IN THE HIGH COURT OF AUSTRALIA
MELBOURNE OFFICE OF THE REGISTRY

No. M 1 of 2013

BETWEEN:

SAVERIO ZIRILLI (Applicant)

and

THE QUEEN (Respondent)

APPLICANT'S SUBMISSIONS

Date of document: 1 October 2013
Filed on behalf of: The Applicant
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PART I: SUITABILITY FOR PUBLICATION

1. The applicant certifies that this submission is in a form suitable for publication on the Internet.

PART II: CONCISE STATEMENT OF THE ISSUES PRESENTED

2. The single ground of this referred Application for Special Leave raises the following issues:

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a) Does a judge's refusal to hear from a prosecutor a submission as to sentencing range amount to (i) a breach of procedural fairness; and/or (ii) a failure on the judge's part to hear and consider a relevant consideration?

b) Are the answers to the questions stated in a) above affected by the fact that the putting of such a range by the Crown was part of a plea agreement with the applicant?

c) Does a submission as to sentencing range – in the form of a submission that sets
20 out the numerical parameters beyond which a sentence would be in error – amount to a submission of law?

PART III: NOTICES UNDER S 78B OF THE *JUDICIARY ACT 1903* (CTH)

3. The applicant certifies that the question whether any notice should be given under s 78B of the *Judiciary Act 1903* (Cth) has been considered. There is not thought to be a need for such a notice.

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PART IV: CITATION OF THE REASONS FOR JUDGMENT

4. The Court of Appeal's judgment is not contained in any authorized report. Its medium neutral citation is *Barbaro & Zirilli v The Queen* [2012] VSCA 288.

PART V: NARRATIVE STATEMENT OF FACTS

5. **Summary**: The applicant refers to, and adopts, the factual background as summarized in
40 the judgment of the Court of Appeal.[1] A further brief summary follows.

6. **Arraignment of applicant**: On 15 December 2011, the applicant pleaded guilty in the Supreme Court before King J to an indictment containing charges of conspiracy to traffic in a commercial quantity of a controlled drug (MDMA), contrary to ss 11.5(1) and 302.2(1) of the *Criminal Code* (Cth) (Charge 1); trafficking in a commercial quantity of a controlled drug (MDMA), contrary to s 302.2(1) of the *Criminal Code* (Cth) (Charge 2); and aiding and abetting an attempt to possess a commercial quantity of a border controlled drug (cocaine), contrary to ss 11.1(1), 11.2(1) and 307.5(1) of the *Criminal Code* (Cth) (Charge 3).

7. **Arraignment of Mr Barbaro**: The applicant's co-accused, Pasquale Barbaro, pleaded guilty to the same offences on a different indictment, the only difference being that he pleaded guilty as the principal offender in Charge 3. Mr Barbaro also had three other offences taken into account pursuant to s 16BA of the *Crimes Act* 1914 (Cth).

8. **The offending**: In short, the factual basis of the offending was as follows:

   a) Charge 1: On 28 June 2007, a shipping container of tinned tomatoes was imported into Melbourne. About 15 million tablets comprising about 1.4 tonnes of MDMA were concealed in the tomato tins. Mr Barbaro and the applicant conspired with others to traffic in the contents of the container.

   b) Charge 2: Police became aware of the container and took control of it. Unable to secure access, Mr Barbaro was left with a debt to the European suppliers in the amount of about 6.6 million Euros. Further quantities of MDMA were sent to assist Mr Barbaro discharge the debt. In total, about 1.2 million tablets were trafficked between February and August 2008. The applicant was aware of the level of indebtedness of Mr Barbaro and of the pressure brought to bear upon him as a consequence of the failed 2007 shipment. He was aware of the trafficking of the drugs by Mr Barbaro and assisted in the process. The role of the applicant was in the collection, transportation and distribution of commercial quantities of tablets in the period February to May 2008. He was only infrequently personally involved in the day-to-day trafficking of the pills by Mr Barbaro. The prosecution case was that that there were five particular occasions on which the applicant had direct involvement in the arrangements for the movement of tablets and that he twice participated in the movement of funds derived from the trafficking during the relevant period. The police, by use of surveillance, observed much of the trafficking.

