IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

No. M3 of 2013

BETWEEN:

PASQUALE BARBARO
Applicant

and

THE QUEEN
Respondent

RESPONDENT'S SUBMISSIONS

Part I - CERTIFICATION

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

Part II - ISSUES

2. Both of the issues raised by the applicant are affected by an incorrect characterisation of the discussions between the parties leading to his guilty pleas and what transpired at the sentence hearing. When this is correctly understood, much of the case advanced on behalf of the applicant lacks a necessary factual foundation. This is addressed in Part IV below at [6] to [9].

Part III - SECTION 78B *JUDICIARY ACT* 1903 (CTH)

3. It is certified that the respondent has considered whether any notice should be given in compliance with section 78B of the *Judiciary Act 1903* and determined that notice is not necessary.

Part IV - FACTS

The facts as to the offending

4. The applicant at [5.1] of his amended submissions refers to and adopts the statement of relevant facts set out by the Court of Appeal: [2012] VSCA 288 at [1-8] and [11]. However this does not fully summarise the offending conduct for which the applicant came to be sentenced.

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5. In addition to the brief details of the 2007 conspiracy to traffick in excess of 15 million imported ecstasy tablets (1.4 tonnes pure) referred to by the Court of Appeal, the following further offence details are relevant to the duration of the non-parole period fixed and in particular relevant to the final question raised by the applicant as to whether formal receipt of the Crown sentencing range could have made any difference to the sentence imposed of life imprisonment with a non-parole period of 30 years (compared to a Crown range of a head sentence of 32 to 37 years with a non-parole period of 24 to 28 years):

(a) the attempt to possess a commercial quantity of cocaine involved an amount of 99.9 kilograms of pure cocaine (almost 50 times the minimum statutory commercial quantity): [2012] VSC 47 at [26];

(b) the commercial quantity of MDMA trafficked in 2008 involved the receipt and wholesale distribution of 1,200,000 ecstasy tablets at a total price payable of $9,959,850 and a total amount paid of $7,255,150: [2012] VSC 47 at [26];

(c) the applicant's admissions of guilt to other offences scheduled pursuant to section 16BA of the *Crimes Act 1914* (Cth) involved:

(i) an offence of money laundering contrary to section 400.3(1) of the Criminal Code involving international cash dealings in excess of $7,000,000 (a 25 year maximum term offence): [2012] VSC 47 at [14] - [16];

(ii) an offence of conspiracy to import a commercial quantity of a border controlled precursor (100 kg of pseudoephedrine) from India (a 25 year maximum term offence): [2012] VSC 47 at [14] - [16]; and

(iii) an offence of dealing with money reasonably suspected of being proceeds of crime, the amount being in excess of $4.2 million (then a 2 year maximum term offence): [2012] VSC 47 at [14] & [16].

Facts as to the plea negotiations, Crown range indication & sentence proceedings

6. The Crown at no stage, in correspondence or otherwise, went further than to indicate to the applicant's then legal representatives what its sentencing range was. This indication was given in the context of the dual expectations set out in the majority decision in *R v MacNeil-Brown; R v Piggott* (2008) 20 VR 677 (***MacNeil-Brown***) at 678 [3], namely that it is reasonable for a sentencing court to expect a prosecutor to make a

submission on sentencing range if the court requests it, or if the prosecutor perceives a significant risk that the court will fall into error regarding the applicable range if the submission is not made.

7. It follows that there was no basis for any legitimate expectation that the Crown sentencing range would form any part of the Crown submissions on sentence in the absence of either of the *MacNeil-Brown* obligations arising. It also follows that the applicant's amended submissions at [5.2] are incorrect. There was never any agreement that the prosecution would make any submission as to sentencing range other than in response to either of the potential dual obligations specified in *MacNeil-Brown*, neither of which arose.

8. The prosecution did, in the context of *MacNeil-Brown*, provide an indicative sentencing range to the solicitor and senior counsel then acting on behalf of the applicant. This was confirmed in subsequent correspondence, including the letter from the prosecution dated 10 October 2011, which is part of Exhibit 5, reproduced in the application book. Nothing in that letter or any other correspondence hinted or suggested that the Crown would go beyond the dual *MacNeil-Brown* obligations, let alone constituted any agreement to do so.

9. The plea in mitigation made by the then senior counsel for the applicant never made any claim that the prosecution agreed to go beyond *MacNeil-Brown*. It was never submitted that the Crown had earlier provided the sentencing range otherwise than in contemplation of its potential obligations under *MacNeil-Brown*. Moreover, the written case filed on behalf of the applicant in the Court of Appeal does not assert that any such agreement ever existed.

