HIGH COURT OF AUSTRALIA

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File Number:	S126/2022
File Title:	Stanley v. Director of Public Prosecutions (NSW) & Anor
Registry:	Sydney
Document filed:	Form 27E - Reply
Filing party:	Appellant
Date filed:	21 Oct 2022

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IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

S126 of 2022

BETWEEN:

EMMA-JANE STANLEY
Appellant
And

DIRECTOR OF PUBLIC PROSECUTIONS (NSW)
First Respondent

DISTRICT COURT OF NEW SOUTH WALES
Second Respondent

APPELLANT'S REPLY

Part I: Certification for publication

1. This submission is in a form suitable for publication on the internet.

Part II: Reply to the First Respondent's argument

The nature of the task of ordering or not ordering an ICO

2. The First Respondent (**Director**) accepts that the decision to order, or decline to order, an ICO is a question that arises *after* an offender has been sentenced to a term of imprisonment (First Respondent's Submissions (**RS**) [10], [23], [25], [26], [32] and [40]). It serves to demonstrate that the task of determining such a question is a function that is properly characterised as discrete (CA [172], CAB 150-151 per McCallum JA; cf. CA [150]-[154], CAB 144 per Leeming JA; CA [139], CAB 139-140 per Basten JA). The Director also accepts that the assessment required by s 66(2) of the *CSP Act* is mandatory (RS [2]-[3]). A failure to undertake the discrete function in accordance with the mandatory forward-looking assessment required by s 66(2), which in turn informs the "paramount" consideration of community safety, amounts to jurisdictional error at least because it is a fundamental misconception of the function conferred (CA [184]-[185], CAB 155-156 per McCallum JA).

3. It is, however, not correct to suggest that the decision to order or decline to order an ICO arises after there has already been a determination of *full-time detention* (cf. RS [26]). Instead, the

sentencing court, having "sentenced an offender to imprisonment," is seized with the task of making the substantially binary choice between two alternative modes of imprisonment: full-time detention or an ICO (CA [173], CAB 151 per McCallum JA). No member of the Court of Appeal reasoned from the premise that the first two of the three steps identified in cases such as *R v Zamagias* [2002] NSWCCA 17 (RS [23]) involve a determination of *full-time* imprisonment. To the extent that the Director's submissions are founded on that premise, they should not be accepted (cf. RS [26]-[27]).

4. The error asserted by the Appellant, a failure to undertake a mandatory assessment informing the paramount consideration, may be distinguished from mere complaint about the way different considerations are prioritised (cf. RS [13]). Similarly, the failure in this case is quite distinct, for example, from a failure to have regard to a factor listed in s 21A of the *CSP Act*. It is clear from the terms of s 21A that it operates when the sentencing court is undertaking its function within jurisdiction "in determining the appropriate sentence for an offence". This may be contrasted with the restriction provided by ss 66(1) and (2) which arises before the sentencing court is exercising its jurisdiction to impose or decline an ICO.

Other textual considerations

5. The Director accepts that a failure to comply with ss 17I and 17J of the *CSP Act*, provisions which apply to the discrete task of imposing an ICO, may result in invalidation but for the sub-sections which specify that non-compliance with those provisions does not invalidate a sentence. The Director observes that a concern for invalidation arises "because of the importance of the need to promote compliance with the order" (RS [35]). Promotion of compliance with an ICO is of some import, but it may be contrasted with the significance of the task to be performed in assessing what Parliament prescribed as the "paramount" consideration in imposing an ICO, namely community safety. Contrary to the Director's submission, the absence of a savings provision does not represent an absence of concern about invalidation resulting from non-compliance (RS [26]). Such an argument, if taken to its logical conclusion, would create a drafting dilemma for Parliament: to include the savings provision both ignites and extinguishes the spectre of invalidity. Rather, the absence of a savings provision tends to confirm that non-compliance with s 66(2) should result in invalidity.

6. There is no doubt that s 5(1) of the *CSP Act* is a central provision in the sentencing regime,

encapsulating the fundamental principle that a sentence of imprisonment is a measure of last resort (RS [37]). However, even if Bell P is correct in construing the savings provision in s 5(4) as extending to non-compliance with s 5(1) (CA [57] CAB 111; cf. CA [170] CAB 149-150 per McCallum JA), that does not mean any non-compliance with s 5(1) is wholly immunised from judicial review for jurisdictional error as savings provisions have their limits (*FCT v Futuris Corp Ltd* (2008) 237 CLR 146 at [55]-[56]), (AS [54]).

