IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY **No. M1 of 2017**

BETWEEN:

THE DIRECTOR OF PUBLIC PROSECUTIONS

Appellant

10 **- v -**

CHARLIE DALGLIESH (A PSEUDONYM)

Respondent

RESPONDENT'S SUBMISSIONS

PART I: SUITABLITY FOR INTERNET PUBLICATION

1. The Respondent certifies that this submission is in a form suitable
20 for publication on the internet.

PART II: CONCISE STATEMENT OF THE RELEVANT ISSUES

2. The Respondent broadly agrees that this appeal raises the question identified by the Appellant, but adds the following:

   (i) neither the learned sentencing judge in imposing sentence nor the Court of Appeal of the Supreme Court of Victoria ("the Court below") in determining the Crown appeal against sentence adopted an
30 approach inconsistent with the process known as "instinctive synthesis"; and

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(iii) the Court below, in determining that the individual sentence imposed on charge 1 (incest) was not manifestly inadequate, applied and acted in accordance with the principles stated within the authorities decided by this Court and did not, in its consideration of the "current sentencing practices" for the offence of incest, elevate those "current sentencing practices" to the level of a "determinative sentencing criterion".

PART III: NOTICE UNDER THE JUDICIARY ACT, 1903 (Comm.)

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3. Section 78B of the Judiciary Act, 1903 (Comm.) does not require that notice be given to the Attorneys-General of the Commonwealth and of the States in relation to this appeal.

PART IV: CONTESTED MATERIAL FACTS

4. The Respondent accepts as correct paras. 5.1 – 5.10 of the Appellant's Submissions dated 27 January, 2017, herein.

20 5. There are, however, several further factual matters relevant to this appeal; see at paras. 6 – 15 below.

6. The appeal to this Court is confined to a challenge to the individual sentence of imprisonment imposed on charge 1 on the indictment, that charge alleging the commission of an offence of incest contrary to s. 44(2) of the Crimes Act, 1958 (Vic.).

7. On the hearing of the plea in mitigation of sentence before the learned sentencing judge, the prosecutor not only made no reference to, but made
30 no submissions whatsoever concerning:

(a) the objective gravity of the offending the subject of any of the charges on the indictment;

(b) any (relevant) aggravating feature of factor said to be involved in the Respondent's offending;

(c) any (relevant) sentencing principle(s);

(d) any decision of any court which could be described as a "comparable" or "like" case, that is, a case which was concerned with offending of similar seriousness;

- see the Judgment below at paras. [26] & [51] – [52].

(e) the "current sentencing practices" for any of the offences the subject of the indictment;

(f) the sentencing statistics as set out within the relevant Sentencing Snapshot for the offence of incest prepared and published by the Sentencing Advisory Council.

8. The Crown appealed to the Court below against the sentence imposed by the learned sentencing judge on two grounds, namely, first, that the (individual) sentence imposed on charge 1 (incest) is manifestly inadequate and, second, the orders for cumulation resulted in a total effective sentence which is manifestly inadequate.

- see the Judgment below at para. [3].

9. Both grounds of appeal failed. By reason of the scope of the appeal to this Court being confined to the sentence imposed on charge 1 (incest), the manner in which the Court below dealt with the second ground need not be further considered.

10. In his challenge to the (individual) sentence imposed on charge 1 (incest), in support of the first ground, the DPP placed particular reliance upon the "current sentencing practices" for that offence. In that regard, the DPP submitted that the (individual) sentence imposed on charge 1 (incest) was not in conformity with the existing sentencing standards as reflected in a large number of comparable cases.

- see the Judgment below at para. [4].

11. The Court below determined that the DPP had failed to establish that the sentence imposed was outside the range of sentences reasonably open to the learned sentencing judge based upon the existing sentencing standards.

- see the Judgment below at para. [5].