10. It is common ground that the sentencing judge declined to hear submissions from the prosecution as to sentencing range. No such assistance was sought. Nor was there any indication of a significant risk of error so as to trigger the second limb of *MacNeil-Brown*. It follows that no occasion arose for the Crown range provided to the applicant's legal representatives to be provided to the sentencing court as required by *MacNeil-Brown*.

11. It is common ground that the Court of Appeal has partly (and very marginally) misstated the sentencing range provided by the Melbourne Office of the Commonwealth Director of Public Prosecutions (**the Melbourne CDPP**) to the applicant's previous legal representatives: applicant's amended submissions at [5.3]. However there was no agreement to put that range if the court did not require it.

12. The accuracy of the portions of transcript reproduced in the applicant's amended submissions at [5.6] is not disputed. However it is necessary to place those extracts in their correct sequence:-

(a) The then senior counsel for the applicant's co-accused, Zirilli, only informed the learned sentencing judge of the prosecution sentencing range after senior counsel for the applicant had completed his plea submissions.

(b) The then senior counsel for Zirilli thereafter made submissions in relation to the sentencing range that had been provided by the Crown.

(c) The then senior counsel for the applicant then sought to be further heard after completion of the plea for Zirilli: plea transcript at p 180. He had the opportunity to take the lead of senior counsel for Zirilli and also make submissions about the Crown range, but chose not to do so. That choice should not be overlooked when considering submissions made on behalf of the applicant about being "shut out" of making submissions about the Crown range, because in context that submission is apt to mislead.

Part V - CITATION OF REASONS FOR JUDGMENT

13. The applicant's amended submissions at [4.1] and [4.2] correctly cite the two judgments.

Part VI - ARGUMENT

MacNeil-Brown, Crown sentencing ranges & sentencing practice in Victoria

14. It is important to place what transpired in this case into a sentencing practice context. The majority decision in *MacNeil-Brown* delivered in September 2008 produced a significant practical change in the conduct of sentencing proceedings in Victoria.[1]

15. The long-established practice in Victoria prior to *MacNeil-Brown* was that the sentencing judge generally did not seek assistance from the Crown by being informed as to what should be the actual duration of any potential custodial sentence, or of any broader custodial sentencing range.

[1] An application by MacNeil-Brown for special leave to appeal to this Court, supported by the respondent, the Victorian Director of Public Prosecutions, was unsuccessful: *MacNeil-Brown v The Queen* [2008] HCA Tran 411 (5 December 2008) per Hayne and Kiefel JJ.

16. In *MacNeil-Brown* it was noted that the provision of a sentencing range to assist the Court had previously been sanctioned: 20 VR 677 at [16]-[21] and [34]-[36]. The change was that this was required of the Crown if sought by a sentencing judge, as well as the Crown being required to provide a range if there was perceived a substantial risk of error as to the applicable range in the absence of such a submission.

17. Prior to *MacNeil-Brown,* submissions were regularly made and received as to whether a custodial sentence was appropriate and, if so, whether the particular circumstances of the offender and the offending warranted a substantial or lesser sentence as against the statutory maximum, without any more precise quantification. Those submissions frequently referred to the actual terms of sentences previously imposed upon other offenders in relevant circumstances.

18. Following *MacNeil-Brown*, the Melbourne CDPP invariably prepares an indicative sentencing range which is available to be provided to a sentencing judge if such assistance is sought. That range would also be available to be referred to by the prosecutor if it was perceived that a significant risk error as to the applicable range.

19. By 2011, *MacNeil-Brown* had resulted in a practice of defence practitioners seeking a prosecution sentencing range for their clients in advance of the plea, and for those figures to then be provided by the prosecuting authorities. Since October 2012, providing this information to the defence in advance of a guilty plea has not been the practice of the Victorian State OPP.[2] The practice has been continued by the Melbourne CDPP. The sentence range information is not provided by the Melbourne CDPP otherwise than as advance notification of the prosecution position responsive to *MacNeil-Brown*. The information is never provided upon the basis that the prosecution will make a submission as to that range otherwise than in accordance with *MacNeil-Brown.*

20. It is important to note that any range formulated by the Crown may be subject to change, should the necessity arise. The unexpected occurrence of features of mitigation or aggravation during the course of a plea hearing, or indeed an error made by the Crown in originally formulating its range, may necessitate the Crown changing its view as to the appropriate sentencing range.

21. The Crown's overriding duty is to assist the court. A person being sentenced and his/her legal representatives cannot and should not assume that an earlier indication of

[2] The Court of Appeal noted that the Victorian Director of Public Prosecutions directed, in October 2012, that *"the Crown's position on sentencing range will henceforth play no part in plea negotiations"*: [2012] VSCA 288 at [26] and footnote 19.

a sentencing range will remain unchanged, nor that a court is bound to accept the Crown range. It is incumbent upon defence lawyers to advise their clients accordingly: see *Talbot v The Queen* [2012] VSCA 118 at [47-50]. In exceptional circumstances, the Crown may even depart from a range given at sentence on a Crown inadequacy appeal, because the ultimate responsibility for the imposition of an appropriate sentence rests with the sentencing judge rather than the prosecutor, but subject to correction on appeal: see *R v Henderson; Ex parte Attorney-General (Qld)* [2013] QCA 63 at [51] (special leave refused 11 October 2013).

