IN THE HIGH COURT OF AUSTRALIA

SYDNEY REGISTRY No. S123 of 2019

BETWEEN: HT

Appellant

and

The Queen

First Respondent

New South Wales Commissioner of Police

Second Respondent

APPELLANT'S SUBMISSIONS - REDACTED

Part I: Certification

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

Part II: Statement of Issues

2. In a Crown appeal against sentence pursuant to s5D of the *Criminal Appeal Act 1912* (NSW), does the Court of Criminal Appeal ("CCA") have the power to deny the respondent access to evidence admitted in the sentencing proceedings?
3. If such a power does exist, then by what principles is the CCA guided in addressing the inevitable procedural unfairness occasioned to the affected party?
4. Is the CCA, when exercising jurisdiction under s5D of the *Criminal Appeal Act* when exercising the discretion whether or not to intervene, obliged to consider:
   i. the procedural unfairness resulting from denying a respondent to a Crown appeal access to evidence admitted in the sentencing proceedings; and/or
   ii. the conduct of the executive, on the one hand, in bringing the appeal but, on the other hand objecting to the respondent's access to that evidence?

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Short summary of the argument

5. The appellant's argument involves the following propositions:

   i. The proper exercise of judicial power requires a court, in all ordinary proceedings, to afford procedural fairness to parties to substantive proceedings including affording them the opportunity to test and respond to evidence admitted in those proceedings;

   ii. The appellant was denied procedural fairness at the hearing of the Crown appeal against sentence because she was denied access to Ex C. Ex C was the basis of the imposition of a statutorily authorised disproportionate sentence upon her and it contained evidence which was critical to the questions involved in the determination of the Crown appeal against sentence.

   iii. The CCA had no power to deny the appellant access to Ex C:

      a. Public interest immunity does not provide such a power;

      b. Such a power does not appear in s130 of the *Evidence Act 1995* (NSW) nor the *Court Suppression and Non-Publication Orders Act 2010* (NSW);

      c. The CCA does not exercise inherent jurisdiction under s23 of the *Supreme Court Act 1970* (NSW) and no such power can be implied; and

      d. Authorities concerning the admission of evidence not provided to a party in judicial review proceedings are either distinguishable or wrongly decided.

   iv. When exercising the discretion to intervene in s5D of the *Criminal Appeal Act*, the CCA failed to consider:

      a. The procedural unfairness resulting from denying the appellant access to evidence which was critical for the resolution of the Crown appeal; and

      b. The inconsistency and unfairness in the executive's conduct in, on the one hand, invoking the jurisdiction of the CCA to increase the appellant's sentence, and on the other, objecting to her access to evidence which was critical for the resolution of the Crown appeal.

   v. In the circumstances of the appellant's case, these two considerations required or strongly militated in favour of the dismissal of the Crown appeal in the exercise of the discretion under s5D of the *Criminal Appeal Act*.

Part III: s78B Notices

6. On the basis of the arguments advanced in these submissions the appellant considers that no notice under s78B of the *Judiciary Act 1903* (Cth) is required.

Part IV: Citation

7. There is no medium neutral citation for the judgment of the CCA. The judgment is restricted and the subject of a non-publication order. The sentencing judgment is also the subject of a non-publication order.

Part V: Relevant Facts

[redacted]

[redacted]

12. [redacted]

10 [redacted]

Part VI: Argument

20 **Denial of procedural fairness and the course of the proceedings (Ground 2)**

13. The manner in which evidence of the appellant's assistance was placed before the sentencing judge and, subsequently, the CCA constituted a significant departure from the principles of procedural fairness. It is recognised that the question of power is antecedent to the denial of procedural fairness. However, the appellant addresses the denial of procedural fairness first as an understanding of how the issue arose and the significance of the evidence in the proceedings may inform the submissions made on the question of power below.

Sentencing proceedings

30 [redacted]

15. [redacted] Defence counsel, faced with this dilemma, chose the option which most favoured his client. [redacted]

[redacted]

19. [redacted]

[redacted]

20. There was no determination by the sentencing judge that the material in Ex C was covered by public interest immunity and no order was made prohibiting disclosure of Ex C. There were no formal non-publication or suppression orders under the *Court Suppression and Non-Publication Orders Act 2010* (NSW) in respect of Ex C or the transcript where submissions are made on the subject of assistance. A portion of the sentencing judgement was subject to a "suppression and non-publication order" (ROS 22 **CAB 70**). Neither party identified a statutory source for the non disclosure to a party of evidence admitted in a proceeding nor any case law that supported such a course.