12. The Court below thereby dismissed the Crown appeal against sentence.

13. In dismissing the Crown appeal against sentence, the Court below gave no consideration to the exercise of the residual discretion to intervene (and thereby re-sentence the Respondent), the onus for which is placed upon the Crown to have this discretion exercised in its favour.

- see, generally, CMB v Attorney-General (NSW) (2015) 256 CLR 346.

14. Although the Court below dismissed the Crown appeal against sentence, the Court below expressed the view that sentences for incest offences in the "mid-range of seriousness" should, in the future, be progressively increased, that is, uplifted by increments, so as to properly reflect the objective gravity of the offence of incest. The Court below thereby acceded

to the contention of the DPP that the "current sentencing practice" for such offences was inadequate and should be uplifted.

- see the Judgment below at paras. [6] – [7], [62] – [74] & ff & [126] – [131].

15. Finally, the Court below held that but for the constraints of "current sentencing practices", which reflect and promote the requirements of consistency in sentencing, a higher sentence would have been imposed on charge 1.

- see the Judgment below at paras. [53], [119] & [132].

PART V: APPLICABLE CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS.

16. The Respondent agrees with the Appellant's Statement of Applicable Constitutional Provisions, Statutes and Regulations.

PART VI: STATEMENT OF ARGUMENT

17. At common law, in imposing sentence in the exercise of the sentencing discretion, a sentencing judge engages in a process described within the authorities as "instinctive synthesis". A number of those authorities have been cited in the Appellant's Submissions herein at paras. 6.1 – 6.3.

18. Put simply, the process of instinctive synthesis requires, first, the identification of the factors relevant to the sentence to be imposed, including the purposes for which the sentence is to be imposed. Those factors, and purposes, will vary from case to case. Some of those factors will point toward an increase in the sentence to be imposed, whilst some of those factors will point toward the imposition of a lesser sentence. Moreover, sometimes, the purposes will point in different directions. The

process of instinctive synthesis then requires the weighing (or balancing) of those factors and purposes, the sentencing judge making a value judgment as to the appropriate sentence to be imposed in all of the circumstances of the case.

- see, for example, AB v R (1999) 198 CLR 111, at paras. [13] – [18] per McHugh J.

19. One of the factors relevant to the imposition of sentence and, by reason of s. 5(2)(b) of the Sentencing Act, 1991, a factor to which the sentencing judge must have regard, is the "current sentencing practices" (for that offence). In having regard to the "current sentencing practices", the sentencing judge will have regard to any information concerning any sentencing patterns for the subject offence.

- R v Kilic (2016) 91 ALJR 131, at para. [21].

20. More precisely, if there be a sentencing pattern for the offence, then the sentencing judge must have regard to the range of sentences previously imposed in "comparable cases". That range of sentences may inform a broad understanding of the range of sentences that would ensure consistency in sentencing and a uniform application of the sentencing principles relevant to the case.

- R v Kilic at para. [22].

21. Moreover, that range of sentences will provide a "yardstick" which will illustrate (but not define) the possible range of sentences available, thereby providing a "yardstick" to a sentencing judge against which to examine a proposed sentence or, in the case of an appellate court in its determination of whether an individual sentence is manifestly excessive or manifestly inadequate, a "yardstick" against which to examine the sentence imposed.

- Hili v R (2010) 242 CLR 520, at paras. [53] – [54];
- Barbaro v R (2014) 253 CLR 58, at para. [41];
- R v Pham (2015) 256 CLR 550, at paras. [26] – [29];
- R v Kilic at paras. [21] – [24].

22. That "yardstick" will therefore inform the "instinctive reaction" when an appellate court is required to consider whether an individual sentence is manifestly excessive or manifestly inadequate.

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- Hudson v R (2010) 30 VR 610, at para. [28];
- Ashdown v R (2011) 37 VR 341, at para. [174] per Redlich JA;
- DPP (Vic.) v Zhuang (2015) 250 A.Crim.R. 282, at paras. [31] – [33].

