IN THE HIGH COURT OF AUSTRALIA

DARWIN REGISTRY

No. D23 of 2019

BETWEEN:

JESSE CUMBERLAND

Appellant

and

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THE QUEEN

Respondent

APPELLANT'S REPLY

Part I: Certification that the submission is suitable for publication on the internet

1. I certify that this submission is in a form suitable for publication on the internet.

Part II: Concise reply to the argument of the respondent

Denial of procedural fairness: the appeal should be allowed and the appellant released

2. The respondent properly concedes that the applicant was denied procedural fairness by reason of the procedure adopted by the CCA (**RS [63]**, **[70]**) and, further, appears to concede that *the appeal should be allowed* (**RS [71]**).

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3. On that basis, the remaining issues, so far as the disposition of the appeal is concerned, is whether this Court should itself substitute an order dismissing the Crown's appeal to the CCA, or whether the matter should be remitted to the CCA — and, if so, the scope of that remitter (re-sentence only, or the entire Crown appeal).

4. It should immediately be pointed out that, if and when the orders of the CCA are set aside (as both parties appear to accept should happen), those orders will cease to support the continuing imprisonment of the appellant. The original sentence imposed by Blokland J will then effectively be "revived"[1] and will remain in effect unless and

[1] Because the order of the CCA setting aside the sentence imposed by Blokland J will have been quashed.

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until the appellant is re-sentenced. Under the sentence imposed by Blokland J, the appellant was entitled to be released from custody on and from 26 June 2019.

5. Once the CCA's sentence is set aside, there would be no warrant for the Appellant's imprisonment to continue, and he would be entitled to be released immediately.

Effect of coronavirus (COVID-19) on sittings of the High Court

6. The parties have been notified by the registry that the Court will not sit in Canberra during April, May and June, and that the Court will be in contact with the parties after that time to discuss the re-listing of the present case. Given that the orders that justify the applicant's continuing imprisonment should be set aside, and that any hearing in this Court would not be for some time, it is respectfully submitted that the Court should, as soon as practicable make orders allowing the appeal and setting aside the orders of the Court of Criminal Appeal. To the extent that it may be necessary to hear further from the parties on this issue, the appellant would ask that the Court make arrangements for that to be done remotely or by way of writing.

The residual discretion

7. It is accepted that, at the hearing on 18 July 2018, no reliance was placed on the residual discretion (**RS [7]-[8]**). However, that position was taken in circumstances where the expectation of both parties was, clearly, that the appeal would be completely determined relatively promptly after that hearing.

8. The appellant also accepts that the reference to the residual discretion to dismiss the appeal was not raised with the court orally on 2 August 2018. The appellant can hardly be criticized for that, however, in circumstances where the CCA had just announced that it had determined that the appeal was to be allowed (even though it had not then made a formal order allowing the appeal).

9. It remains the case, though, that had the CCA not proceeded to determine the appeal in breach of procedural fairness, and had instead held a further hearing, as it should have, the appellant *at that hearing* could properly have submitted that, in the circumstances *then* existing, the CCA should exercise the residual discretion to dismiss the appeal. The respondent appears to accept as much (see **RS [27]**).

10. As submitted in the appellant's primary submissions, it is undesirable, and involves error, for a CCA to determine a Crown appeal against sentence in two distinct stages, separated by a substantial period of time, because it is the circumstances prevailing at

the point of any re-sentencing which are the very circumstances that must be taken into account in deciding how the residual discretion should be exercised. If there is a significant lapse of time between the decision to allow the appeal and the re-sentencing, the practical effect is to preclude an offender from being aware of, and thus making any submissions about, the application of the residual discretion in the circumstances prevailing at the time that is relevant for that purpose.

11. The respondent also concedes (**AS [29]**) that *if* "consideration of the residual discretion had in fact been revived by the appellant's counsel" then "it may be concluded that [the CCA] have failed to turn its mind to this issue and have therefore erred". The respondent thus seeks, in effect, to place the blame for the CCA's non-consideration of the residual discretion at the feet of counsel for the appellant: it is said counsel ought to have raised the residual discretion with the CCA at some time before it unexpectedly delivered judgment on 19 June 2019 (or afterwards). But there are insuperable difficulties with that submission in the context of the present case.

11.1. First, the CCA had already announced on 2 August 2018 that the appeal was to be allowed, and thus gave the clear impression that it had already determined against exercising the residual discretion to the benefit of the appellant.

11.2. Secondly, as the respondent concedes, the CCA had led counsel for the appellant to believe that it would *not* make orders disposing of the appeal until after it had heard further from the appellant. Counsel was entitled to wait until the foreshadowed further hearing to raise any issue relevant to the disposition of the appeal, including the residual discretion. No criticism can fairly be made of his failure to raise the issue before the delivery of judgment.

11.3. Thirdly, before the three-member CCA unexpectedly delivered its judgment on 19 June 2019, there was no way the appellant could know when that would occur. No sensible submission concerning the exercise of the discretion could be made until he had some idea when approximately that was likely to happen.

11.4. Fourthly, the changed circumstances of the case — in particular the delay and the fact that the custodial period was now about to expire — together with other compassionate personal circumstances (such as the appellant's youth and the fact that he had previously been assaulted in prison), the fact that the Court had indicated that the appellant would be heard further before final orders were made, and the onus of the Crown to exclude the exercise of the residual

discretion,[2] were such that the CCA was bound to consider the residual discretion, or afford the parties an opportunity to make submissions about it.

