HIGH COURT OF AUSTRALIA

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Important Information

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IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

BETWEEN:

JONG HAN PARK
Appellant

and

THE QUEEN
Respondent

APPELLANT'S REPLY

Part I: Certification

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

Part II: Reply

2. The respondent's submissions ('RS') rely on an alleged endorsement by Parliament of what is said to be an established sentencing practice. The proposition that, where Parliament repeats words that have been judicially construed, it is taken to have intended the words to bear the meaning already judicially attributed to them, is often described as artificial and inconsistent with the modern ability of courts to scrutinise Parliamentary intention. The inference is nonetheless sometimes drawn in relation to well established judicial interpretation of legislative provisions, which can be safely inferred as known to Parliament. Even then, it will not be utilised to endorse an incorrect statutory interpretation.[1]

3. The decision of the NSW Court of Criminal Appeal in *Lapa v R* (2008) 192 A Crim R 305 ('*Lapa*') did not provide judicial interpretation of any legislative provision - later re-enacted or otherwise. *Lapa* did not consider the terms of s 22 of the *Crimes (Sentencing Procedure) Act* (the '*Sentencing Act*') at all. As noted in the appellant's submissions ('AS') at [14], the current case was the first occasion the section has been so considered. In *Lapa* a complaint of absence of jurisdiction upon application of a discount for the plea to a figure of 2 years 8 months was responded to by reference to

[1] *R v Reynhoudt* (1962) 107 CLR 381 at 388 (Dixon CJ), *Flaherty v Girgis* (1987) 162 CLR 574 at 594 (Mason ACJ, Wilson and Dawson JJ), *Re Alcan Australia Ltd; Ex parte Federation of Industrial, Manufacturing and Engineering Employees* (1994) 181 CLR 96 at 106 – 107 (Mason CJ, Brennan, Deane, Dawson, Toohey, Gaudron and McHugh JJ), *Zickar v MGH Plastic Industries Pty Ltd* (1996) 187 CLR 310 at 327 – 329 (Toohey, McHugh and Gummow JJ), 349 – 351, *Electrolux Home Products Pty Ltd v The Australian Workers' Union* [2004] HCA 40; 221 CLR 309 at 324 – 325 [7] – [8] (Gleeson CJ), 346 – 347 (McHugh J), 370 – 371 (Gummow, Hayne and Heydon JJ), 398 [251] (Callinan J), *Foots v Southern Cross Mine Management Pty Ltd* (2007) 234 CLR 52 at 75[63] (Gleeson CJ, Gummow, Hayne and Crennan JJ), *Minister for Immigration and Border Protection v Kumar* [2017] HCA 11; 260 CLR 367 at [76] – [77] (Nettle J, dissenting as to the result in that case), *Probuild Constructions (Aust) Pty Ltd v Shade Systems Pty Ltd* [2018] HCA 4; 264 CLR 1 at 20 – 21 [[52] (Kiefel CJ, Bell, Keane, Nettle and Gordon JJ).

R v Doan (2000) 50 NSWLR 115 ('*Doan*'). It was held that by 'parity of reasoning' it was open to the Drug Court sentencing judge to reason as he did.

4. Without an established judicial interpretation of the terms of s 22 of the *Sentencing Act*, the less meaningful concept of an 'established sentencing practice' is relied on in the Response. However the provenance of even this claim has not been identified. The appellant has clearly contended that the cases referred to in the majority judgments (Bathurst CJ not nominating any authorities additional to those referred to in the judgment of R A Hulme J) did not demonstrate the suggested 'continued adherence' to a 'sentencing practice': AS [41], [66]. This has not been responded to.

5. The decision in *Lapa* stood in 2008 only for the proposition that it was open to the judge to take the course taken in that case. There was no articulation of the correct or only approach. *Lapa* has not been shown to have been subsequently relevantly referred to in this state. It was not affirmed a decade later in *Mundine v R* [2017] NSWCCA 97 ('*Mundine*'): RS [44]. The only relevant recorded argument advanced was that the sentencing judge had exceeded his discretion in suggesting a 2 year 3 month indicative sentence.[2] The Crown conceded the point. In re-sentencing, Adamson J applied *Doan* in a way similarly to that found open in *Lapa*, but without referring to *Lapa*.

6. Although R A Hulme J referred to five decisions in addition to these two CCA decisions under the heading of 'Longstanding authority',[3] none of these 'followed' *Lapa* and *Mundine*: RS [48]. Two (*Wamir v R* [2011] NSWDC 152 referred to at CCA [187] – [188] and *Bimson, Roads & Maritime Services v Damorange Pty Ltd* [2014] NSWSC 734 referred to at [190]) involved no contentious application of principle relevant to this case. The two 2018 Local Court decisions (CCA [185] and [186]) were decided after the 2017 legislative action relied on by the respondent (and did not refer to *Lapa* or *Mundine*, but did similarly purport to apply *Doan*). There is thus one unreported District Court decision (*R v Johnson* [2014] NSWDC 91 referred to at CCA [189]) in which an appeal from the Local Court was disposed of by resentencing consistently with *Lapa* – although not referring to it – decided prior to the legislative consideration relied upon by the respondent.

[2] *Mundine* at [66]
[3] CCA [178] ff.

7. *Lapa* is not shown by use of case citators such as *Casebase* or *Austlii* to have been referred to in any NSW decision on this issue in that relevant period. It is not by name or principle referred to in the *Sentencing Bench Book* or *Local Court Bench Book* published by the Judicial Commission of NSW. The interstate authorities referred to by the respondent involve differently framed legislation and have not been suggested by the respondent to have required consideration of a guideline judgment similar to *R v Thomson; R v Houlton* (2000) 49 NSWLR 383 ('*Thomson and Houlton*').

