IN THE HIGH COURT OF AUSTRALIA
MELBOURNE OFFICE OF THE REGISTRY

No. M 1 of 2013

BETWEEN:

SAVERIO ZIRILLI (Applicant)

and

THE QUEEN (Respondent)

APPLICANT'S REPLY

PART I: SUITABILITY FOR PUBLICATION

1. It is certified that this submission is suitable for publication on the internet.

PART II: SUBMISSIONS IN REPLY

2. The respondent argues that the foundation for the applicant's contention that the prosecutor was prevented from making submissions as to sentencing range never existed as the prosecution had only ever agreed to make a submission if requested to do so by the sentencing judge, or if a significant risk was perceived by the prosecutor to have arisen that the sentencing judge would fall into error if the submission was not made: *Respondent's Submissions* at [2], [6]–[14], [39]. This contention should be rejected.

3. First, it is clear that the prosecution submission on the range was an important aspect of the applicant's decision to plead guilty. This was made clear by senior counsel for the applicant in his submissions to the sentencing judge, including

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those he made as to *why* the sentencing judge ought to hear the prosecution submission as to the appropriate sentencing range. [1]

4. At no stage in the course of the plea, including in reply[2], did the prosecutor contest that the prosecution's had a clear position in relation to the range of sentences.

5. Secondly, the Court of Appeal clearly understood that the prosecutor had been prevented by the sentencing judge from making what was *a proposed submission* and determined the relevant ground of appeal accordingly.[3]

6. Thirdly, *whether or not* the prosecution sought to make the provision of its range contingent on a request from the sentencing judge is not ultimately to the point. In circumstances of the range between the parties (at least in relation to the head sentence) being an aspect of a plea agreement, it was a relevant or material consideration for the sentencing judge to take that range into account.[4]

7. The applicant accepts that there were separately negotiated guilty pleas involving him and Barbaro. This is made clear in the Applicant's Submissions and was understood by the Court of Appeal:[5] cf *Respondent's Submissions* at [6].

8. The question of whether a submission on sentencing range is a submission of law has also been addressed in the submissions on behalf of Barbaro at [6.3] and [6.19]: cf *Respondent's Submissions* at [3].

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[1] 20 January 2012, plea, T 125 (10) – (16): "...you've been speaking with Mr Dunn about a letter and the terms on which a plea was agreed, and Your Honour has had what you've had to say about sentencing range and so on. There's a like letter that was sent in October to Mr Zirilli's lawyers, and *that formed the basis of the plea in this case*"; T 134 (14): "*No doubt influenced the thing that Your Honour says is prohibited,* the Crown's submission on range..." (referring to the value of the guilty plea); T 156 (14): "The second aspect *is when its part of a plea agreement that this is what's going to be said...*") See further *Applicant's Submissions* at [13].

[2] 20 January 2012, plea, T 159-180.

[3] *Barbaro & Zirilli v The Queen* [2012] VSCA 288 at [11] ("*The submission which the Crown proposed to advance* was as follows...")

[4] *Applicant's Submissions* at [12], [25], [32]-[33].

[5] *Barbaro & Zirilli v The Queen* [2012] VSCA 288 at [11], [13]. *Applicant's Submissions* at [9] "...had *each* entered into an agreement."

Procedural Fairness

9. The respondent's reliance on the fact that senior counsel for the applicant did make a submission where he referred, inter alia, to the prosecution range is misplaced: *Respondent's Submissions* at [32] and [35]. Her Honour had made it clear from the outset that she would "presume they've [sentencing ranges] not been given."[6] It was clear that the sentencing judge was referring to the provision of ranges by either party. See further *Applicant's Submissions* at [26] – [29].

10. The respondent's argument that it could not possibly have made any difference that the "uttering the numbers constituting the Crown range" was done by the senior counsel for the applicant rather than the prosecutor is flawed and should be rejected: *Respondent's Submissions* at [36] – [37], [44]. First, the provision of a sentencing range is much more than simply uttering numbers.[7]

11. Secondly, it was not for the applicant's counsel to in effect make the prosecutor's submission on his behalf and then to state the bases of agreement and disagreement. It was for the prosecutor, representing the interests of the community, to first address the sentencing judge on the range of sentence agreed proximate to the time of the applicant's decision to plead guilty.

12. Thirdly, the respondent's analysis overlooks the fact that the prosecutor was uniquely placed to provide the sentencing judge with assistance on such matters as the utilitarian value of the applicant's guilty plea.

13. Fourthly, and in any event, the sentencing judge made it plain that she would ignore any submission on the range.

Relevant Considerations

14. It is accepted that senior counsel for the applicant did not, in seeking to justify why the sentencing judge should at least hear from the prosecution as to its range,

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[6] 19 January 2012, plea, T 6 (26). See further *Applicant's Submissions* at [11].

[7] *R v MacNeil-Brown & Piggott* (2008) 20 VR 677 at 681[12] per Maxwell P, Vincent and Redlich JJA.

invoke "relevant considerations" in the public law sense: *Respondent's Submissions* at [40].

15. However, the nature of the submission made before the sentencing judge, consistent with the submissions on the part of the applicant in this Court, do – it is submitted – fall within both Ground 1(a) and Ground 1(c) of the Ground of Appeal: cf *Respondent's Submissions* at [42].

The question of remittal if either ground is made out

16. The respondent's submission at [45] that "no significance" attaches to the sentencing judge not referring to the prosecution sentencing range in her reasons for sentence must be rejected. *If* the sentencing range advanced by senior counsel for the applicant (by reference to the prosecution's range) had in fact been considered by the sentencing judge, it would have at least been mentioned in the reasons for sentence. The failure to refer to the matter in the reasons for sentence was entirely consistent with the erroneous determination of the sentencing judge from the outset to ignore any submissions as to the sentencing range.

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