied (DCJ pp 27-28, CAB 74-75), her Honour did not refer to s 66 of the *CSP Act* specifically or in substance. Her Honour did not assess or make any findings about whether making an ICO or serving the sentence by way of full-time detention was more likely to address the Appellant's risk of reoffending (as required by s 66(2) of the *CSP Act*) and, as Beech-Jones JA observed, her Honour's consideration "never travelled beyond a brief reference to the contents of the Sentencing Assessment Report and the Appellant's past employment history as being "positive indicat[ors] towards good prospects of rehabilitation"" (CA [190], CAB 157). Further:

a. Community safety was not assessed in any forward-looking manner, nor was it assessed by reference to the Appellant's risk of reoffending, as mandated by ss 66(1) and (2);

b. While her Honour referred to community safety as the paramount consideration, she prefaced it with "[i]n my view" as if it was a finding made by the court, rather than the statutorily mandated paramount consideration when deciding whether to make an ICO (*CSP Act*, s 66(1));

c. The only matter taken into account in relation to community safety was the risk posed by the firearms that were the subject of the Appellant's offending, but ignoring the fact that those firearms had been seized such that they were not a threat to community safety in any respect; and

d. Her Honour did not address the Appellant's explanation for the offences, where it could be expected that resolution of the issue of whether the Appellant was a "dedicated drug runner or someone caring for five children who just wanted the guns out of her house" was significant in the determination of the s 66(2) assessment (CA [191], CAB 158 per Beech-Jones JA).

34. As this was a quintessential case for a consideration of the re-ordered sentencing objectives effected by s 66 (CA [189], CAB 157), and the outcome of the assessment mandated by s 66(2) was not a given (CA [192], CAB 158), it could not be assumed that the task was undertaken (cf *Mourtada v R* [2021] NSWCCA 211 per Adamson J at [37]). A conclusion that Judge Williams failed to properly consider and apply s 66(2) of the *CSP Act* is unavoidable. The First Respondent's notice of contention should be dismissed.

35. There is no issue that Judge Williams had the power to decline to impose an ICO and, instead, order that the Appellant serve at least the non-parole period of her sentence (determined to be two years) in full-time custody. The question that arises in this case is whether the power being exercised was limited by the terms of s 66 of the *CSP Act* such that a failure to engage with s 66 amounted to jurisdictional error. This question depends on what is the nature of the power being exercised, what are the limits on it, and what may be discerned from the legislative

intent as to whether the exercise of it without regard to those limits amounts to jurisdictional error (*Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at [91] per McHugh, Gummow, Kirby and Hayne JJ).

The nature of the jurisdiction being exercised

36. The matter was heard as an appeal pursuant to s 11 of the *CAR Act* which required Judge Williams to engage in a fresh sentencing task and form her own view as to the appropriate sentence (*Wany* [22]-[28]), then determine the appeal either by setting aside the sentence, varying the sentence, or dismissing the appeal (*CAR Act*, s 20(2)).

37. Sentencing involves the exercise of various powers at different stages each subject to their own limits.[5] To characterise sentencing in this manner, as one with various stages, is not to offend the principle against sentencing in a staged mathematical approach which contemplates increments to, or decrements from, a predetermined range of sentences, as rejected in *Markarian* (2005) 228 CLR 357 at [37] (cf CA [139], CAB 139-140 per Basten JA). Rather, engagement with a process of instinctive synthesis occurs at each stage of the sentencing process, but the existence of each stage arises from the *CSP Act* which provides that the ultimate sentence can only be imposed after the exercise of particular powers, including the power to impose or decline to order an ICO, each of which is the subject of obligations and constraints.