Crown Appeal

21. At the hearing of the Crown appeal, HT (the appellant in these proceedings) sought access to Ex C and indicated that Ex C was relevant not only to the question of re-sentence but also the ground of manifest inadequacy (T1.40, T1.46-2.27 **CAB 90**). The second respondent opposed access being granted to the appellant on the basis of public interest immunity (T2.36-.40 **CAB 91**). In support of the claim, the second respondent read an affidavit of Acting Assistant Commissioner John Kertalec, which itself included a confidential affidavit and a further confidential affidavit (T6.18-.20 **CAB 95**). The affidavit and confidential affidavit were provided to the appellant but not the further confidential affidavit (CCA [73]).

22. Following submissions by the second respondent and the appellant, the first respondent's representative said "I've seen the contents of exhibit C. I wasn't going to make a submission about it. My friend asked me what my position was. I say generally I support my friend [the second respondent's representative] ..." (T9.43-.45 **CAB 98**). Asked whether the Crown urged on the Court that it should allow the appellant's counsel to see the material as a matter of fairness counsel for the Crown responded "We don't urge that your Honour, no." (T10.9-.17 **CAB 99**).

23. At the hearing the CCA upheld the claim and ruled "The Court having read the material and the affidavits in support is of the opinion that the public interest immunity claim, which has been raised by Mr Singleton on behalf of the Commissioner of Police must upheld [sic], particularly on the particular class or classification under which the information comes." (T10.28-.33 **CAB 99**). The CCA ordered that the contents of Ex C

before the sentencing judge be kept confidential on the grounds of public interest immunity and that they not be made available to counsel for the appellant (**CAB 125**). No reasons were given for adopting such a course other than identification of the basis of the order, namely a particular class or classification of public interest immunity. No statute or authority was identified as supporting the procedure adopted in this case by any party or the CCA.

24. During the hearing of the Crown appeal, when the Crown started to make submissions on the question of the appellant's assistance, Hoeben CJ at CL said "I think in fairness you should simply leave us to make our own evaluation" (T20.23-.24 **CAB 109**, see also T22.47 **CAB 111**). RA Hulme J also noted "there's an inability of the respondent to engage with the subject in any detail at all" (T21.9-.10 **CAB 110**).

Content of procedural fairness in the appellant's case

25. Observance of procedural fairness requires that a Court, making an order that finally alters or determines a right or legally protected interest, afford the parties to the proceedings a fair opportunity to test and to respond to the evidence upon which the order might be made (*Assistant Commissioner Condon v Pompano* (2013) 252 CLR 38 at [1], [177], *South Australia v Totani* (2010) 242 CLR 1 at [62], [69], *Bass v Permanent Trustee Co Ltd* at [56], *International Finance v Crime Commission* (2009) 240 CLR 319 at [39], [54], *K Generation v Liquor Licensing Court* (2009) 237 CLR 510 at [48]). Procedural fairness in adversarial proceedings has Constitutional significance (*Pompano* at [177] per Gageler J, see also at [180]-[188] and the cases cited therein, *Bass v Permanent Trustee Co Ltd* at [56], *International Finance Trust Co Ltd v New South Wales Crime Commission* at [53]-[55]).

26. The Crown alleged the sentence imposed on the appellant was manifestly inadequate. Where a person has given assistance to authorities a sentencing judge may impose a lesser penalty than it would otherwise impose having regard to certain matters (s23(1)-(2) *C(SP) Act*). The imposition of a lesser penalty is constrained by s23(3) of the *C(SP) Act* which provides "A lesser penalty that is imposed under this section on an offender must not be unreasonable disproportionate to the nature and circumstances of the offence". The question posed by the Crown appeal, therefore, was whether it was open to the sentencing judge, in the exercise of the discretion under s23, to conclude that the sentences imposed were not unreasonably disproportionate (*CMB v Attorney General (NSW)* (2015) 256 CLR 346 at [78]). In s23(3) of the *C(SP) Act*, "unreasonably" is given

a wide operation (*CMB* at [78]). It is not limited to the seriousness of the offending and *includes* an evaluation of the nature and extent of assistance provided to the authorities (*CMB* at [41], [78]; *R v C* (1994) 75 A Crim R 309 at 314-5).