23. The application of the principles described in paras. 17 – 22 above does not involve a sentencing court exercising the sentencing discretion in a manner inconsistent with the process known as "instinctive synthesis". In this regard, in explaining the process of "instinctive synthesis" as engaged in by a sentencing judge, McHugh J has stated:

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> "...In R v Rushby [[1977] 1 NSWLR 594, at p. 597], Street CJ said, correctly in my opinion, that the "determination in any given case of the appropriate sentence involves an adjudicative balancing of a number of differing and not entirely consistent elements". No doubt at the conclusion of the process, the judge will check the sentence against other comparable sentences and may feel compelled to adjust the sentence up or down. But that is quite different from beginning with an "objectively" determined sentence."

30 - see AB v R (1999) 198 CLR 111, at para. [18].

24. Upon an analysis of the reasons within the Judgment below, the Court below has dealt with, and determined, the first ground in accordance with the principles summarised in paras. 17 – 23 above, using the range of sentences imposed in past cases as a "yardstick" against which to examine the (individual) sentence imposed on charge 1 (incest) in order to

determine whether that sentence was manifestly inadequate. See further at paras. 25 – 38 below.

25. The Court below first examined some 12 "comparable cases", those cases having been accepted by the parties in the Court below as "necessarily inform[ing] the permissible range [of sentences] open to the sentencing judge".

- see the Judgment below at paras. [25] – [39].

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26. Those cases thereby provided the relevant "yardstick" for the Court below.

- see, for example, R v Kilic at para. [22].

27. The Court below then considered the respective submissions concerning those cases, those submissions also making reference to the particular facts and circumstances of the instant case.

- see the Judgment below at paras. [40] – [47].

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28. The Court below then examined the (individual) sentence imposed on charge 1 (incest) against that "yardstick".

- see the Judgment below at paras. [48] – [53].

29. In conducting that examination, the Court below expressly recognised that the "comparable cases" only provided a "limited guide" to the range of sentences reasonably open to the learned sentencing judge.

30 - see the Judgment below at paras. [49] & [118].

30. In that regard, the approach adopted by the Court below was mindful of the principle that the sentences imposed by the sentencing courts in the "comparable cases" do not define or limit the boundaries of the range of sentences open to a sentencing judge.

- R v Pham at paras. [26] & [27];
- R v Kilic at para. [22].

31. Moreover, in conducting that examination, the Court below was mindful of the purpose of the requirement to have regard to "current sentencing practices", namely, to promote a consistency of approach in the sentencing of offenders.

- R v Kilic at para. [21].

32. In this regard, it has been authoritatively stated that like cases should be treated in a like manner.

- Wong v R (2001) 207 CLR 584, at paras. [6] & [65];
- Hili v R at para. [49];
- R v Pham at para. [28] (1).

33. It was therefore open to the Court below, in conducting the requisite examination, to give much weight to the first of the purposes of the Sentencing Act as specified in s. 1(a) of the Sentencing Act, namely, "to promote [a] consistency of approach in the sentencing of offenders".

- see the Judgment below at paras. [119] – [120];
- also see: R v Kilic at paras. [21] – [22].

34. Having conducted that examination, the Court below determined that the (individual) sentence imposed on charge 1 (incest) did not fall outside the range of sentences reasonably open to the learned sentencing judge.

- see the Judgment below at paras. [4] – [5], [53], [119] – [120] & [132].

35. In conducting that examination, the Court below did not err in adopting an approach inconsistent with the process known as "instinctive synthesis". The Court below simply engaged in the process of "check[ing] the sentence [imposed by the learned sentencing judge] against other comparable sentences" which was not only endorsed by McHugh J in AB v R, but held by McHugh J not to contravene the process of "instinctive synthesis". See further at para. 23 above.

- AB v R (1999) 198 CLR 111, at para. [18] per McHugh J;
- also see: Wong v R at para. [12] per Gleeson CJ (diss.).

