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

RESPONDENT'S SUPPLEMENTARY SUBMISSIONS

PART I: CERTIFICATION

1. The Respondent certifies that these submissions are in a form suitable for publication on the internet.

PART II: SUPPLEMENTARY ARGUMENT

2. In the respondent's submission, neither the appellant's interpretation of the "penalty that it would otherwise have imposed", nor the interpretation of the majority of the CCA in *Park v R* [2020] NSWCCA 90, has wider consequences for the construction or application of s 53A of the *Sentencing Procedure Act* 1999 (NSW).

3. Section 53A was inserted into the *Sentencing Act* by the *Crimes (Sentencing Procedure) Amendment Act* 2010 (NSW) (referred to in RS Annexure A). Section 53A states:

> **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 Act) had separate sentences been imposed instead of an aggregate sentence.

…

4. Prior to the enactment of s 53A, the only option for a sentencing judge, when dealing with more than one offence, was to fix an appropriate sentence for each offence, and then consider questions of accumulation or concurrence, as well as questions of totality (*Pearce v The Queen* (1998) 194 CLR 610 at [45]), in order to arrive at start and finish dates for each individual sentence.[1]

5. The purpose of s 53A is to allow for simplification of this procedure, as the portion of the Second Reading Speech reproduced in the appellant's supplementary submissions (ASS) at [8] makes clear. Section 53A was not intended to make any change of substance to sentencing, and it remains an optional procedure:

> "It must be emphasised that these amendments are not intended to alter the way offenders are sentenced in any substantial way, or to have any impact on the overall length of sentences. It is designed purely to simplify the process when setting sentences for multiple offences, such that the overall impact of the sentence is clear, as is the court's assessment of the offender's criminality with respect to each offence.
>
> …
>
> At the request of the judiciary, these provisions have been drafted so that they are optional. It is recognised that the sentencing decisions that courts face are varied and complex. Should a court wish to sentence an offender convicted of multiple offences by setting individual sentences for each offence and setting out the degree of accumulation, commencement and expiry dates for each offence, that option will remain open to it."[2]

6. Section 53A appears in Part 4 of the *Sentencing Procedure Act*, within the Division dealing with setting terms of imprisonment, along with provisions for the setting of non-parole periods, commencement dates, and the like. Section 53A is therefore a mechanical provision that addresses how a sentence may be imposed for multiple offences, where individual periods of imprisonment have previously been determined in accordance with Parts 1-3.[3]

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[1] The jurisdictional limit would then apply to each separate sentence. Section 58 of the *Crimes (Sentencing Procedure) Act* provides that the overall term imposed for the accumulated sentences could not exceed 5 years.
[2] Second Reading Speech to the *Crimes (Sentencing Procedure) Amendment Bill* 2010; 23 November 2010.
[3] Section 53B of the *Crimes (Sentencing Procedure) Act* provides that where an aggregate sentence is imposed, the Local Court may impose a sentence of imprisonment that does not exceed 5 years.

7. As the appellant notes, a number of propositions concerning aggregate sentencing were summarised in the "seminal" case of *JM v R* [2014] NSWCCA 297 at [39]-[40].

8. In *Hanna v R* [2020] NSWCCA 125, the sentencing judge had indicated that the offender's pleas of guilty were taken into account as having a high utilitarian value, but had not specified or quantified a discount, leaving unclear the starting point before consideration of the plea. The analysis of ss 22(1) and 53A of the *Sentencing Procedure Act* undertaken by Simpson AJA was therefore required in order to confirm that the starting point of the indicative sentence had necessarily been above the jurisdictional limit, as was more explicitly the case in *Park*.

9. The result of the analysis by Simpson AJA (at [81]-[83]) is that the indicated individual sentences for the purposes of s 53A are sentences that have had applied to them any discount to reflect the utilitarian value of a plea of guilty. This is not controversial. That the discount for a plea of guilty is to be applied to the indicated sentence rather than the aggregate sentence was referred to by Simpson AJA as "now well established" (at [78]), with reference made (at [79]) to the contrary view expressed by Basten JA in *PG v R* [2017] NSWCCA 179; (2017) 268 A Crim R 61.

10. In *PG*, the CCA considered how s 22 and s 53A(2)(b) are to be read together. In particular it considered the tension created by the need to take a plea of guilty into account in passing sentence by potentially imposing a lesser penalty (when the only sentence "imposed" under s 53A is the aggregate sentence), and the need to take into account all matters under Part 3 (which includes s 22) when arriving at the indicated sentences (see [72]).

11. The interpretation adopted by Basten JA, in the minority in *PG*, was that the discount must be applied both to the indicated sentences and the aggregate sentence, emphasising the terms of s 22 and the importance, for the purpose of that section, of providing a transparent and visible discount to the aggregate sentence ([63]-[65]).

12. The majority in *PG* (Button and N Adams JJ) at [77]-[93] confirmed the previously established view, that the discount is to be applied only to the indicated sentences. In doing so, their Honours considered that it was relevant to bear in mind the purpose of the aggregate sentencing regime (to simplify the arithmetical task of the sentencing judge without creating substantive change), as well as the purpose of s 22, and they

further considered the practical difficulty of applying a discount to an aggregate sentence imposed for offences that are a mixture of pleas and convictions after trial.

13. The decision in *PG* has since been affirmed numerous times by the CCA (see *Berryman v R* [2017] NSWCCA 297). The consequence of this accepted interpretation is that where s 53A is utilised, the discount for the plea is not applied directly to the sentence that is actually imposed.

14. The central question as to whether it is permissible to discount for a plea from a starting point that is above the jurisdictional limit is determined by the interpretation of s 22(1). Section 22 applies to the assessment of the appropriate sentence for an individual offence. Section 53A is an option available at the point of fixing the overall term of imprisonment, where individual terms for multiple offences have already been determined. Because s 53A is optional, the indicated sentences equate to the sentences that the court would actually have imposed, and must therefore comply with any jurisdictional limit.

15. On the respondent's analysis, compliance with the jurisdictional limit takes place after the application of any discount for a plea, and before consideration of questions of accumulation, concurrence and totality in the case of multiple offences. For the reasons outlined above, the purpose that underlies s 53A is very different to the purpose that underlies s 22. The question of how the two provisions interact with the jurisdictional limit requires consideration of these differing purposes. Viewed in context, there is nothing in the terms of s 22(1) and s 53A that requires the "lesser penalty than [the court] would otherwise have imposed" (s 22(1)) to be identical to the sentence that "would have been imposed" had there been separate sentences (s 53A).

16. As stated at RS [14], this appeal concerns the sequence in which a sentencing court should undertake the two processes of discounting a sentence as a consequence of a plea of guilty, and applying a jurisdictional limit. On either proposed construction of s 22(1), both of these processes are undertaken before the sentencing court comes to consider s 53A.

Dated 16 September 2021

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