22. As was noted by the learned sentencing judge,[3] and subsequently commented upon by the Court of Appeal,[4] in keeping generally with the practice of Supreme Court judges it was not her Honour's practice to seek sentencing ranges.

23. It is the experience of the Melbourne CDPP that judges in the County Court more regularly seek assistance, though not in every instance. Senior counsel for both applicants variously acknowledged this.[5] Her Honour's reluctance to hear the Crown's sentencing range was therefore unsurprising, even though her Honour ultimately did hear what the Crown sentencing range was from the then senior counsel for Zirilli, and there is no reason to suppose that the same opportunity would not have been afforded to the then senior counsel for the applicant had it been sought.

24. It should be noted that since the handing down of *MacNeil-Brown*, there have been instances wherein ranges were prepared by the Crown for the court, and duly communicated to defence practitioners, but which were ultimately never proffered to the sentencing judge. The formulation and provision to defence practitioners of a *MacNeil-Brown* sentencing range offers no guarantee that it will ever be put before a court, or that it will remain unchanged, or that it will be accepted by a court.

25. In light of the above and contrary to the applicant's amended submissions at [6.1]-[6.4], the legal significance of a *MacNeil-Brown* range when provided to a sentencing court should not be exaggerated, especially following the subsequent decision in *Hili v The Queen* (2010) 242 CLR 520. Consistently with *Hili* at [54]-[56], a Crown range cannot exceed the significance of prior intermediate appeal court sentence decisions as a yardstick against which to examine a proposed sentence.

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[3] Sentence transcript, 19 January 2012, p 6, line 9
[4] [2012] VSCA 288 at [13]
[5] Mr. Dunn QC (for Barbaro) at page 115 line 10; Mr Croucher SC (for Zirilli) at pages 157 - 158, lines 2-3.

26. A Crown range cannot and does not bind, as opposed to guide or assist, a sentencing court as to what the upper or lower limits of a particular sentence might be. If a sentence falls outside such a range, that may or may not mean that there is manifest excess or inadequacy, but if it does, that will be because of all of the circumstances, not the range per se.

27. As a matter of first principle, a sentencing court cannot or should not be compelled to hear from the Crown on sentencing range if it is not required; see *R v Felicite* [2011] VSCA 274; (2011) 211 A Crim R 266 at [29]. Indeed, the respondent would prefer it if the provision of a range on judicial request was not mandatory, but rather was permitted if requested or otherwise considered appropriate, in accordance with any other submission on sentence by the Crown.

28. In the above context, the applicant's amended submissions at [6.1]-[6.4] exaggerate the role and significance of a Crown sentencing range, or indeed any such range advanced on behalf of an offender. While such a range when proffered undoubtedly represents a submission as to what a party considers an appropriate sentence should approximate, it is overstating it to submit, in effect, that "a range" put forward by a party is necessarily "the range". A proffered range may not represent the legally permissible upper and lower limits reflecting the outer limits of "the generous ambit of reasonable disagreement": *Norbis v Norbis* (1986) 161 CLR 513 at 540, per Brennan J. Exceeding the suggested range will not necessarily constitute manifest excess, and falling below it manifest inadequacy. That is especially so when a suggested range necessarily is provided prior to any findings of fact made by the sentencing judge, which may well justify a more severe or more lenient sentence than the range proffered. As was noted in *MacNeil-Brown* 20 VR 677 at [5], [12] & [68]-[69], a range proffered at a sentence hearing can only ever be *indicative* of the limits within which the sentencing discretion may lawfully be exercised.

29. It is important that a proffered range represents assistance to a sentencing court, not a fetter or restraint on the exercise of this most difficult discretion.

Procedural Fairness

30. The questions referred to this enlarged Full Court were confined to the sentencing court's non-receipt of the prosecutor's submissions on sentencing range. Despite that limitation, the applicant at [6.12]-[6.17] of his amended submissions traverses not only the prosecution not making a submission on sentencing range, but also allegations about him being denied an opportunity to make submissions about the Crown range.

The applicant was no more denied that opportunity than was his co-accused, Zirilli, whose senior counsel did make such submissions.