Limits on the power to sentence

38. The sentencing task performed by Judge Williams was not unfettered but subject to various obligations and constraints including:

    a. The requirement for procedural fairness including to give a warning in accordance with *Parker v Director of Public Prosecutions* (1992) 28 NSWLR 282 at 290 in the event her Honour formed the view that a sentence greater than that imposed in the Local Court was warranted;

[5] The distinction between jurisdiction and power is acknowledged: see, for example, *CGU Insurance LTD v Blakeley* (2016) 259 CLR 339 at [25] and [31]; *Lacey v Attorney-General (QLD)* (2011) 242 CLR 573 at [48]; *Osland v Secretary, Department of Justice [No 2]* (2010) 241 CLR 320 at [19] and [78].

b. The jurisdictional limits on the Local Court (*CAR Act*, s 71), including the five year limit on the total sentence that may be imposed (*CSP Act*, ss 53B and 58);

c. Provisions in the *CSP Act* which define and limit the court's use of available sentences; and

d. Common law principles applicable to the exercise of the sentencing discretion, such as considerations of totality and double punishment.

39. Judge Williams was required to follow the statute, which contemplates a staged approach to the imposition of an ICO (*R v Zamagias* [2002] NSWCCA 17, referred to in *Wany* at [18]-[21]). After first determining that no sentence other than imprisonment was appropriate (*CSP Act*, s 5(1)) and then determining to impose an aggregate sentence of three years (*CSP Act*, ss 68(2) and (3)), her Honour was required to sentence the Appellant to imprisonment (*CSP Act*, s 7(1)) before considering whether to order an ICO.[6]

40. After sentencing the Appellant to imprisonment, Judge Williams was required to obtain a sentencing assessment report (*CSP Act*, s 17D(1)) except in the limited circumstances prescribed by s 17D(1A) of the *CSP Act*.

41. Thirdly, and critically, the sentencing judge was required to determine whether to make an ICO in respect of the Appellant. The considerations to be taken into account in that regard are prescribed solely by s 66 of the *CSP Act*. Thus, as McCallum JA observed at CA [172], CAB 150-151, the statutory command presented by s 66(2) arises at a discrete stage of the sentencing process only *after* the court has determined to impose a sentence of imprisonment. The issue is how that sentence of imprisonment is to be served – whether in a State gaol, or outside gaol but subject to an ICO (involving the types of conditions provided for in ss 72-73B of the *CSP Act*). In making the choice between an ICO and full-time detention, Parliament has directed the court to undertake a specific assessment process (s 66(2)) in having regard to the paramount consideration of community safety (s 66(1)). The process is forward-looking and directs a

[6] See, also, s 17D(3) of the *CSP Act* which states "[t]he sentencing court must not request an assessment report relating to the imposition of a home detention condition on an intensive correction order unless it has imposed a sentence of imprisonment on the offender for a specified term". A home detention order is an "additional condition" available to a sentencing court when imposing an ICO (*CSP Act*, s 73A(2)(a)).

court to consider the consequences for the community before making its choice. If the s 66(2) process is not undertaken, then community safety as defined by s 66(2) – the paramount consideration – has not been properly assessed in accordance with the statute.

42. Thus, Judge Williams' power to impose an ICO was limited by: (1) that the Appellant had been sentenced to imprisonment, (2) that she had before her the information contained in a sentencing assessment report (as prescribed by cl 12A of the *Crimes (Sentencing Procedure) Regulations 2017* (NSW)), and (3) the requirement to consider the matters listed in s 66, including the *paramount consideration* of community safety. As her Honour did not assess community safety in the manner mandated by s 66 of the *CSP Act* the exercise of the power to impose (or not impose) an ICO occurred without regards to the limits of her jurisdiction.

43. Viewed in this manner, a failure to address the matters in s 66 may be characterised as jurisdictional error within the second category of example given in *Kirk v Industrial Court of New South Wales* (2010) 239 CLR 531 (***Kirk***) at [72][7] where s 66 operates as a condition on the exercise of jurisdiction. Alternatively, her Honour misconceived the function (the third category of example given in *Kirk* at [72][8]), including because she considered without reference to s 66 that it was a matter for her determination that community safety was the paramount consideration and then proceeded to assess it by reference to what had gone before rather than by reference to the future-focussed question of the Appellant's risk of reoffending.

