IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

No. M3 of 2013

BETWEEN: PASQUALE BARBARO — Applicant

-and-

THE QUEEN — Respondent

APPLICANT'S REPLY

PART 1 - CERTIFICATION

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PART II – SUBMISSIONS IN REPLY

2.1 In response to the Respondent's submissions at [6] – [10], it may be conceded that the Crown had not agreed that it would necessarily, of its own motion, make a submission to the sentencing judge regarding "the range" the Crown considered appropriate with respect to the Applicant. Nevertheless, the Respondent accepts that the range was given on the understanding that it would be advanced by the Crown in accordance with the Court of Appeal's decision in *MacNeil-Browne*: that is, the range would be advanced by the Crown if the sentencing judge requested it, or the prosecutor perceived a significant risk that the court would fall into error.

2.2 At the moment during the sentencing proceedings that the judge raised with counsel the possibility of imposing upon the Applicant a life sentence,[1] the second of the 'dual expectations' in *MacNeil-Brown* was enlivened.

2.3 In its correspondence to the Applicant, the Crown set the upper limit of its range at 37 years. In accordance with *MacNeil-Brown*, a sentence materially greater than 37 years

[1] *Plea transcript* at pp. 57, 63-64 and 119.

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was thus one that was manifestly excessive and would bespeak error. The prosecutor should then have perceived the significant risk that the court would fall into error and informed the judge of the Crown's sentencing range.

2.4 However, the Applicant's case does not turn on what the Crown had agreed to submit of its own motion. The core of the Applicant's argument is that *he* was shut out by the sentencing judge from informing her Honour what the Crown considered was the appropriate sentencing range.

2.5 In discussions with the Applicant's legal representatives before the Applicant entered his pleas of guilty, the Crown provided to his legal representatives its "sentencing range". The Applicant thereafter entered his pleas of guilty (and came to be sentenced).

2.6 Contrary to what is implicitly contended by the Respondent at [25] and [35] of its Submissions, that "sentencing range" was not some mere summary of the range of sentences imposed in other comparable cases. It was not the kind of "range" discussed in *Hili v The Queen* (2010) 242 CLR 520 at [54]-[56] (ie the "range of sentences that have in fact been imposed" in the past in other cases). Rather, and in accordance with *MacNeil-Browne*, it represented the Crown's acknowledgment that a sentence imposed on the Applicant that was below the bottom end of that range would be manifestly inadequate (and thus amount to error); and a sentence greater than the top of that range would be manifestly excessive (and thus amount to error).

2.7 By providing its sentencing range, it must have been understood by the Crown that the Applicant would, or at least might, want the sentencing judge to be made aware of it. The Crown must have also understood that, in the context of its discussions with the Applicant toward resolution, its provision to his legal representatives of a "sentencing range" was a fact relevant to the Applicant's decision to plead guilty. That is, the Crown must have proffered the range knowing that it might operate as an incentive to the Applicant to forgo his right to trial. The Applicant thus entered his pleas of guilty assuming (reasonably) that the sentencing judge would, somehow, be informed of the Crown's range and that it would, at the least, be given proper consideration by the Court.

2.8 When the Applicant's senior counsel drew to the attention of the sentencing judge the "two letters" from the Commonwealth DPP,[2] which formed part of Exhibit 5 in the sentencing proceedings, he referred to "what was agreed between the parties as to the sentencing range." Implicit in Counsel's remark was not the proposition that the Crown had "agreed" to do something. Rather, it conveyed that the Crown had communicated to the Applicant what the Crown regarded as the appropriate sentencing range and that the Applicant agreed with its terms.

2.9 Senior counsel then sought to inform the sentencing judge "what was agreed between the parties". That is, he sought to inform the sentencing judge what was that sentencing

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2 *Ibid* at p. 115, line 3.

range. However, before he could do so, the sentencing judge asked him: "And do you understand what I've said about the sentencing range?" That was in turn a clear reminder to counsel that her Honour had earlier stated that: there was "no basis" for "*McNeill Brown* figures" to be put before her[3]; she would "not in any way be looking at the *McNeill Brown* figures that have been put forward";[4] and that she would not take those figures into account.[5] It was thereby made very clear to senior counsel that the sentencing judge was (again) directing him *not* to inform her of the range which the Crown had communicated to the Applicant as the sentencing range that, in the view of the Crown, obtained to him and his offending.