   c) Charge 3: On 24 July 2008, a container destined for a legitimate coffee importer arrived in Melbourne. The container also carried three 50-kilogram bags of powder containing about 99 kilograms of cocaine. The applicant and others

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[1] *Barbaro & Zirilli v The Queen* [2012] VSCA 288 at [1]-[8] (general matters); [11], [13] & [26] (matters relevant to Ground 1).

travelled to Melbourne to assist Mr Barbaro in taking possession of the cocaine. A truck was arranged to transport the drug. Contacts at the docks were activated to assist with access. It was Mr Barbaro's plan to have the cocaine driven to Griffith once it was in their possession. The cocaine was discovered by the authorities, who then placed the container under surveillance. Those expecting the cocaine became aware of this. On 7 August 2008, Mr Barbaro contacted the European supplier by text and advised him to tell "the Gypsy" that the cocaine had been intercepted. The supplier responded that the situation with "the Gypsy" was very serious and that "the Gypsy" wished to be reimbursed for the cost price of the cocaine.

9. **Putting of range part of plea agreements**: In agreeing to plead guilty, the applicant and Mr Barbaro had each entered into an agreement with the Crown – confirmed in writing in a letter from the Crown to the solicitors for the applicants – that the prosecution would make a particular submission to the court on the sentencing range.[2]

10. Had the Crown been allowed by the judge to do so, the prosecutor would have submitted, in the applicant's case, a sentencing range of 21 to 25 years' imprisonment with a non-parole period of 16 to 19 years and, in Mr Barbaro's case, a sentencing range of 33 to 37 years' imprisonment with a non-parole period of 24 to 28 years.

11. **Judge's refusal to hear submissions on range**: On 19 and 20 January 2012, King J heard the prosecution opening and the pleas in mitigation on behalf of Mr Barbaro and the applicant. King J made it plain at the outset, and during the course of the hearing, that she did not want to receive submissions as to range "from anyone". That sentiment was repeated to counsel for Mr Barbaro and to counsel for the applicant. At stages throughout the plea hearing her Honour said:

- "... I make it clear that I do not seek and will not seek any indication of sentencing range from anyone." (T 6)
- "Can I say I will not take them into account. I will presume they've not been given. I did not ask for them, there is no basis for you to put them before me." (T 6)
- "I want everyone to understand I will not be looking at the *MacNeil-Brown* figures that have been put forward." (T 6-7)

[2] *Barbaro & Zirilli v The Queen* [2012] VSCA 288 at [11], [13]; 19 January 2012, plea, T 5 (20) – 6 (10); 20 January 2012, T 115 (5) – (7) and 125 (10) – (21). Whereas the letter to Mr Barbaro's solicitors was in materials provided to Her Honour, the letter provided to the applicant's solicitors was not: 19 January 2012, plea, T 6 (10); 20 January 2012, T 155 (29).

- "Generally as a court, we have a policy that we tend not to ask for any sentencing indications or ranges. It's not – I'm unaware of any judge of this court who requests it." (T 7)
- "And you do understand what I've said about sentencing range?" (T 115)
- "You will not address me on range. You can only do that if I request it." (T 154)
- "If you think I'm going to fall into appealable error then I don't think you've got the right to say that because you have no idea what it is that I am contemplating in respect of your client." (T 154-155)
- "I do not wish to know ranges from the Crown. I don't care what their ranges are." (T 155)
- "When [the prosecutor] puts on the red robes of this Court and becomes a judge of this court, then his recommendation on sentence is something that will have relevance." (T 155-156)
- "What part of *MacNeil-Brown* doesn't anyone understand?" (T 178)

12. **Submissions at plea by counsel for the applicant:** At the plea the applicant's counsel submitted that there were two reasons why her Honour should consider the prosecution submission as to range. First, it was submitted that "it's a relevant consideration."[3] Secondly, it was argued that it should be heard and considered "when it's part of a plea agreement that this is what's going to be said."[4]

13. Counsel readily accepted her Honour's comment that such a range cannot bind the court, but pointed out that "...there's a difference between not binding the court and informing the court based on their considerations..."[5] He also argued that "...if the Crown is not allowed to honour aspects of a plea agreement, the system falls apart."[6] (That is, people will be discouraged from entering into agreements to plead guilty).[7] Each of the above submissions by counsel for the applicant at the plea are maintained on this application.