44. However, whether or not the error falls within one of the categories identified in *Craig v South Australia* (1995) 184 CLR 163 (***Craig***) and *Kirk* is not essential; it is not a pre-requisite to a finding of jurisdictional error. The majority in *Kirk* eschewed a rigid taxonomy of jurisdictional error (at [73]) and observed "[i]t is neither necessary, nor possible, to attempt to mark the metes and bounds of jurisdictional error" (*Kirk* at [71]).

45. Similarly, the question of whether failure to have regard to the limits on a particular power amounts to jurisdictional error cannot be determined on the basis it does not amount to jurisdictional error if it may be characterised as erroneously identifying, formulating and determining a relevant issue (cf CA [48]-[49], CAB 107-108 per Bell P; CA [195], CAB 160

[7] As contemplated in *Wany* at [67].
[8] Ibid.

per Beech-Jones JA).

46. This Court stated in *Craig* (at 179-180, adopted in *Kirk* at [67]):

> In contrast [to the jurisdiction of administrative tribunals], the ordinary jurisdiction of a court of law encompasses authority to decide questions of law, as well as questions of fact, involved in matters which it has jurisdiction to determine. The identification of relevant issues, the formulation of relevant questions and the determination of what is and what is not relevant evidence are all routine steps in the discharge of that ordinary jurisdiction. Demonstrable mistake in the identification of such issues or the formulation of such questions will commonly involve error of law which may, if an appeal is available and is pursued, be corrected by an appellate court and, depending on the circumstances, found an order setting aside the order or decision of the inferior court. Such a mistake on the part of an inferior court entrusted with authority to identify, formulate and determine such issues and questions will not, however, ordinarily constitute jurisdictional error. Similarly, a failure by an inferior court to take into account some matter which it was, as a matter of law, required to take into account in determining a question within jurisdiction or reliance by such a court upon some irrelevant matter upon which it was, as a matter of law, not entitled to rely in determining such a question will not ordinarily involve jurisdictional error. (underlining added)

47. Three points may be made about this passage. First, it does not pose a negative definition of jurisdictional error. Rather this Court was seeking to make the point that courts, including inferior courts, have the authority to decide questions of law and fact when determining matters in which they have jurisdiction to decide (*Kirk* at [67]). In that context they have the power to identify, formulate and determine a relevant issue, and they do so routinely without issues of jurisdictional error arising. The passage is descriptive rather than prescriptive.[9]

48. Secondly, by including the phrase "not ordinarily" in that passage, this Court was recognising the possibility that some such errors by inferior courts may lead to jurisdictional error (CA [166], CAB 148). Bell P's suggestion that the phrase "not ordinarily" was included only to allow for jurisdictional error in cases tainted by procedural fairness, should not be accepted (CA [50], CAB 108). Rather, as McCallum JA observed, "[d]enial of procedural fairness is not a species of error in the identification, formulation and determination of what is relevant; it is of a different kind of error altogether" (CA [167], CAB 148). The phrase was more likely included as an acknowledgement of the lack of certainty in this area of the law (CA [167],

[9] See, in a different context, *Hili v The Queen; Jones v The Queen* (2010) 242 CLR 520 at [36]-[38]; *Parente v R* (2017) 96 NSWLR 633 at [100]-[106].

CAB 148), or that jurisdictional error is rare. Bell P's approach risks reducing the review of sentencing decisions by this Court under Chapter III of the Constitution to those tainted by procedural unfairness. Further, given the scope of a court's power under s 43 of the *CSP Act* to reopen proceedings where a court has imposed a penalty that is contrary to law, or failed to impose a penalty that is required to be imposed by law (*CSP Act*, s 43(1)), it is difficult to see what errors would ever be left to be reviewed on the basis of jurisdictional error, except those arising from procedural unfairness (or possibly bias or those committed in bad faith).