27. Ex C was the evidentiary basis for the imposition of a lesser sentence. Ordinarily the onus is on an offender to establish a matter in mitigation on sentence (*Olbrich v The Queen* (1999) 199 CLR 270 at [25]; *Filippou v The Queen* (2015) 256 CLR 47 at [64]). However, the Crown has a duty to assist the court by providing material relevant to sentence and should not unduly obstruct an offender in placing that material before the sentencing judge on the question of assistance (*Bourchas* (2002) 133 A Crim R 413 at [64]-[65]). The obligation is limited and there is no positive duty on the Crown to establish the extent and effectives of any assistance (*Cartwright v R* (1989) 17 NSWLR 243 at 253-254, *Bourchas* at [69]-[70]).

28. Exercise of the CCA's appellate jurisdiction under s5D of the *Criminal Appeal Act* required it to have regard to the material that was admitted in the proceedings before the sentencing judge (*Betts v The Queen* (2016) 258 CLR 420 at [10], *Mickelberg v The Queen* (1989) 167 CLR 259 at 267, 274, 298, *Eastman v The Queen* (2000) 203 CLR 1, *Dinsdale v The Queen* (2000) 202 CLR 321 at [3]). The appellant's assistance to authorities was relevant to whether error (*House v The King* (1936) 55 CLR 499 at 504-505) had been established and whether the sentence was so manifestly inadequate that it constituted an affront to the administration of justice such that the residual discretion to vary the sentence should be exercised (see *CMB v Attorney General* at [37], *Green v The Queen* (2011) 244 CLR 462 at [42]). It was also relevant to what discount should be applied to the appellant's sentence should the Court determine to re-sentence her.

29. At first instance the appellant did not have the opportunity to consider and test the accuracy of the evidence (both the factual and evaluative component) including, if necessary placing further evidence before the sentencing judge. [redacted] highlighted the difficulty for the defence in testing the accuracy of Ex C. Nor was the appellant in a position to make submissions as to the mandatory considerations in s23(2) of the *C(SP) Act*, what discount should be allowed for the assistance including whether there is an upper limit of discounts to be allowed for assistance to authorities, and the extent to which the appellant's assistance in fact influenced the assessment of whether the sentence to be imposed was unreasonably disproportionate. [redacted]

[redacted] However, he was deprived of the ability to persuade the sentencing judge that such a course was appropriate having regard to the matters referred to in Ex C. For example, a submission that the appellant should receive a custodial sentence to be served in the community may have had more force if there was evidence suggesting the appellant's safety in custody was at risk as a result of her assistance (see s23(2)(g) and (h) *C(SP) Act*).

30. The procedural unfairness at first instance might have been hypothetical because of the nature of the outcome; there was possibly no "practical injustice" (*Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Lam* (2003) 214 CLR 1 at [38], *Re Refugee Tribunal; Ex parte Aala* (2000) 204 CLR 82 at [60]).

31. However, at the hearing of the appeal the unfairness became manifest. This is particularly so in circumstances where the executive was invoking the jurisdiction of the CCA and seeking an increase in the sentence imposed and, on the other hand, maintaining its objection to the appellant's access to evidence central to the exercise of that jurisdiction. As a result of the CCA's ruling denying the appellant access to Ex C, she was deprived of the opportunity to do any one or more of the following:

    i. consider and test the accuracy of the evidence (both the factual and evaluative components), including, if necessary placing further evidence before the CCA pursuant to s12 of the *Criminal Appeal Act*;

    ii. make submissions regarding the appropriate weight to be given to her assistance including by reference to the mandatory considerations in s23(2) of the *C(SP) Act* and potentially challenging decisions suggesting that there is an upper limit of discount permitted for assistance to authorities (*see Dinsdale v The Queen* (2000) 202 CLR 321 at [5], *Bugmy v The Queen* (2013) 239 CLR 571 at [22]-[24]; cf. CCA at [121]);

    iii. make submissions on s23(3) of the *C(SP) Act* and the degree to which the nature and extent of the appellant's assistance affected that constraint;

    iv. make submissions regarding whether the Court should exercise the discretion under s5D of the *Criminal Appeal Act* on the basis that the sentence did not constitute an affront to the administration of justice and/or the nature and extent of the appellant's assistance and whether there was a public interest in having information of the particular kind provided by the appellant brought to the attention of the authorities; and

    v. make submission as to the appropriate level of discount on re-sentencing.