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[3] 20 January 2012, plea, T 156 (12). The Court of Appeal erroneously state at paragraph [14] of its reasons that no submission as to the prosecution submissions on range being a relevant consideration was made before the sentencing judge.
[4] 20 January 2012, plea, T 156 (14).
[5] 20 January 2012, plea, T 156 (22).
[6] 20 January 2012, plea, T 156 (28).
[7] Similarly, the prosecutor drew the judge's attention, at the outset of the plea hearing, to the fact that a large number of co-accused who had also been provided with such ranges would be interested in the outcome of these proceedings: 19 January 2012, plea, T 6 (22) – 7 (8).

14. **Sentences**: On 23 February 2012, her Honour imposed the following sentences of imprisonment:

Charge	Zirilli	Barbaro
1 Conspiracy to traffick CQ MDMA	20 yrs	Life
2 Trafficking CQ MDMA	15 yrs	23 yrs
3 Aid & abet attempt possess CQ cocaine	13 yrs	20 yrs
Total effective sentence (TES):	26 yrs[8]	Life
Non-parole period (NPP):	18 yrs	30 yrs
Section 6AAA statement[9] – TES:	30 yrs	Life
Section 6AAA statement – NPP:	24 yrs	Life

15. **No reference to range in sentencing reasons**: Consistently with the approach of her Honour in the course of the plea, no reference was made to the Crown's sentencing range in the lengthy reasons for sentence.[10]

16. **Sentences imposed compared to Crown's sentencing range:** The total effective sentence and the non-parole period imposed on Mr Barbaro were beyond the range suggested by the prosecution in its letter. The total effective sentence imposed on the applicant was beyond the range suggested by the prosecution in its letter and within, but at the upper end of, its range as to the non-parole period (and substantially higher than counsel for the applicant had submitted).

[8] The judge directed that the sentence on Charge 3 commence immediately; that the sentence on Charge 2 commence two years after the commencement of the sentence on Charge 3 (making four years of effective cumulation upon the sentence on Charge 3); and that the sentence on Charge 1 commence six years after the commencement of the sentence on Charge 3 (making 13 years of effective cumulation upon the sentence on Charge 3, or nine years of effective cumulation upon the combination of the sentences on Charges 2 and 3); making a total effective sentence of 26 years' imprisonment in respect of which a non-parole period of 18 years was fixed and 102 days of pre-sentence detention were declared.

[9] Section 6AAA of the *Sentencing Act* 1991 (Vic) provides that if, in sentencing an offender, a court imposes a less severe sentence than it would otherwise have imposed because of a plea of guilty, the court must state the sentence and the non-parole period, if any, that it would have imposed but for the plea of guilty.

[10] *DPP v Barbaro & Zirilli* [2012] VSC 47.

PART VI: APPLICANT'S ARGUMENT

Ground 1: *The Court of Appeal erred:-*

a) *in failing to hold that the primary judge erred in refusing to hear the prosecution's submission on the appropriate sentencing range;*
b) *in holding that there was no denial of procedural fairness in the primary judge's refusal to hear the prosecution's submission on the appropriate sentencing range, and*
c) *in holding that the prosecution's submission on sentencing range was not a relevant consideration in sentencing.*

17. **Applicants submissions in the Court of Appeal**: In the Court of Appeal, it was submitted that the judge's remarks in the course of the plea betrayed a material misunderstanding of *R v MacNeil-Brown & Piggott* (2008) 20 VR 677 *("MacNeil-Brown")*. It was submitted that nowhere in its judgment did the majority in *MacNeil-Brown* state that it was a *necessary* pre-condition of a court's being informed of the Crown's range that the court invite the submission. Indeed, a prosecutor is at liberty, it was pointed out, to proffer a range so as to avoid the perceptible risk of error; and defence counsel are seemingly at liberty *simpliciter* to do so.