49. Thirdly, and in any event, Judge Williams' mistaken approach to s 66 does not fall within the negative formulation posed by *Craig*. Her Honour did not merely fail to identify, formulate or determine the assessment mandated by ss 66(1) and (2) of the *CSP Act.* Rather, her Honour misconceived the restrictions on her power to impose an ICO by seeing it as an assessment of the risk of the firearms that were the subject of the offence and not much more. In this respect, her Honour misconceived the discrete function, referred to earlier at [41], that she was required to perform (CA [172], CAB 150-151 per McCallum JA; cf CA [153], CAB 144 per Leeming JA). To make the choice between full-time detention and ordering an ICO without complying with Parliament's command is fundamentally to misconceive the function of exercising that choice and amounts to jurisdictional error (CA [185] per McCallum JA).

50. It is no answer to characterise the function at a higher level of generality, either as the hearing of an appeal *de novo* against the sentence imposed in the Local Court (CA [63]; CAB 113), or as an exercise of the broad sentencing discretion contemplated in *Markarian v The Queen* (2005) 228 CLR 357 (CA [139]; CAB 139-140 and [153]; CAB 144). Such a characterisation would preclude a finding of jurisdictional error in respect of any sentence, and overlooks the point that s 66(2) applies at a discrete stage only after a *Markarian*-type analysis has led to the conclusion that a sentence of imprisonment of a particular term is appropriate.

That the procedure mandated by s 66 is jurisdictional is supported by the statutory language

51. Instead of the slavish application of a semantic approach reliant on post-facto descriptions of what has and has not been held to amount to jurisdictional error, what is required is an examination of the power being exercised and the jurisdictional limits of it, by reference to the structure and language of the statute. The following matters point to s 66 as a limit on the

jurisdiction to impose an ICO.

52. First, section 66 was included in the *CSP Act* in the division titled "Restrictions on power to make intensive corrections orders". Division headings are to be taken as part of the Act (*Interpretation Act 1987* (NSW), s 35(1)). While the heading was an artefact of the *CSP Act* prior to the insertion of s 66 in its current terms, it remains that Parliament chose for it to be inserted within that Division, as to point the way towards and be used to identify the mischief to which the provision is directed and its purpose (*R v A2; R v Magennis; R v Vaziri* (2019) 93 ALJR 1103 at [40], [155] and [160]). This is evidence of an intention that s 66 is a restriction or limit on the power to impose an ICO, in the same manner as ss 67-69 which are also contained in the division and also limit the sentencing court's power to impose an ICO.

53. Secondly, the statutory language is mandatory. Community safety "must be" the paramount consideration: s 66(1). The sentencing court "is to" conduct the assessment prescribed by s 66(2). The sentencing court "must also" consider the provisions of s 3A of the *CSP Act* and any other relevant matter: s 66(3). "Must" and "is to" are words of mandate.

54. Thirdly, the *CSP Act* does not state that non-compliance with s 66(2) does not result in invalidity[10]. That stands in contrast to a number of provisions in the Act which expressly provide that non-compliance does not invalidate a sentence or order (CA [45], CAB 106-107; CA [54], CAB 109-110 and CA [96], CAB 124). This circumstance suggests that Parliament intended that a failure to undertake this particular mandatory task would result in invalidity. Bell P referred to this circumstance but, in citing the pitfalls of *expressio unius* reasoning, effectively – and erroneously – gave it no weight in the exercise of construction (CA [54]-[56], CAB 109-110). Basten JA took a similar approach to Bell P (CA [99], CAB 126). This approach overlooks the timing and form of the *Crimes (Sentencing Procedure) Amendment (Sentencing Options) Act 2017* (NSW) (the ***Amending Act***), which introduced s 66 in its current terms. It was assented to on 24 October 2017 and commenced on 24 September 2018, at a time when it was not unusual in New South Wales for the drafting technique, which

[10] It is accepted however that there are limits on these clauses, such that where a failure to comply with a provision that contains such a clause amounts to jurisdictional error the presence of the clause does not oust the capacity of the Court of Appeal to review the decision on the basis of that error (*FCT v Futuris Corp Ltd* (2008) 237 CLR 146 at [24]-[25]).