36. Finally, and of particular relevance on this (further) appeal brought by the Crown to this Court, the Court below determined the first ground in accordance with the approach adopted (indeed, dictated) by the DPP on the Crown appeal to the Court below, namely, the (individual) sentence imposed on charge 1 (incest) was not in conformity with the existing sentencing standards as reflected in the comparable cases; see at para. 10 above. Put simply, having invited the Court below to determine the first ground by conducting a comparison between the (individual) sentence imposed on charge 1 and the sentences imposed by the sentencing courts in the "comparable cases", the DPP ought not be now heard to complain on appeal to this Court of the process engaged in by the Court below.

- see the Judgment below at paras. [4] – [5].

37. Using language different from the words "yardstick" and "examination", the Court below simply engaged in a process of comparison, that is, the Court below compared the (individual) sentence imposed on charge 1 (incest) with the sentences imposed in the "comparable cases". And in engaging in that process of comparison, the Court below engaged in a process which was described by Gleeson CJ in Wong v R as "a legitimate forensic tool for advocates and judges; and has been employed for many years".

- Wong v R at para. [12] per Gleeson CJ (diss.);
- also see: R v Kilic at para. [21], where paras. [6] – [12] of the judgment of Gleeson CJ in Wong v R were cited.

38. The Crown's case in the Court below was that the process of comparison was to be conducted by reference to the "current sentencing practices" as evidenced by the 12 "comparable cases"; see at paras. 10 & 25 above. In this Court, however, the Crown's case is that the Court below should not have been constrained by those "current sentencing practices".

39. Moreover, in contending in this Court that the Court below should not have been constrained by those "current sentencing practices", the Crown is placing reliance upon the fruits of its success in the Court below that the "current sentencing practices" for incest offences in the "mid-range of seriousness" should be uplifted.

40. And in circumstances where the Crown is placing reliance upon the holding of the Court below concerning the inadequacy of those "current sentencing practices" as the basis for the Crown's contention in this Court that the sentence imposed on charge 1 is manifestly inadequate, there is a resultant unfairness for the Respondent. That unfairness is that the Crown is resiling from its acceptance in the Court below that any such uplift should have no bearing on the disposition of the Crown appeal against sentence to the Court below.

- see, for example, the Judgment below at paras. [67] – [69].

PART VII: NOTICE OF CONTENTION

41. The Respondent has not filed any Notice of Contention.

PART VIII: ORDERS SOUGHT BY THE APPELLANT

42. Should this Court determine to make an order allowing the appeal, then it will be necessary for the matter to be remitted to the Court below for determination in accordance with the law, one component or incident of which is the exercise of the residual discretion.

43. On a Crown appeal against sentence, the Court retains a residual discretion not to interfere with the sentence imposed by a sentencing judge, even when satisfied that an error has occurred in the exercise of the sentencing discretion and that a different sentence should have been imposed (at first instance). The onus rests with the Crown to negate any reason why the residual discretion should be exercised.

- see, generally, CMB v Attorney-General (NSW) (2015) 256 CLR 346.

44. With respect to the exercise of the residual discretion in this matter, the Respondent will place much reliance upon the matters summarised in para. 7 above, the effect of which are that the Crown did not do what was reasonably required to assist the learned sentencing judge to avoid imposing an individual sentence on charge 1 (incest) which was manifestly inadequate.

- CMB v Attorney-General (NSW) at paras. [38] – [39] per French CJ and Gageler J, but see esp. at para. [38];
- also see: - DPP (Vic.) v Karazisis (2010) 31 VR 634, at paras. [100] & [104] – [115], but see esp. at para. [115];
  - Green & Quinn v R (2011) 244 CLR 462, at para. [36].

PART IX: COSTS

45. On being granted special leave to appeal on 16 December, 2016, the Appellant gave an undertaking to pay the Respondent's reasonable costs of the appeal.

PART X: PRESENTATION OF ORAL ARGUMENT

46. The Respondent estimates that less than 2 hours is required for the presentation of the Respondent's oral argument.

Dated the 17th day of February, 2017

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