8. The most striking aspect of the law reform consideration since 2009 of discounts for guilty pleas and Local Court jurisdiction is that there is no mention in any of this study, documented in close to a thousand pages, of any sentencing practice of the kind said by the respondent to have been established. This undermines the existence of such a practice and more importantly renders fantastical the prospect that the legislature was cognisant of any such practice in passing the legislation it did in 2017.

9. The respondent has placed reliance on the Sentencing Council 2010 report. There was no reference made in the report to the practice the respondent submits to have been well established. There is one footnote (14) in a 210 page report regarding the sentencing jurisdiction of the Local Court which notes, after citing *Doan* 'See also *Lapa v The Queen* [2008] NSWCCA 331, [15] - [17], in which the NSW Court of Criminal Appeal held that it was open to the Drug Court to determine a starting point of sentence greater than its jurisdictional limit of two years, even though the maximum sentence that could ultimately be imposed was two years.'. There was no explanation that this related to discounts for the utilitarian value of guilty pleas, and nothing in the report suggesting that this approach should be, could be, or ever had been applied in the Local Court. There was no mention of any sentencing practice.

10. The report sets out the low proportion of cases where a sentence at the jurisdictional limit was set.[4] Annexure D contained the detail of 147 such cases in offences of personal violence between 2007 and 2010. Included were 73 cases where the jurisdictional limit had been imposed and there had been a guilty plea. It is not possible from this table to determine whether the jurisdictional limit was imposed as a result of applying a quantified discount to a 'sentence' above the jurisdictional limit, then capping the sentence actually imposed (the majority / respondent's approach in

[4] Pages 38 - 39

this case), or determining that a sentence at the jurisdictional limit was already a great deal lower than regarded as appropriate and declining to impose a lesser penalty than would have been imposed if there had not been a guilty plea (the appellant's approach in this case, without endorsing this as the correct outcome in any example listed).[5]

11. However Annexure E to the report contains transcript of comments of magistrates in 19 of those 147 cases, where a view was expressed regarding the constraints of the jurisdictional limit. None indicated application of the *Thomson and Houlton* quantitative discount to a figure above the jurisdictional limit. The remarks of a number are closer to the appellant's construction of the legislation. For example in cases 5, 16 and 18 the magistrates made reference to the benefit already provided by the jurisdictional limit, indicating no further reduction should be provided for the plea.

12. In relation to the July 2013 NSW Law Reform Commission *Sentencing* Report 139, Question paper 2, at 2.9, made brief reference to *Doan* and (at Q 2.2) asked the contributors to express views about whether it should be codified. A number of relevant submissions (Legal Aid, Public Defenders, Bar Association) recommended against this, but made no reference to any intersection of the principle in *Doan* and discounts for the utilitarian value of guilty pleas. One important submission did.

13. In his submission dated 14 June 2012[6], the Chief Magistrate of the Local Court wrote of two differing approaches in the Local Court in the application of *Doan* and the jurisdictional limit where objective criminality suggests a sentence exceeding jurisdiction and the offender has pleaded guilty:

> *On one approach, because a sentence beyond the jurisdictional limit cannot be imposed, the starting point when determining the sentence should be the jurisdictional limit and a further discount allowed from there. Otherwise, in real terms the offender will not receive any recognition of, or benefit for, the utilitarian value of the plea. However, if this approach is taken, the ultimate sentence may be manifestly inadequate.*
>
> *The alternate approach is to identify, upon a consideration of all the objective and subjective features of the offence and the offender, what the appropriate sentence would be but for the jurisdictional limit of the Court. Allowing for a plea of guilty from that point, the sentence may still be beyond the jurisdictional limit, such that the appropriate sentence is the maximum available to the Court. This is a rationally preferable approach and appears to better accord with the case law applying Doan.*

[5] Two possible exceptions, cases 45 and 132, suggest reduction of discount for lateness of plea, which might indicate the magistrates adopted the approach of the majority and respondent in the present case.

[6] Accessed electronically: NSW Law Reform Commission, Completed Projects, Sentencing (2013), Submissions, SE 10 His Honour Judge Graeme Henson, Chief Magistrate of the Local Court (QP 1 – 4)

14. *Lapa* was cited in support of the second approach. There was thus no established practice 3 ½ years after delivery of judgment in *Lapa*. S61/2021

15. Above all this, it is Fullerton J's construction of the legislation that is correct (and it is the predecessor of the 2017 legislation under review). It is this construction that ensures consistency: cf. RS [33], [34]. All offenders in NSW should receive a lesser sentence for pleading guilty unless the judicial officer has consciously determined not to provide that benefit in the circumstances of the particular case and explained this. There should not be a small pocket of offenders who are told they are receiving a benefit they are not in fact receiving. The benefit will not always be provided, but must be 'additional' if so provided: cf. RS [27], [34] – [37].

16. It is the majority's construction that constrains sentencing power, not that advanced by the appellant: cf. RS [38]. On the majority construction, the judicial officer cannot impose a lesser sentence than would have been imposed had the offender pleaded not guilty, in cases such as the present; whereas on the appellant's construction the relevant issues would be addressed judicially. There is no meaningful judicial function performed in 'reducing' a 3 year starting point to 2 years 3 months, as occurred in the District Court case referred to above at [6]. 2 years 3 months is not a 'lesser sentence imposed under' s 22 of the *Sentencing Act*, and nor is the 2 years actually imposed because of the jurisdictional limit. On this method there is no apparent exercise of the statutory discretion in 'discounting' 3 years by 25%.

17. A construction of the legislation which automatically results in offenders such as the appellant serving up to six months longer in custody than they may need to, without judicial advertence to the relevant issues, should not be endorsed.

Dated: 23 July 2021

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