specifies that non-compliance does not invalidate a sentence, to be utilised (CA [46], CAB 107). More pointedly, the *Amending Act* itself introduced such provisions in respect of ss 17I and 17J. Viewed in this context, the absence of such a provision in s 66 strongly favours a conclusion that non-compliance should result in invalidity. This is so regardless of whether or not Parliament has taken a different view of non-compliance with s 5(1) (cf CA [57], CAB 111 and [169]-[170], CAB 149-150).

55. Fourthly, s 66(2) directly serves an important legislative object of putting community safety "first" and, in that regard, reducing reoffending by "community supervision combined with programs that target the causes of crime" (Minister's Second Reading Speech, as quoted in *Wany* at [8]). That an ICO may be imposed or refused without considering community safety in the manner contemplated by s 66(2) undermines the legitimacy of this sentencing option and is antithetical to Parliament's intent (CA [175]-[176], CAB 151-152, *Wany* [3]-[11]).

56. Finally, the power being exercised has grave consequences (see further submissions regarding consequences below). It mandates a choice between full-time custody and a community-based sentence of imprisonment (CA [165], CAB 147-148) in circumstances where the *CSP Act* generally warns against the use of imprisonment as a sentencing option (*CSP Act,* s 5(1); CA [170], CAB 149-150) and, by the reforms introduced by the *Amending Act*, Parliament specifically warns against the use of full-time imprisonment for short periods (CA [176], CAB 152). In these circumstances it cannot be the case that Parliament intended to permit inferior sentencing courts to make grave legal errors resulting in imprisonment without jurisdictional consequences.

57. That the assessment mandated by s 66(2) may not be determinative is not a matter militating against jurisdictional error (cf CA [194], CAB 159 per Beech-Jones JA; CA [104], CAB 127-128 per Basten JA). Such an approach also disregards the principle of materiality. That is:

    a. The statute is ordinarily to be interpreted as incorporating a threshold of materiality in the event of non-compliance (*Hossain v Minister for Immigration and Border Protection* (2018) 264 CLR 123; [2018] HCA 40 at [29]); and

    b. Jurisdictional error does not arise where the threshold of materiality is not met

because a failure to comply with a condition could have made no difference to the decision that was made in the circumstances in which that decision was made (*Hossain* at [30]-[31]).

58. It was not suggested or argued by the respondent in this case that failure to conduct the assessment mandated by s 66(2) was immaterial (CA [40], CAB 104-105).

Consequences

59. Bell P (CA [56], CAB 110-111), Basten JA (CA [134]-[137], CAB 138-139) and Leeming JA (CA [157], CAB 145) reasoned that the range of "complex" consequences that would flow from finding a sentence invalid demonstrates the unlikelihood that Parliament intended invalidity as the consequence of non-compliance with s 66(2) (see, also, *Quinn* [95]). Basten JA referred to such consequences – that the order was a nullity would mean "any person can disregard [it], a person refused an ICO will be unlawfully imprisoned, and a person granted an ICO, who was not on bail, may be returned to custody" – and characterised them as "potentially dramatic and disruptive of the orderly administration of justice" (CA [134] and [136], CAB 138).

60. For a number of reasons, the concern about the perceived consequences did not warrant the significant weight their Honours gave it in construing whether or not this amounted to jurisdictional error.

61. First, the concern about what will happen if a failure to engage with s 66 of the *CSP Act* amounts to jurisdictional error is misplaced. A finding of jurisdictional error in this matter would result in the Appellant's sentence being quashed pursuant to s 69B of the *Supreme Court Act 1969* (NSW). Her appeal against severity of sentence would be extant. The matter would be returned to the District Court, the Appellant would be returned to bail, and her appeal would be redetermined.[11]

62. Secondly, as Beech-Jones JA observed[12], a court's order is presumed valid until challenged (CA [200]-[201]; CAB 161-162 citing *Minister for Immigration and Multicultural Affairs v*

[11] As has occurred in other cases such as *Wany* at [71].
[12] Aronson M, "Reforming Certiorari and Messing with Nullity", (2022) 29 AJ Admin L 110, p 117 and footnote 51.