31. Contrary to the applicant's amended submissions at [6.12]-[6.17]:-

(a) there was no error on the part of the Court of Appeal in concluding at [20] that no question of procedural fairness arises if a judge declines to hear a submission of law which he or she adjudges to be unnecessary or unhelpful - if that refusal results in a sentencing error, the remedy lies in an appeal as to the result, not a public law complaint about the process, or else the sentencing process will become mired in form over substance;

(b) there was no error on the part of the Court of Appeal in concluding at [21] that the focus of the law of procedural fairness is on an opportunity to meet adverse matters, that is, the case put against a party, in circumstances where the applicant had full notice of all adverse matters that the prosecution wanted the judge to take into account - procedural fairness is concerned with "practical injustice" and there was none in this case occasioned by the sentencing court not receiving the Crown range and the applicant's senior counsel deciding not to make the submission himself: see *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex Parte Lam* (2003) 214 CLR 1 at 13-14 [37];

(c) there was no error on the part of the Court of Appeal in concluding at [23] that it remained open to the applicant to make a submission about the Crown range - Zirilli's senior counsel had already done so, but the applicant's counsel chose not to when making other submissions after Zirilli, doubtless for sound forensic reasons;

(d) there was no error on the part of the Court of Appeal in concluding at [26] that any agreement reached between the parties could not and did not bind the way in which a sentencing court proceeds - the distinction sought to be drawn by the applicant in his amended submissions at [6.15] is illusory because the substance of the applicant's case is that the sentencing court should have been bound to receive the sentencing range from the Crown;

(e) there was no error on the part of the Court of Appeal in concluding at [13] and [17] (not [28] as cited by in the applicant's amended submissions at [6.16] and footnote 31) that a sentencing judge was entitled to refuse to hear a Crown submission as to range unless there was a perceived substantial risk of error -

the bar set for the second limb of *MacNeil-Brown* is high enough to avoid a court being compulsorily burdened with speculative submissions about an error that is not perceived to be at any substantial risk of occurring.

Relevant Considerations

32. The arguments advanced on behalf of the applicant do not identify, let alone establish, any legislative or other basis for concluding that a Crown submission on sentencing range is a "*relevant*" (i.e. mandatory) consideration in the relevant public law sense: *Minister for Aboriginal Affairs v Peko-Wallsend* (1986) 162 CLR 24 at 39-40. It is difficult to see how a submission by a party to litigation could ever be a mandatory consideration, not least because it is difficult to see when such a submission would or would not be required to be received, nor why this should be confined to a Crown sentence range.

33. Sentencing law is already heavily burdened by explicit legislative obligations and strongly guided by a large and detailed body of sentencing case law. There would appear to be no useful work to be done by the application of public law concepts of relevant (or irrelevant) considerations to criminal sentencing proceedings.

The question of remittal if either ground is made out

34. The Crown submits that the formal receipt of the Crown's sentencing range could not have made any difference to the sentence imposed having regard to the careful approach of the learned sentencing judge as set out in her detailed remarks on sentence.

35. The applicant's amended submissions ignore what the learned sentencing judge in fact did and was entitled to do in relation to prior sentence cases. Her Honour expressly stated that she had "*examined the range of sentences that have been imposed in Commonwealth and State cases involving offences of this type, and it is difficult to find a comparable series of offences*": [2012] VSC 47 at [101]. A range of prior sentences *was* therefore considered, with her Honour only declining to have regard and give primacy to a mere numerical range sought to be proffered by the Crown.

36. The learned sentencing judge also quoted from a decision of the New South Wales Court of Criminal Appeal in *R v To* (2007) 172 A Crim R 121, on the question of imposing the maximum sentence for the worst category of offending ([2012] VSC 47 at [103]. Her Honour's overall approach was therefore consistent with that mandated by this Court in *Hili & Jones v The Queen* (2010) 242 CLR 520 at 537-8 [53-6].

37. That approach and her Honour's views as to the objective extreme seriousness of the offending meant that the Crown sentencing range could not have made a difference. If there was a perception that the provision of a Crown range could have made a difference, experienced senior counsel for the applicant would surely have made that submission and addressed in relation to it.

38. Even if the Crown range had been provided, it is incorrect to assert that anything further would have needed to have been said by the Crown in support of that range. All of the relevant features of the case standing behind the Crown range, including those in mitigation, were forcefully made by the Crown. It is quite wrong to assert (applicant's amended submissions at [6.4]) that any submission would have been made that a sentence outside the Crown range would constitute manifest error. As noted at [28] above, a suggested range necessarily is provided prior to any findings of fact made by the sentencing judge, which may well justify a more severe or more lenient sentence than the range proffered. A Crown sentence range can never be more than indicative.

Part VII - Notice of Contention or cross-appeal

39. The respondent does not intend to file a notice of contention or cross-appeal.

Part VIII - Time Estimate

40. Subject to anything unexpected emerging from the applicant's oral submissions, it is expected that the respondent's oral argument in this and the related case of Zirilli will take in the order of an hour combined.

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