18. Further, it was stressed on behalf of the applicants in the Court of Appeal that the majority in *MacNeil-Brown* determined that a submission as to range is a submission of law.[11] *Ex hypothesi*, if thought relevant by counsel or necessary to advance the interests of his or her client, there is, it is submitted, no more a warrant for a judge's refusal to hear, or to consider, a submission on sentencing range than there is to decline to consider any other matter of law.

19. But whether or not a submission on range is regarded as a submission of law, it was submitted that it must be regarded as a relevant consideration, and to decline to hear such a submission, particularly in circumstances where the making of such a submission was part of a plea agreement and where the sentence imposed exceeds the range that was to be put by the prosecution, is as clear an example of a denial of procedural fairness as one can imagine. It was submitted that it cannot but result in material error, as it did here.

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[11] *R v MacNeil-Brown & Piggott* (2008) 20 VR 677 at 691 [42] per Maxwell P, Vincent and Redlich JJA ("A submission on sentencing range is a submission of law. It identifies the ambit within which – according to the submitting party- the sentencing discretion may lawfully be exercised in the circumstances of the particular case."); cf: 711[127] per Buchanan JA ("...the specification of the limits of a range is unlike a legal submission, which usually is capable of being broken down into its constituent parts.") and 713[141] per Kellam JA ("I do not agree that such a submission is a submission of law").

20. **Impugned passages in the reasons of the Court of Appeal**: The Court of Appeal did not agree with the foregoing analysis. The central passages of the Court's reasons impugned by the ground of appeal are set out below:[12]

> [20] 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, for example, counsel wished to make a submission on a legal issue by reference to authorities with which the judge was entirely familiar, it would be wholly unexceptionable for the judge to decline to hear it. Taking that course carries with it the risk that the judge may fall into error, but that again is not a question of procedural fairness.
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> [21] The hearing rule is, of course, directed at ensuring that a person whose rights may be affected by a decision has a reasonable opportunity to know, and to meet, the case against him/her. The rule focuses attention on adverse matters on which the decision maker will be relying, and requires that the person affected be given proper notice of all such matters and a reasonable opportunity to respond to them. Self-evidently, a matter which the decision maker expressly declines to consider – in this case, a submission on sentencing range – does not attract the rule. In the present case, the appellants had full notice of all of the adverse matters which the prosecution wished the judge to take into account. No question of natural justice arose.
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> [22] For similar reasons, a submission on sentencing range is not a 'relevant consideration' in the public law sense. Such a submission addresses the legal conclusion reasonably open to the decision maker once all of the relevant factual matters – the 'legitimate considerations' – have been taken into account and evaluated in the light of the applicable sentencing principles. And, as we have made clear, the view of the Crown as to the available sentencing range is not a matter which a sentencing judge is bound to take into account.
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> [23] There was, of course, nothing to prevent counsel for the appellants making their own submissions to the judge on sentencing range. Senior counsel for Mr Barbaro (who did not appear on the appeal) did not make a range submission. Nor did he raise any question about the judge's rejection of the Crown submission, saying instead that he could 'understand [her Honour's] reluctance to talk about the Crown range'. Senior counsel for Mr Zirilli (who also appeared on the appeal) did make a submission on range and, for this purpose, was permitted to make reference to the Crown submission. Accordingly, no question arises of any failure to consider submissions advanced by the appellants....
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> [26] On the plea, senior counsel for Mr Zirilli told the judge that the proposed Crown submission on range was 'part of a plea agreement' between the appellants and the Crown. Her Honour correctly pointed out, however, that such an agreement 'does not bind the Court in any way, shape or form'. Counsel conceded at the time that this was so. We note the recent announcement by the Director of Public Prosecutions that the Crown's position on sentencing range will henceforth play no part in plea negotiations.

