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

10 APPELLANT'S SUPPLEMENTARY SUBMISSIONS

Part I: Certification

1. These submissions are in a form suitable for publication on the internet.

Part II: Supplementary Argument

2. These submissions are filed in compliance with an order made by Kiefel CJ on 2 September 2021 allowing a supplementary submission concerning the interpretation of s 53A of the *Crimes (Sentencing Procedure) Act 1999* ('the *Sentencing Act*'), following questions asked by Gageler J as to whether the appellant's construction of s 22(1) could have wider consequences upon the operation of s 53A.

3. Section 53A of the *Sentencing Act* provides as follows:[1]

20 ***53A Aggregate sentences of imprisonment***
(1) A court may, in sentencing an offender for more than one offence, impose an aggregate sentence of imprisonment with respect to all or any 2 or more of those offences instead of imposing a separate sentence of imprisonment for each.
(2) A court that imposes an aggregate sentence of imprisonment under this section on an offender must indicate to the offender, and make a written record of, the following—
(a) the fact that an aggregate sentence is being imposed,
(b) the sentence that would have been imposed for each offence (after taking into account such matters as are relevant under Part 3 or any other provision of this
30 *Act) had separate sentences been imposed instead of an aggregate sentence.*

4. The indication provided and record made, as required by s 53A(2)(b), is what is described in NSW as an indicative sentence (or sometimes 'sentence indication'). It was the indicative sentence of 2 years imprisonment for offence 6 in this case that gave rise to consideration by the CCA of the interpretation of s 22(1) of the *Sentencing Act*.

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[1] JBA 51 – 52 regarding version applicable for the sentencing of the appellant, which is in the same terms now.

5. It is submitted that there are no unintended consequences for the interpretation of s 53A arising from the appellant's construction of s 22(1). On the contrary, assumptions which are uncontroversial regarding the interpretation of s 53A are supportive of the appellant's construction of s 22(1).

6. Aggregate sentences are often imposed in NSW where the prospect of multiple sentences of imprisonment arises – in relation to matters where there has been a guilty plea and where there has not, and in relation to summary matters, indictable matters dealt with summarily (including on a s 166 certificate in the District Court as in this case), and indictable matters dealt with on indictment.

10 7. No issue has been taken with the proposition that the phrase '…impose a lesser sentence than it would otherwise have imposed' in s 22(1) of the *Sentencing Act* is applicable in this case although a sentence was not actually imposed for offence 6. The same construction applies in cases such as this where an aggregate sentence is imposed but error is asserted in relation to an indicative sentence, as with cases where a sentence is actually imposed.

8. Section 53A was introduced by Schedule 2[14] of the *Crimes (Sentencing Procedure) Amendment Act* 2010. The Second Reading Speech to the corresponding Bill includes the following (emphasis added):

> *The reasons for setting out the precise details of each sentence are to ensure*
> 20 *transparency, reflect criminality and ensure that victims get due recognition. This also makes it easier to adjust an overall sentence when one sentence is changed on appeal. Those principles remain important, but in order to simplify the sentencing process for the judiciary, and for the community's understanding of it, the Government has decided to remove the requirement to specify the precise detail of any overlap between the sentences by allowing it to set one overall sentence and one non-parole period, provided that the court first indicates* ***the appropriate sentence that would have been given for each offence had it been sentenced individually****. The amendments will allow the judge to approach sentencing for multiple offences in a simple way when appropriate and*
> 30 *lead to a sentence which is simpler and more easily understood by all.*[2]

9. Accordingly, the clear parliamentary intention for s53A (and in particular, s53A(2)(b)) was that a sentencing court would indicate the sentence that it would *in fact* have imposed for each offence, had that offence been sentenced individually.

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[2] Second Reading Speech to the *Crimes (Sentencing Procedure) Amendment Bill 2010*; 23 November 2010, p2. The proposition is repeated on a number of occasions thereafter.

10. Previously there has been some controversy as to whether a discount for the utility of a guilty plea should be provided in relation to individual indicative sentences, or the aggregate sentence imposed. This has been resolved in support of the former.[3] Part 3 of the *Sentencing Act*, which is referred to in s 53A(2)(b), includes s 22.

11. In what has been described as the seminal case on aggregate sentencing4 - *JM v R* [2014] NSWCCA 297; 246 A Crim R 528 ('JM') - R A Hulme J (Hoeben CJ at CL and Adamson J agreeing) summarised relevant principles derived from the caselaw regarding the approach a court should take where it chooses to utilise s 53A.5 His Honour confirmed the abovementioned proposition that discounts for pleading guilty are applied in connection with indicative sentences not the aggregate. It was confirmed that s 53A(2) is "clearly directed to ensuring transparency in the process of imposing an aggregate sentence and in that connection, imposing a discipline on sentencing judges".