32. The exercise of judicial power "involves the application of the relevant law to the facts as found in proceedings" (*Bass v Permanent Trustee Co Ltd* (1999) 198 CLR 334, see also *Cesan v The Queen* (2008) 236 CLR 358 at [67]-[71]). At the Crown appeal, the appellant may have been able to make submissions on the relevant law at a level of generality. However, she was deprived of the ability to engage with a fundamental aspect of the exercise of judicial power, namely how the relevant law was to be applied to the facts in her case.

33. The procedure adopted constituted a denial of procedural fairness which, if viewed jurisdictionally, would have amounted to jurisdictional error (*Re Refugee Tribunal; Ex parte Aala* at [41], [169]; *Re Minister for Immigration and Multicultural Affairs; Ex parte Miah* (2001) 206 CLR 57 at [26], [213]).

34. [redacted] There was no finding by the CCA that it was not open to the sentencing judge to conclude that the sentence imposed was not unreasonably disproportionate having regard to the nature and extent of the assistance. [redacted] However, this finding misapprehended the appellate task the CCA was engaged in on the Crown appeal. This involved, in the first instance, identification of *House v The King* error based on material before the sentencing judge (*CMB* at [33], [54]). It also ignored the difficulty faced by the appellant in ensuring the accuracy of both the factual and evaluative components of the evidence of her assistance.

35. [redacted] It related to only one matter a sentencing judge must consider under s23(2) of the *C(SP) Act* namely, subpara (c). It did not provide the appellant any opportunity to engage in a meaningful way with the Crown appeal.

36. It is submitted that the appellant was denied procedural fairness at the hearing of the Crown appeal as a result of the CCA denying the appellant access to Ex C. This is so even if the Court concludes the CCA had the power to deny the appellant access to Ex C. The CCA gave no consideration to the principles of procedural fairness and their

significance in the administration of justice in Australia in determining whether to grant access to the appellant to Ex C or determining whether the CCA should dismiss the Crown appeal. Nor was consideration given to whether the Court could exercise jurisdiction under s5D of the *Criminal Appeal Act* in the prevailing circumstances.

Power (Ground 1)

Public Interest Immunity

37. At the hearing of the Crown appeal, the second respondent opposed the appellant, or her legal representatives, being given access to Ex C on the ground of public interest immunity (T2.33-.40 **CAB 91**). The claim for public interest immunity was made on two bases – described as a "class claim" and a "contents claim" (T7.39-.45 **CAB 96**). The CCA ruled that the public interest immunity claim must be upheld "particularly on the particular class or classification under which the information comes" (T10.29-.33 **CAB 99**). A class claim within the doctrine of public interest immunity is available where the material in question "belongs to a class of documents which in the public interest ought not be produced, whether or not it would be harmful to disclose the contents of the particular document" (*Sankey v Williams* (1978) 142 CLR 1 at 39, *The Commonwealth v Northern Land Council* (1993) 176 CLR 604 at 616). A contents claim is based on the fact that it would be contrary to the public interest to disclose the contents of the document (*Sankey v Williams* at 39).

38. Here, the order was made on the basis of public interest immunity. It is submitted, however, that public interest immunity does not support denying a party access to evidence admitted in substantive proceedings. A successful claim of public interest immunity means that the material in question need not be disclosed to another party (*The Commonwealth v Northern Land Council* at 616, *Sankey v Williams* at 43, *Gypsy Jokers Motorcycle Club v Commissioner of Police* (2008) 234 CLR 532 at [24], [36], *Assistant Commissioner Condon v Pompano* at [47], [148]). It does not ordinarily result in evidence being admitted in a proceeding but kept confidential from a party. The CCA's ruling denying the appellant access to Ex C represented a significant departure from the public interest immunity procedure. As Lord Dyson observed, the closed procedure under consideration in *Al Rawi and others v Security Service and others* [2012] 1 AC 531 was in many ways the antithesis of the "PII procedure" (at [41], see also [92] Lord Kerr).

39. The basis of the "class claim" was that "it is necessary that the procedure followed below be upheld because if this Court overturns that procedure the procedure won't be available in other cases" (T7.37-.41, see also T3.6-.18 **CAB 96, 92**). [redacted] Withholding relevant evidence regarding an offender's assistance to authorities is contrary to the Crown's obligation to provide such evidence to the sentencing judge and may well undermine the public interest in encouraging offenders to provide assistance to authorities [redacted]. Further, the mandatory considerations in s23(2)(b)-(d) of the *C(SP) Act* refer to matters within the knowledge of the authorities and not the offender. Accordingly, in order to facilitate and encourage those involved in criminal activity providing assistance to authorities such evidence should be freely and willingly placed before the Court so as to fulfil the purpose and important policy objectives behind s23 of the *C(SP) Act*.