21. **Errors in the reasons of the Court of Appeal**: It is submitted that the passages extracted above disclose a number of errors. ***First***, there is an inherent circularity underpinning the Court of Appeal's reasoning in paragraphs [20] and [21]. To state that "[n]o question of procedural fairness arises if a judge declines to hear a submission of law which he or she

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[12] *Barbaro & Zirilli v The Queen* [2012] VSCA 288 at [20]-[23] & [26] (footnotes omitted).

adjudges to be unnecessary or unhelpful" is to misapprehend the very nature of the hearing rule – namely, to avail a party the opportunity to be heard.[13] To state that a judge is at liberty to pre-judge what he or she determines to be relevant, and to foreclose a party the opportunity to be heard accordingly, is the very vice (or at least one of the vices) against which the hearing rule is said to guard. This is the case whether or not a submission on range is properly regarded as a "submission of law."[14]

22. ***Secondly***, to reason in paragraph [21] that the "...hearing rule....focuses attention on adverse matters" and thus "a matter which [a] decision-maker expressly declines to consider – in this case, a submission on sentencing range – does not attract the rule" is to restrict unduly the nature of the rule; and, again, to beg the question. It also betrays a reliance upon a distinction that is more apparent than real. Counsel shut out by a judge from making a submission thought by a party to be *favourable* is forced into adopting a course potentially *adverse* to that party's interest.

23. ***Thirdly,*** it is contended that the Court of Appeal erred at paragraph [22] in declining to accept that a submission on sentencing range is not a "relevant consideration" in the public law sense.

24. It had been made clear to the judge that the applicant had pleaded guilty on the understanding that the Crown would make a particular submission on range. Further to the submissions on behalf of the applicant identified at paragraphs [12] and [13] above, it was submitted that among the reasons why the judge should hear the prosecutor on the sentencing range were that he was well placed to assist the Court given his instructions and his comprehensive knowledge of the (massive) brief.[15] See further the authorities referred to at paragraph [33] below.

25. Whether or not the analogy with a relevant consideration in the public law sense is sound, the prosecution submission on range was surely a "material consideration" that had not

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[13] *Kioa v West* (1985) 159 CLR 550 at 582-586 per Mason J and 628-629 per Brennan J; *VEAL v Minister of Immigration and Multicultural and Indigenous Affairs* (2005) 225 CLR 88 at [15].
[14] *Barbaro & Zirilli v The Queen* [2012] VSCA 288 at [20]. See paragraphs [18] and [19] above. The Director suggested at the special leave hearing that the majority holding in *R v Mac-Neil Brown* (that a submission on range is a submission of law) might be at odds with this Court's reasons in *Hili v The Queen* (2010) 242 CLR 520: *Zirilli & Barbaro v The Queen* [2013] HCA Trans 184 at 495-500.
[15] 20 January 2012, plea, T 155 (16) – (30).

been considered, such as to enliven appellate review of a discretionary judgment pursuant to the established principles set out in *House v The King*.[16]

26. ***Fourthly***, the Court of Appeal errs at paragraph [23] in the reliance placed on the fact that counsel for the applicant "...did make a submission on the range and, for this purpose, was permitted to make reference to the Crown submission." This ignores both the full course of what occurred in the Court below and the true nature and purpose of a submission on the range.

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27. First, the judge refused to hear – and expressed a determined view that she would disregard – any attempt by the prosecutor or defence counsel to advance a submission as to range. It was an unambiguous refusal to permit counsel to be heard. It is apparent from what counsel for Mr Barbaro said on the plea[17] that he understood the judge to have ruled that he not put an "indication of sentencing range", let alone make a submission as to what would be an appropriate sentence. Counsel for Mr Barbaro complied with the ruling.

