HIGH COURT OF AUSTRALIA

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Details of Filing

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IN THE HIGH COURT OF AUSTRALIA

SYDNEY REGISTRY

BETWEEN: **JONG HAN PARK**

Appellant

and

THE QUEEN

Respondent

APPELLANT'S OUTLINE OF ORAL SUBMISSIONS

Part I: Certification

1. The appellant certifies that this outline is in a form suitable for publication on the internet.

Part II: Propositions to be advanced

2. The construction of s 22(1) of the *Crimes (Sentencing Procedure) Act* preferred by Fullerton J adopts the plain and natural meaning of words which are unambiguous. The literal meaning serves the purpose encouraging guilty pleas and the majority construction does not.
3. There is no warrant for moving beyond the literal meaning of the words to ensure sentences are not imposed which are unreasonably disproportionate to the nature and circumstances of offences because the provision of a discount for the utilitarian value of the plea is discretionary (although strongly guided by *R v Thomson; R v Houlton* (2000) 49 NSWLR 383 ('*Thomson and Houlton*')), and there is an express requirement to not impose a lesser penalty because of the guilty plea if this would result in such a sentence.
4. There are three relevant areas of sentencing principle which bear on the correct construction of the phrase 'than it would otherwise have imposed' in s 22(1), and the task to be undertaken by the sentencing judge in this case. One is the role of a maximum penalty as a yardstick in sentencing: AS [37] and cases cited. Generally mitigating factors are taken into account in an instinctively synthesised way with all other circumstances of the offence and offender, and sentencing purposes and principle, to permit comparison with the maximum penalty, conscious of the range of offending and offenders dealt with. This is central to determination of the type of sentence to be imposed and, if custodial, its length.
5. Reduction in sentence to reflect the utilitarian value of a guilty plea is foreign to that process and is qualitatively different from other mitigating factors. It is not synthesised with those other factors. It serves only a 'non-sentencing purpose' of encouraging pleas. Especially as encouraged to be applied by *Thomson and Houlton*, the section is a conscious legislative qualification to the instinctive synthesis process: AS [25] – [26].

6. The second relevant area of sentencing principle derives from *Thomson and Houlton*: AS [18]. Spigelman CJ undertook detailed consideration of the preference for the instinctive synthesis method the justification alongside this to encouraging articulated discounts for the utilitarian value of a guilty plea, within a specified range: [54] ff. / JBA Part D 447, [127]-[128]. S61/2021

7. Because the statutory objective of encouraging early pleas was not being attained, a guideline was necessary to ensure that offenders could know that in this State a discount for a plea is in fact given on a systematic basis. [112] / JBA Part D at 462; see also [135]. His Honour explained why this should focus on the utilitarian value of the plea which is qualitatively different from other aspects of the plea: [70], [114] – [115], [112] – [123] / JBA Part D 452, 462 - 464. Although holding a judge could take another course such as quantifying a discount for all aspects of a plea ([113]), subsequent authority has discouraged this: AS [24].

8. The majority construction does not support the purpose of the section implemented in accordance with the guideline of providing visible rewards for pleading guilty to encourage others. The suggested advice in Response [37] is unrealistic. An accused person needs to be advised that they can generally expect to receive a lesser sentence if they plead guilty (in the order of about 25% if early) than if they do not, although the sentencer may regard the case as so serious that a discount for pleading guilty will not be provided or not to that extent.

9. The majority and minority constructions are narrow. *Thomson and Houlton* provides context for why this is necessary (reduction quantified, any discount transparent).

10. The third area of principle is caselaw regarding the effect of jurisdictional limits on sentencing summarily for indictable offences: AS [36] – [39]. A matter of principle arose in *R v Doan* because in articulating a disparity complaint, the submission was advanced that the *Criminal Procedure Act* limitation of the term of imprisonment able to be imposed in the Local Court to 2 years were not merely jurisdictional but performed the same function as the specification of a maximum penalty. The 'central issue' was whether the statutory provision of a maximum available penalty of two years in s 27(2) of the *Criminal Procedure Act* had the effect of making a higher prescribed statutory maximum for a particular offence irrelevant to a sentence determination by a magistrate exercising the jurisdiction of the Local Court: [27] – it did not.

11. In so far as *Doan* is 'longstanding authority' which is 'well settled' it relates to the issue it actually decided: the role of a maximum penalty is to be filled by the offence creating provision, not a jurisdictional limit. The respondent's reliance on *Doan* is wrong: Response [21], [24], [25]. Fullerton J was correct to find *Doan* not determinative: CCA [100], [132].

12. The application of a quantified discount, if provided, to advance a systemic goal disconnected from the purposes of sentencing, requiring contrast with the sentence that would have been

imposed had the offender not pleaded, cannot be done prior to application of the jurisdictional limit - a fundamental component of determining the sentence that would have been imposed had the person pleaded not guilty. Rather than with the maximum, the discount has a direct relationship with the sentence that 'would otherwise have been imposed.' S61/2021

13. Five NSW sentencing decisions have been identified where *Doan* has been applied in a way the appellant submits to be unwarranted extension. Two (*Lapa*, *Mundine*) were decisions of the CCA and so would normally have warranted application by the CCA. Those cases did not engage with the construction of the legislation that was called for in this case. If the minority construction is correct those decisions were plainly wrong – and there was good reason for not applying them because they did not constitute a suite of carefully worked out principle.

14. The fact that the power to reduce is discretionary (although very strongly encouraged) is important. The discretionary nature of the reduction and the requirements: to give reasons where there is not a lesser penalty imposed, and that a lesser penalty not be unreasonably disproportionate to the nature and circumstances of the offence, means there is no need to distort the natural meaning of the phrase under consideration.

15. Fullerton J's construction promotes a true judicial discretion to exercise once the sentence that would actually have been imposed absent the guilty plea is ascertained: AS [63]. Relevant factors have an authentic bearing on whether to provide a lower sentence than would have been imposed had there not been a guilty plea, in each individual case: AS [63], [65].

16. The application of a discount for a guilty plea will in many cases seem disproportionate to the nature and circumstances of the offence because the utilitarian value of the plea has nothing to do with the circumstances of the offence and offender and the purposes of sentencing: AS [25], [59]. Thus the word 'unreasonably' is important: AS [61]. This requires individualised justice - minds will differ and it balancing competing policies is allowed: AS [62], [63].

17. On the construction of the majority the operation of the section is impeded: AS [64], Reply [15] – [17]. The few identified instances of application of the process found open in *Lapa* demonstrate no discretion being exercised, but rather a purported obedience to *Thomson and Houlton,* in a way which is mechanistic and not mindful of the discount's purpose.

18. The respondent's contention of 2017 legislative endorsement of a so called 'established practice' is inapt for many reasons: Reply.

Dated: 1 September 2021

Belinda Rigg
Public Defenders Chambers