12. In appeals relating to aggregate sentences it is the aggregate sentence that is the subject of the appeal. Although error in relation to indicative sentences is considered in determining this issue (as in this case), they are not themselves sentences 'imposed' and amenable to review.6 As stated by Johnson J (Macfarlan JA and R A Hulme J agreeing) in *Vaughan v R* [2020] NSWCCA 30 ('Vaughan') at [90]:

> *The only operative sentence imposed by the Court is the aggregate sentence under this statutory scheme. The Court is required to indicate sentences for the purpose of understanding the components of the aggregate sentence in general terms. However, the Court does not pass indicative sentences. The periods indicated by the sentencing Court have no practical operation at all.*

13. In the current case Fullerton J stated at [105] – [106] (CAB 90):

> *Relevantly, s268(1A) provides that:*
>
> > *The maximum term of imprisonment that the Local Court may impose for an offence is, subject to this section, 2 years or the maximum term of imprisonment provided by law for the offence, whichever is the shorter term.*

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[3] *SHR v R* [2014] NSWCCA 94 per Fullerton J at [37]-[43], Fullerton J in Park at [127] – [129] (CAB 99 – 100), Simpson AJA in *Hanna v R* (2020) 102 NSWLR 244 at 256 [78] – [79] (JBA 327).
[4] *Vaughan v R* [2020] NSWCCA 3 at [92]; *Taitoko v R* [2020] NSWCCA 43 at [130].
[5] *JM* at [39]
[6] *JM* at [40](11), *Hanna v R* (2020) 102 NSWLR 244 at 255 [72] (JBA 326).

By operation of ss 168(3) and 268(1A) of the Criminal Procedure Act, the jurisdictional maximum of 2 years' imprisonment for the take and drive offence was the maximum sentence the sentencing judge was entitled to indicate for offence 6 under the aggregate sentencing provisions in s 53A of the Crimes (Sentencing Procedure) Act.

14. The appellant agrees that two years imprisonment was the maximum sentence the sentencing judge was able to indicate for offence six – but neither the combination of provisions of the *Criminal Procedure Act* referred to by her Honour, nor the provisions of the *Sentencing Act,* expressly specifies this unless the phrase '.. the sentence that would have been imposed for each offence .. had separate sentences been imposed…' in s 53A(2) is taken to mean (as it should) the sentence that would actually have been imposed.

15. The s 268 *Criminal Procedure Act* jurisdictional limit is not specified as a figure limiting an indicative sentence. In imposing an aggregate sentence under s 53A there is no facility for such a jurisdictional limit to simply 'take effect', as the respondent submits it should in connection with s 22(1) and indictable matters dealt with summarily. The only express limitation is that contained in s 49(2)(a) of the *Sentencing Act* which states 'The term of an aggregate sentence of imprisonment must not be more than the sum of the maximum periods of imprisonment that could have been imposed if separate sentences of imprisonment had been imposed in respect of each offence to which the sentence relates'.

16. However the appellant is not aware of any authority which suggests that an applicable jurisdictional limit is not an essential component of determining the sentence that 'would have been imposed .. had separate sentences been imposed.' The decision of *Mundine v R* [2017] NSWCCA 98 ('*Mundine*') is the only case the appellant is aware of where it has been argued that it is erroneous to indicate a sentence for the purposes of s 53A(2)(b) which is above a relevant jurisdictional limit. The existence of error was conceded by the Crown and upheld by the Court.[7]

17. This treatment of the jurisdictional limit in the context of aggregate sentencing is analogous with the appellant's construction of s 22(1) as applied in the context of a jurisdictional limit. The jurisdictional limit is an essential matter to take into account

[7] *Mundine* at [19] JBA 381 (Basten JA), [66]-[67] JBA 395 and [92] JBA 401 (Adamson J)

in determining the sentence that would actually have been imposed: absent any discount for the utility of a guilty plea, for the purposes of s 22(1); and had a separate sentence been imposed, for the purposes of s 53A(2)(b). The policy reasons for doing so are different in each case; but both policies are of importance. The similarity of wording is important, and the appellant has elsewhere set out reliance on the use of similar terminology to 'impose' throughout the *Sentencing Act* and indeed s 22 itself.[8]

18. Here, as in *Hanna v R* [2020] NSWCCA 125; 102 NSWLR 244 (JBA 315) ('*Hanna*'), both issues arise. In a serious case which may otherwise warrant a sentence above the jurisdictional limit (absent the plea, and absent the jurisdictional limit, in accordance with *R v Doan* (2000) 50 NSWLR 115), the jurisdictional limit should be taken into account in determining the sentence that would have been imposed had there not been a guilty plea, to consider the s 22(1) discretion. It will then have been taken it into account for the purposes of s 53A as well.

19. Similar reasoning was articulated by Simpson AJA in *Hanna* at [81], [83], [85] and [87] (JBA 327-328). At [83] her Honour said:

> *To put it another way, perhaps more clearly: the sentences that would have been imposed for the purposes of s 53A included a reduction, for the purposes of s 22(1), in the sentences "that [the court] would otherwise have imposed". Since the sentences that "would have been imposed" (had an aggregate sentence not been imposed) were at the outer limit of the jurisdiction of the Local Court, a reduction for the purposes of s 22(1) meant that the sentences that "would otherwise have been imposed" but for that reduction exceeded the jurisdictional limit.*

Dated: 9 September 2021

Belinda Rigg
Public Defenders Chambers

Jane Paingakulam
Denman Chambers

[8] See also *Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v Moorcroft* [2021] HCA 19; 95 ALJR 557 at 564 [25] (JBA 371)