Bhardwaj (2002) 209 CLR 597 at [151] per Hayne J).

63. Thirdly, far-reaching practical consequences have not prevented a finding of invalidity in other cases (CA [199], CAB 160-161). Illustrating the point, in *Oakey Coal Action Alliance Inc v New Acland Coal Pty Ltd* (2021) 386 ALR 212 the practical inconvenience of overturning a decision after an almost 100 day hearing, and litigation spanning almost 14 years, did not deter this Court from recognising the full consequences of a finding of jurisdictional error.

64. Fourthly, and importantly, Beech-Jones JA was correct to note at CA [202], CAB 162 that "all the dire warnings about invalidity need to be considered against the potentially serious consequences of not finding jurisdictional error where a judge misapplies or acts contrary to a provision of the Sentencing Act". The exercise of power here necessarily has the gravest of consequences for the individuals the subject of the decision: detention, or not. In this context, the fact that there may be some administrative or practical complexities involved in recognising that the decision was affected by legal error[13] is not a strong reason militating against recognising that such a legal error matters. It is difficult to see that such an outcome would have been intended by Parliament. And those complexities are, in any event, just an incident of the nature of jurisdictional error, which notion has constitutional status, avoiding "islands of power immune from supervision and restraint" (*Kirk* at [99]).

65. Finally, broader considerations favour relief being granted. The constitutional protection given by *Kirk*, enabling the orderly application of s 73(ii) of the Constitution to jurisdictions such as this (where there is no appeal to the Supreme Court and a privative clause) is real and important. The jurisdiction here being exercised, namely, (de novo) appeals against sentence from the Local Court is itself large and significant. On any view of it, s 66 of the *CSP Act* provides for a mandatory step (and inquiry) in consideration of whether or not to impose an ICO in lieu of a sentence of imprisonment already imposed. A narrow view of jurisdiction and jurisdictional error such as taken by the Court of Appeal in this case, immunises from review sentencing errors (broadly speaking) answering this description and this is antithetical to the coherent and proper application of the law in inferior sentencing courts. Given the scope of s 43 of *CSP Act* to correct obvious or blatant sentencing errors, it is difficult to know what would

[13] Indeed, as *Kable No. 2* (2013) 252 CLR 118 demonstrates it is not the case, at least with a superior court, that a person will be unlawfully imprisoned notwithstanding the fact that there was no power to imprison them.

be left that is capable of scrutiny on review other than denials of procedural fairness, bias and the like.

66. Accordingly, a proper consideration of the consequences favours a conclusion that the District Court's failure amounted to jurisdictional error.

Part VII: Orders sought

1. The appeal be allowed.

2. Set aside order 1 made by the Court of Appeal and in its place the following orders be made:

   a. Relief in the nature of certiorari quashing the decision of the Second Respondent.

   b. An order that the proceedings be returned to the District Court for the Appellant's appeal to be dealt with according to law.

Part VIII: Estimate of time to present oral argument

1. The Appellant estimates that 1 ½ hours will be required to present her oral argument.

T A GAME
Forbes Chambers
(02) 9390 7777

T QUILTER
Public Defenders Chambers
(02) 9268 3111

C E O'NEILL
Forbes Chambers
(02) 9390 7777

ANNEXURE – LIST OF LEGISLATIVE MATERIALS REFERRED TO

All provisions are as at 17 June 2021, when the District Court handed down judgment.

1. *Crimes (Sentencing Procedure) Act 1999* (NSW), sections 5, 7, 17D, 17I, 17J, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 73A, 73B.
2. *Crimes (Appeal and Review) Act 2001* (NSW), sections 11, 17, 20.