2.10 The Respondent Submissions at [12](c), [23], [30], [31](c) and [37] (which endorse what was said by the Court of Appeal at [23]), that the Applicant was not denied an opportunity to inform the judge of the Crown's sentencing range, should be rejected. True it is that senior counsel for Mr Zirilli disregarded the sentencing judge's clearly stated direction that she should not be informed of the Crown's range as it obtained to Mr Zirilli.[6] But that in no way impacted upon the fact that the judge directed senior counsel for the Applicant not to inform her of the range and on the fact that he complied with that direction.

2.11 It cannot follow from the fact that senior counsel for Mr Zirilli disregarded the judge's direction that senior counsel for the Applicant had the "opportunity" to do the same.

2.12 Thus, the Applicant's legal representative sought to inform the judge of the sentencing range the Crown considered appropriate for the Applicant and was directed by the judge not to do so. In that sense, the sentencing judge directed senior counsel that he not inform her of the "prosecution submission" as to range.

2.13 The term "prosecution submission" in the preceding sentence should be understood in terms of substance rather than form. It means the Crown's view, or position, as to the appropriate range available to the sentencing court. It would have been the position taken by the Crown if the Crown was requested to indicate its position to the sentencing judge or, for some other reason, the Crown decided to indicate its position to the sentencing judge.

2.14 As contended in the Applicant's Submissions, sentencing proceedings are fundamentally adversarial. The parties to those proceedings, the offender and the Crown, must be permitted to make submissions regarding the exercise of the sentencing discretion. If, before those proceedings, the offender is informed by the Crown that the Crown has formed a particular view as to how that sentencing discretion should be exercised (or, more precisely, has a view regarding the ambit of that discretion), the

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3 *Ibid* at p. 55, line 28.

4 Ibid at pp. 55-56.

5 *Ibid* at p. 55, line 25.

6 *Ibid* at pp. 154-58.

offender should be permitted to inform the sentencing court of the "prosecution submission". The offender must be permitted to inform the judge of the Crown's submission (or concession) which, if accepted by the judge, would advance the offender's interests.

2.15 Directing that that not occur in the Applicant's case was a breach of procedural fairness. The fact that the Crown's range was not "binding" on the sentencing judge is not to the point.

2.16 The argument becomes all the stronger when the Crown communicates its view regarding the limits of the sentencing discretion in discussions ahead of possible resolution and an accused's plea of guilty. In that context, the Crown's position, and its communication, become immediately relevant to the offender's decision to plead guilty or proceed to trial. The accused would assume (reasonably) that the sentencing judge would be informed of the Crown's range and that it would be given proper consideration by the sentencing judge. In those circumstances, the range and its communication operate as an incentive to the offender to plead guilty. When senior counsel for the Applicant sought to inform the sentencing judge as to "how the matter was settled"[7], it was conveyed that the provision of the Crown's sentencing range was a factor in the decision of the Applicant to enter pleas of guilty. This makes it all the more unfair to the Applicant if the sentencing judge directs counsel for the Applicant not to inform her of the Crown's sentencing range.

2.17 The Respondent's contention at [34] that, were the sentencing judge to have been informed of the Crown's range, as well as its submissions in support of it, it would not and could not have made a difference to the exercise of her discretion, is little more than a submission by assertion; an exercise in speculation and conjecture.

2.18 As regards the Respondent's submission at [38], while the Crown range was "provided prior to any findings of fact made by the sentencing judge", which might have (theoretically) justified "a more severe or more lenient sentence that the range offered", it has never been suggested that the factual basis on which the Applicant was sentenced differed in any material way from the facts upon which the Crown range was premised.

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7 *Ibid* at p. 115, line 5.