Potential applicable statutes

40. In written submissions on the special leave application the first respondent suggested that the power to deny a party access to evidence admitted in the proceedings is derived from s130 of the *Evidence Act*. The second respondent, in a proposed Notice of Contention, contends that the *Court Suppression and Non-Publication Orders Act* could be the source of such a power. It is submitted that, as a matter of statutory construction, neither the *Evidence Act 1995* (NSW) nor the *Court Suppression and Non-Publication Orders Act* permit a Court to deny a party access to evidence admitted in substantive proceedings.

41. Section 130 of the *Evidence Act* is a rule of admissibility and permits the Court to direct that the information or document to which s130 applies not be adduced as evidence. Section 8 of the *Court Suppression and Non-Publication Orders Act* permits a Court to make a suppression or non-publication order on certain grounds set out in s8(1). In s2 of that Act a non-publication order is defined as an order that prohibits or restricts the publication of information and a suppression order is defined to mean an order that

prohibits or restricts the disclosure of information by publication or otherwise. A definition of "publish" is also included in s2, and is concerned with dissemination or access to the public or section of the public.

42. Neither s130 of the *Evidence Act* nor the *Court Suppression and Non-Publication Order Act* expressly contemplate material being admitted into evidence but not disclosed to another party to the substantive proceedings. Nor does such a construction arise by necessary implication. Given the significance of open justice and procedural fairness in the administration of justice in Australia, these statutes are to be interpreted in light of the presumption against a parliamentary intention to infringe upon such rights and freedoms, as required by the principle of legality (see *K-Generation v Liquor Licensing Court* at [37], and the cases cited therein).

43. Further, the order was made on the basis of public interest immunity. Section 130 of the *Evidence Act* was not identified by the CCA as the statutory source of the power to deny the appellant access to Ex C. The CCA did not determine that the evidence was admissible; the evidence had already been admitted at the sentencing proceedings and was part of the record for consideration on the Crown appeal. No order was made by the sentencing judge prohibiting the disclosure of Ex C. Nor was there a direction that the *Evidence Act* apply to the sentencing proceedings.

44. Nor was the CCA's order framed in terms of the *Court Suppression and Non-Publication Orders Act* as required by s8(2). The order sought in the second respondent's Notice of Motion was framed in terms of s8(2) of the *Court Suppression and Non-Publication Orders Act* (**CAB 84**). However, the second respondent did not move on the notice of motion (T12.5-.9 **CAB 101**).

Authorities concerning evidence admitted but not disclosed to a party

45. There are suggestions in *Eastman v DPP (No 2)* (2014) 9 ACTLR 178 that s130 of the *Evidence Act* permits a Court to admit evidence that is subject to public interest immunity and deny the parties to the proceedings access to that evidence and also that a superior court of record has a power, by virtue of its inherent jurisdiction, to deny a party (or the parties) access to admitted evidence in the proceedings (see at [169]). A close examination of the judgment indicates that the Court of Appeal held that it could admit evidence that was subject to public interest immunity under s130 of the *Evidence Act*. Section 130 of the *Evidence Act* was not, however, identified as the power to deny the parties access to such evidence. Further, to the extent that the Court had regard to

confidential aspects of a board's report that was not provided to the parties (and to evidence underlying the confidential aspects of the report) this appears to have been pursuant to express statutory permission for the board to hold hearings in private and the Full Court being required to consider all aspects of the board's report (at [184], [210]).

46. Related to the reasoning in *Eastman*, are authorities which provide some support for a procedure in judicial review proceedings whereby evidence that was before the decision maker is admitted but not provided to the party affected by the decision. In *Eastman*, the board's proceedings were administrative and the confidential evidence was provided to the board pursuant to particular statutory provisions that permitted private hearings to the exclusion of parties to the proceedings. In *Nicopoulos v Commissioner of Corrective Services* (2004) 148 A Crim R 74 Smart AJ, in judicial review proceedings, held that the Court had the power, in the circumstances of that case, to admit the evidence contained in the confidential affidavits and not give the plaintiff access to them (at [92]).