12. The passage in *Pantorno v The Queen*[3] on which the respondent relies (**RS [26]**) is directed to special leave. Since in this case special leave has already been granted on several grounds — one of which is now conceded — it is academic whether the appellant might alternatively have approached the CCA and asked it to reopen its orders. It is also significant that, when judgment was delivered, counsel for the respondent did in fact take the rather extraordinary step of immediately raising certain matters orally, and was told by the presiding Judge: "Well, why don't you read the
10 judgment and if you have a quibble with it, *you know where to go*."[4]

13. There is no inconsistency between the appellant's reliance on his rehabilitation, to the extent that it was already demonstrated and accepted, and his submission that (as is now conceded) he was denied procedural fairness. Progress in rehabilitation is not a binary "yes or no" consideration; evidence of sustained progress over a longer period is plainly beneficial to an offender (contra **RS [68]**).

14. As to **RS [44]**, the relevant delay is not delay in the CCA *informing the appellant that the Crown appeal would be allowed*. Indeed, that could not properly be determined until the situation at the time of any potential re-sentencing was known. Rather, the relevant "delay" is the total time between the original sentencing and the eventual
20 making of final orders on the appeal. Delay is both relevant to the residual discretion to dismiss an appeal and a "powerful mitigating factor" in sentencing.[5]

15. The effect of the respondent's concession in this Court is that the orders of the CCA must be set aside, and the appellant released from custody (see [4]-[5] above). He will have been free in the community for a period before the CCA considers any remitted appeal. The CCA would then be faced with the prospect of *returning to custody* a person who had already served the entire custodial portion of the sentence originally imposed on him (plus *substantial* further time in custody pending the determination of this appeal) *and had already been released from custody*. In those circumstances, it is

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2 *CMB v Attorney-General (NSW)* (2015) 256 CLR 346 at 366 [57] (Kiefel, Keane and Bell JJ).

3 (1989) 166 CLR 466 at 472-3.

4 Respondent's Book of Further Material, pp 17-18. (Emphasis added.)

5 *R v Schwabegger* [1998] 4 VR 649 at 659; *R v Merrett* (2007) 14 VR 392 at 400 [35]-[38]. See also *R v Cockerell* [2001] VSCA 239 at [10] (Chernov JA, Winneke P and Buchanan JA agreeing).

inevitable that the residual discretion should be exercised in the appellant's favour.

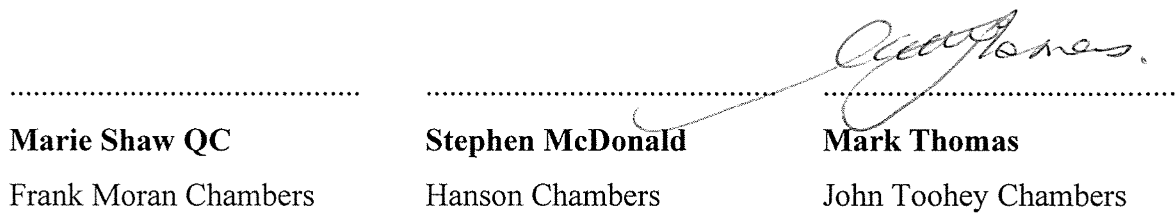
16. The interests of justice would not be served by the further extension of uncertainty necessarily involved in remitting the matter for reconsideration by the CCA. This is a case where it is appropriate to recognize, as the original sentencing Judge did, that "it seems that an offender is ready to rehabilitate and where there are other compelling circumstances that reasonably excite some sympathy in the judge's mind".[6]

The scope of any remittal

17. Should the Court nevertheless conclude that the appropriate course is to remit the matter to the CCA, then *all* of the orders of the CCA must be set aside and the whole Crown appeal should be reheard by a differently constituted CCA. That is so irrespective of whether this Court accepts the appellant's submission that the CCA erred in separately announcing that it would allow the appeal on 2 August 2018, then deferring re-sentencing until 19 June 2019.

18. The anticipated date of hearing in this Court is now expected to be sometime beyond June 2020. The CCA, considering the appeal on remitter, would necessarily need to take into account the different circumstances then prevailing — circumstances that would overwhelmingly support the exercise of the residual discretion in favour of dismissing the appeal. It would be manifestly unjust if the appellant, facing the prospect of being re-sentenced in mid- or late-2020, was somehow precluded, by the announcement of the CCA back on 2 August 2018, from arguing that the CCA should exercise the residual discretion in light of the appellant's circumstances proximate to the time when any re-sentencing would actually occur.[7]

Dated: 18 March 2020



Marie Shaw QC
Frank Moran Chambers

Stephen McDonald
Hanson Chambers

Mark Thomas
John Toohey Chambers

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[6] *R v Osenkowski* (1982) 30 SASR 212 at 212–3 (King CJ).

[7] Indeed, any suggestion that the appellant should not be permitted to raise the residual discretion issue on any remitter would seem inconsistent with the Crown's position that it was still open to the appellant to raise that issue right up until the making of the CCA's final orders, or even beyond (see **RS [27]**).