7. That s 66(2) is not (or may not be) determinative goes to the question of materiality (cf. RS [29]). It is accepted that an error will not amount to jurisdictional error if a failure to comply with the condition could have made no difference to the decision that was made (*Hossain v Minister for Immigration and Border Protection* (2018) 264 CLR 123 per Kiefel CJ, Gageler and Keane JJ at [29]-[31]; Edelman J at [66]-[72]; Nettle J in qualified agreement with Edelman J at [42])[1]. However the question is not one of whether a failure to comply was determinative, but whether there is a realistic possibility that the decision in fact made could have been different had the breach of the condition not occurred (*Minister for Immigration and Border Protection v SZMTA* (2019) 264 CLR 421 at [45]). Given the centrality of the assessment mandated by s 66(2) to the task being undertaken, there is no issue in the Appellant's case that the failure to comply was material (CA [40] CAB 105).

8. It is not in dispute that the consequences of invalidity can be taken into account in determining whether jurisdictional error has occurred (RS [42]). However, the Court of Appeal was mistaken in its approach to this factor in this case (AS [61]-[65]). The Director fails to address the limited consequences of a finding of jurisdictional error in a case such as this: the matter would simply be returned to the District Court, the Appellant would be returned to bail, and her appeal would be redetermined. Further, there are significant consequences militating in favour of a finding of jurisdictional error: namely, the imprisonment of persons following a legally flawed sentencing procedure involving a failure to address itself to a mandatory consideration. The existence of other decisions of grave seriousness made by courts (cf. CA [158] CAB 145 per Leeming JA) does not deprive a decision to imprison the Appellant for at least two years of its import (cf. RS [15]-[16]).

[1] Materiality is part of the question of jurisdictional error and accordingly the concept of non-material jurisdictional error is misplaced (cf. CA [40] CAB 104-105 per Bell P).

9. A broad approach to jurisdictional error is not required for the Appellant to succeed in the circumstances of this case (cf. RS [17]). However, the bare privative clause in s 176 of the *District Court Act 1973* (NSW) should be strictly construed to give full effect to s 73 of the Constitution. To do otherwise would be to create islands of power immune from supervision and restraint, to permit the development of "distorted positions", and would remove from the New South Wales Supreme Court one of its defining characteristics (*Kirk v Industrial Court of New South Wales* (2010) 239 CLR 531 at [98]-[99]). This approach is consistent with that endorsed in *Minister for Immigration & Multicultural Affairs v Bhardwaj* (2002) 209 CLR 597 per Gaudron and Gummow JJ at [48] in the context of an administrative decision, which recognised that it is fundamental to the rule of law that persons affected by such decisions should have access to courts to challenge those decisions.

The Director's Notice of Contention should be dismissed

10. The Director is unable to point to any passage in Judge Williams' reasons where her Honour expressly addresses and records the outcome of an assessment made pursuant to s 66(2) of the *CSP Act* (CA [190] CAB 157). The Director asks this Court to infer that Judge Williams:

    a. Carried out the relevant assessment required by s 66(2); and

    b. Arrived at a particular outcome; and

    c. Factored that outcome into her ultimate decision,

    but chose not to even refer to that assessment or outcome in her judgment delivered three weeks after the hearing (in a case where the question of whether to order an ICO was the central issue).

11. Consistent with the conclusions of McCallum and Beech-Jones JJA (CA [161], [183]-[184] CAB 146, 155-156; CA [190]-[192] CAB 157-159), and the inclination of Bell P (CA [25] CAB 100-101), this Court should not accept that contention.

12. Judge Williams merely referred to the sentencing assessment report where the Appellant was considered a medium risk of reoffending (DCJ p 17, CAB 63, ABFM 126), but her Honour did not expressly indicate whether she agreed with that risk assessment, or whether her Honour's findings about the Appellant's prospects of rehabilitation impacted on it (DCJ p 25 CAB 72). As Beech-Jones JA observed, Judge Williams did not even indicate whether she was

dealing with the Appellant as a "dedicated gun runner or someone caring for five children who just wanted the guns out of her house" (CA [191] CAB 158). More importantly, whatever view Judge Williams took of the Appellant's risk of reoffending, her Honour made no reference as to how the two alternative methods of imprisonment would address that likelihood of reoffending (CA [184] CAB 155-156). It is not known if Judge Williams concluded that the deterrent impact of full-time detention would more effectively address the Appellant's likelihood of reoffending. Further, and by contrast, it is not known if Judge Williams concluded that intensive supervision in the community, combined with the undisrupted responsibilities of motherhood, would operate as a more effective means of addressing the likelihood of reoffending but that other factors led her to nonetheless dismiss the appeal. While there may be cases where the failure to record the finding about the assessment does not lead to a conclusion that the judge failed to undertake the relevant assessment (cf. RS [49]), the correct view in this case is that Judge Williams failed to undertake the task mandated by s 66(2) of the *CSP* Act (CA [192] CAB 158).

Conclusion

13. In determining whether to make an ICO in respect of the Appellant, an Aboriginal woman with young children, the sentencing judge did not consider the mandatory and paramount consideration of community safety, as assessed in accordance with s 66(2) of the *CSP* Act, and detained the Appellant for at least two years. The error amounts to jurisdictional error requiring review. The Court of Appeal's decision by majority to decline relief was erroneous and should be set aside.

21 October 2022

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