47. It is submitted that the decision in *Nicopoulos* can be distinguished. Where evidence that is properly subject to public interest immunity is before an administrative decision maker, a Court conducting judicial review proceedings may have regard to that material and not provide it to the person challenging that decision (see for example, *Chu v Minister for Immigration* (1997) 78 FCR 314 per Carr and Sunberg JJ at 327-328). The significant difference between the exercise of executive power and the exercise of judicial power was highlighted in *Applicant VEAL of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 225 CLR 88 at [24]. Here, the appellant's case at first instance and on appeal involved the exercise of judicial power.

48. However, even in the judicial review context it is less than clear that such a course is permissible in the absence of a statutory power to do so. In *Chu* Kiefel J (as her Honour then was) concluded that the Court was not justified in reviewing the confidential material (at 351). Her Honour said

> "the exercise sought to be undertaken by the Court would not produce for the applicant reasons which he might understand and accept, but a stated conclusion which is not reviewable. Such a process is not one consonant with the role of a judge in our system. In applications for production of documents it is undertaken because there is no alternative and because some ground is shown for it." (at 352).

Inherent jurisdiction and implied power

49. Section 3 of the *Criminal Appeal Act 1912* (NSW) provides "The Supreme Court shall for the purposes of this Act be the Court of Criminal Appeal, and the court shall be constituted by such three or more judges of the Supreme Court as the Chief Justice may direct.". The *Criminal Appeal Act* "does not create or constitute a new Court distinct from the Supreme Court, but merely directs that the Supreme Court shall act as the Court of Criminal Appeal" (*Stewart v The King* (1921) 29 CLR 234 at 240). The CCA is superior court of record with powers that inhere to a court of that description (*R v Jones; R v Hili (No 2)* (2010) 79 NSWLR 143 at [25]). However, the CCA is not the Supreme Court for all purposes. The CCA is a creature of statute exercising jurisdiction under the *Criminal Appeal Act* and the powers conferred on it by that Act and others, for example, the *Bail Act* and the *Court Suppression and Non-Publication Orders Act* (see *R v Burns* (1920) 20 NSWSR 351 at 358, *DPP (Cth) v Cassaniti* (2006) 204 FLR 152 at [12]-[13]).

50. The CCA does not have inherent jurisdiction of the kind found in s23 of the *Supreme Court Act*. Rather, it has implied powers in the exercise of jurisdiction under the *Criminal Appeal Act* (*JS v R (No 2)* (2007) 179 A Crim R 10 at [6]). In *Grierson v The King* (1938) 60 CLR 431 at 435 it was said

> "The [Criminal Appeal Act] is based upon the English Act of 1907. It does not give a general appellate power in criminal cases exercisable on grounds and by procedure discoverable from independent sources. It defines the grounds, prescribes the procedure and states the duty of the court. The statute deals with criminal appeals rather as a right or benefit conferred on prisoners convicted of indictable offences and sets out the kind of convictions and sentences from which they may appeal and lays down the conditions on which they may appeal as of right and by leave and the procedure which they must observe.... "

51. To date this Court has considered the question of whether a party to substantive proceedings can be denied access to evidence admitted in the proceedings in the context of specific legislation permitting such a procedure. The focus of those decisions has been whether such legislation is invalid by reason of Chapter III of the *Constitution* and *Kable v Director of Public Prosecutions* (1996) 189 CLR 51. These issues have been considered in the context of the essential feature of the exercise judicial power: "Judicial power involves the application of the relevant law to facts as found in proceedings conducted in accordance with the judicial process. And that requires that the parties be

given an opportunity to present their evidence and to challenge the evidence led against them." (*Bass v Permanent Trustee* (at [56]). In *Pompano* the plurality observed that "The rules of procedural fairness do not have immutably fixed content." (at [156]). However, the plurality went on to say that, as a general rule, the adversarial system "assumes … that opposing parties will know *what* case an opposite party seeks to make and *how* that party seeks to make it" (at [157], emphasis in the original).

52. In the UK, a procedure where evidence which has not been disclosed to another party is admitted and used by a court (with the use of special advocates) has been held by the UK Supreme Court to involve a departure from a fundamental common law and such a procedure could only be authorized by parliament (*Al Rawi and others v Security Service and others* [2012] 1 AC 531 at [21]-[22], [35], [41]-[42] [44], [47]-[48], [49], [67], [69], [71], [74], [76], [78], [86], [88], [106]-[107], [120], [192], [197]).[1] A majority of the UK Supreme Court either doubted that consent of the parties would permit such a procedure to be adopted or considered that consent of the parties did not permit such a procedure to be adopted in the absence of statutory authorisation (see at [46], [67], [69] per Lord Dyson, at [75] per Lord Hope, at [82], [84] per Lord Brown, at [98] per Lord Kerr).

53. There are limitations on the court exercising its inherent power to control its own procedure and "the court cannot exercise its power to regulate its own procedures in such a way as will deny parties their fundamental common law right to participate in the proceedings in accordance with the common law principles of natural justice and open justice" (*Al Rawi* at [21]-[22] per Lord Dyson, see also Lord Hope at [72]). Lord Dyson described the closed material procedure as "inherently unfair" and "certainly not necessary in the interests of justice" (at [42]).

54. It is submitted that a Court exercising inherent jurisdiction is not able to deny a party access to evidence admitted in the proceedings. Nor is such a power part of the implied powers of a statutory court. Such a procedure is contrary to the exercise of judicial power in Australia. If the Supreme Court does not have inherent jurisdiction to make an order denying a party to substantive proceedings access to evidence, then it follows that such a power cannot be implied into a statutory court's powers (as a corollary of the

[1] French CJ declined to consider whether the State and Territory Supreme Courts had the inherent power to direct the type of procedure adopted in *Al Rawi* (*Pompano* at [49]).

reasoning in *John Fairfax Publications Pty Limited v District Court of New South Wales* (2004) 61 NSWLR 344 at [38]).

55. There are instances where a court does view confidential material in the course of proceedings (see *Pompano* at [157]). For example, when determining whether a public interest immunity claim should be upheld in relation to production of documents (that is, an interlocutory proceeding) where it is necessary for the Court to view the material in order to determine the claim (*Sankey v Williams* at 46, *Alister v The Queen* at 469-470). Commercially sensitive information contained in documents in civil litigation is generally protected by confidentiality regimes which provide for access by the parties' legal representatives, experts and potentially in house counsel of the parties (the latter so that adequate instructions can be given). However, in both instances, it does not result in evidence being admitted in the substantive proceedings but not provided to a party at all (whether the party's legal representatives or the party itself).

The residual discretion (Ground 3)

56. When exercising jurisdiction under s5D of the *Criminal Appeal Act* the CCA retains a discretion to intervene and vary the sentence imposed on an offender (*CMB v Attorney General (NSW)* (2015) 256 CLR 346 at [32]-[33], [54]-[55]). This is described as the residual discretion. Relevant to the exercise of this discretion is the limited purpose of Crown appeals under s5D, namely to lay down principles and provide guidance to sentencing judges (*Green v The Queen* at [1]). There may be circumstances where the guidance provided to sentencing judges will be limited and the decision will occasion injustice if the appeal is allowed in which case it may be appropriate for the appeal to be dismissed in the exercise of the residual discretion (*Green* at [2]).

[redacted]

Procedural unfairness

58. The denial of procedural fairness to the appellant on the Crown appeal was a matter the Court (it is submitted) erroneously failed to consider when determining whether to exercise the residual discretion under s5D of the *Criminal Appeal Act*. It is submitted that allowing a Crown appeal in these circumstances is contrary to the limited purpose

of Crown appeals against sentence and guidance that may be provided to sentencing judges by allowing a Crown appeal "should not come at too high a cost in terms of justice to the individual" (*Green v The Queen* at [43]). In *Pompano*, even where legislation permitted significant modification of principles of procedural fairness, the plurality held that fairness to the disadvantaged party was, nevertheless, a matter the court could take into account in deciding whether to declare the information to be criminal intelligence (*Pompano* at [162]).

59. The denial of procedural fairness related to the most critical aspect of the appellant's subjective case and the feature which permitted the imposition of a lesser sentence and one which was (permissibly) disproportionate to the gravity of the offending. This unusual feature of the case militated strongly in favour of, if not compelled, dismissal of the Crown appeal.

60. There is a further aspect to the significance of procedural fairness and the exercise of the residual discretion which relates to public confidence in the justice system. *Green v The Queen* recognised that public confidence in the criminal justice system is a relevant to the exercise of the residual discretion in s5D of the *Criminal Appeal Act*. In *Green* the plurality referred to a category of case where the inadequacy of a sentence is so marked that it amounts to an affront to the administration of justice "which risks undermining public confidence in the criminal justice system" (at [42], [69]).

61. A denial of procedural fairness in proceedings, however, can also undermine public confidence in the justice system. As Gageler J recognized in *Pompano* "Justifications for procedural fairness are both instrumental and intrinsic. To deny a court the ability to act fairly is not only to risk unsound conclusions and to generate unjustified feelings of resentment in those to whom fairness is denied. The effects go further. Unfairness in the procedure of a court saps confidence in the judicial process and undermines the integrity of the court as an institution that exists for the administration of justice" (at [186] citations omitted).

62. The exercise of the residual discretion under s5D of the *Criminal Appeal Act* required consideration of public confidence in the justice system which, in the appellant's case, involved two issues – the extent of the inadequacy of the sentence in the context of the appellant's assistance and the procedural unfairness involved in the proceedings on the appeal. [redacted] but no consideration to the latter.

Executive conduct

63. The executive's position in respect of the appellant's sentence and its role in the denial of procedural fairness on the appeal was also relevant to the exercise of the residual discretion. Conduct of the executive is relevant to the exercise of the residual discretion in s5D of the *Criminal Appeal Act* (*Green v The Queen* at [37]; *CMB* at [38], [64]-[65], *R v JW* (2010) 77 NSWLR 7 at [88], [91]-[93]). An inconsistency in the approach taken by the executive at first instance and on the Crown appeal is relevant to the exercise of the discretion in s5D (*JW* at [93], *CMB* at [38], [64]-[65], [68]). Similarly, the executive's selective invocation of the jurisdiction of the CCA is relevant to the exercise of the discretion in s5D (*Green* at [37]). Further,

> "The courts of criminal jurisdiction, including courts of criminal appeal, have always been astute to exercise what can be described as a supervisory jurisdiction over the executive branch of government's involvement in the administration of criminal justice, with respect both to police investigations and to criminal prosecutions. This approach has been manifest in a number of different ways including the exercise of the inherent jurisdiction to prevent abuse of process or the exercise of the discretion to reject otherwise admissible evidence." (*JW* at [88]).

64. In the appeal against the appellant's sentence, one branch of the executive invoked the Court's jurisdiction to increase the sentence imposed on the appellant pursuant to s5D of the *Criminal Appeal Act* yet at the same time another branch of the executive objected to the appellant having access to evidence admitted in the sentencing proceedings regarding a matter which justified the imposition of what would be an otherwise disproportionate sentence under s23 of the *C(SP) Act*. The practice of having the Commissioner of Police separately represented is effectively protective; to ensure a degree of independence where information is sought to be protected from disclosure. The result of the executive's conduct in this case led to a denial of procedural fairness in relation to evidence critical to questions involved in the resolution of the Crown appeal.

65. Where material is properly withheld from a party on the basis of public interest immunity but that material is necessary for the fair trial of an accused, then the appropriate course is for the prosecution to abandon the prosecution or for the court to stay the proceedings (*Alister v The Queen* at 431, 457). Given the executive's desire to keep Ex C confidential, the appropriate course was for the Crown appeal to be stayed

or abandoned. In the appellant's case there was no need to resort to an application for a stay of proceedings given the width of the discretion in s5D of the *Criminal Appeal Act*.

Part VII: Orders sought

66. The appellant seeks the following orders:

    i. The orders made by the New South Wales Court of Criminal Appeal on 28 June 2017 and 17 July 2017 are set aside.

    ii. The Crown appeal is dismissed or alternatively, the appeal is remitted to the New South Wales Court of Criminal Appeal to be dealt with in accordance with law.

    iii. The contents of Ex C are suppressed until further order of the Court.

67. Ordinarily success on grounds 1 and/or 2 would result in the Crown appeal being remitted to the CCA. However, it is submitted that in the circumstances of the case, particularly given the conduct of the executive to date, the Crown appeal should be dismissed (s37 *Judiciary Act*).

68. If the Court sets aside the order made by the CCA on 28 June 2017 there will be no order prohibiting disclosure of the contents of Ex C (see order (i) above). In that event, the appellant will seek order (iii) above. The appellant does not know the contents of Ex C but it is understood that they are highly sensitive such that a suppression order under s77RE of the *Judiciary Act* is justified.

Part VIII: Estimate

69. The appellant estimates presentation of her oral argument may take up to 2 hours.

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