28. Secondly, when counsel for the applicant sought leave to refer to the Crown's submission on range in order to make his own submission, the judge corrected counsel and said, "The
20 Crown have submitted nothing to me."[18] Given her Honour's remarks on the plea and the failure to refer to any submissions on range in her reasons for sentence, it is plain that the judge did not even consider the limited submissions on range made by counsel for the applicant.[19]

29. Thirdly, and critically, a submission on the range is not simply the assertion of raw numbers at the top and bottom of the said range. It requires a "clearly articulated" submission as to the matters justifying the range.[20] Amongst other things, it puts the opposing party and judge on inquiry as to the underlying reasons for the range. Her Honour deprived herself of this process in her instinctive synthesis.

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[16] (1936) 55 CLR 499 at 505 per Dixon, Evatt and Mc Tiernan JJ.
[17] 19 January 2012, plea, T 64.
[18] 20 January 2012, plea, T 157 (29).
[19] 20 January 2012, plea, T 157 (30) – 158 (18).
[20] *R v MacNeil-Brown & Piggott* (2008) 20 VR 677 at 681[12] per Maxwell P, Vincent and Redlich JJA.

30. In the circumstances of this case, the failure to hear the prosecutor's submissions on range was most unfair. That denial was to the disadvantage of Mr Barbaro and the applicant, because the prosecutor was particularly well placed to explain and justify the Crown's range – which, in each case, was markedly less than the sentences the judge imposed. Had her Honour listened to and considered the Crown's submissions on range (ie: not simply the raw numbers, but the supporting reasons) she may well have imposed substantially shorter sentences.

31. ***Fifthly***, the Court of Appeal's remark, at paragraph [26], that the sentencing judge "correctly pointed out that such an agreement 'does not bind the Court in any way, shape or form'" is, with respect, not to the point. Of course her Honour was not *bound* by any agreement between the parties as to range. That was accepted by counsel for the applicant on the plea[21] and is, of course, settled law.[22]

32. But the fact that an agreement as to range cannot bind a Court does not undermine the contention that her Honour was at the very least bound to consider carefully a Crown submission on range and to take such a submission into account in the exercise of her intuitive synthesis. This is entirely consistent with this Court's holding in *GAS & SJK v The Queen* (2004) 217 CLR 198 at 211 [31] that:

> "*There may be an understanding between counsel as to the submissions of law that they will make*, but that does not bind the judge in any sense." (emphasis added)

33. That there is no tension between a Court being bound to consider a submission on the range and such a range not being binding is illustrated, for example, by the reasons of McLellan CJ at CL (with whom Hislop and Johnson JJ agreed) in *Ahmad v The Queen* [2006] NSWCCA 177 at [23]:

> With respect to any aspect of the agreement which relates to the appropriateness of any particular sentence, or a component of it, the Crown's agreement is confined to an undertaking to make a submission to the sentencing judge consistent with the terms of that agreement. The agreement can neither bind the judge nor be given any greater weight than is appropriate to a submission of counsel ***with knowledge of the facts relevant to the offence and the offender. It must of course be carefully considered*** but carries no greater weight than any other submission which the Crown may make in the sentencing process. If it were otherwise the fundamental assumption that it is for the judge to determine an appropriate sentence would be seriously compromised. (emphasis added.)[23]

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[21] See paragraph [13] above.
[22] *GAS & SJK v The Queen* (2004) 217 CLR 198 at 211 [31] (the Court).
[23] See also, for example: *R v Mokbel* [2012] VSC 255 at [48] and *Mokbel v The Queen* [2013] VSCA 118 at [102].

34. **Conclusion**: The sentencing judge deprived both the applicant and Mr Barbaro of judicial consideration of submissions by the Crown that accorded with, or largely accorded with, their own counsel's submissions on range.

35. In deciding that the sentencing judge had, in the circumstances, not deprived the applicant and Mr Barbaro procedural fairness on a material question of law, and/or not deprived them and the Crown the opportunity fully to advance and have considered a "relevant consideration", the Court of Appeal, it is submitted, erred.

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36. This Court should hold that there was an error in the sentence first imposed[24] because a relevant or material consideration was not considered, so as to vitiate the exercise of the sentencing discretion.

37. Further, there was a denial of procedural fairness. It cannot be said by the respondent that the same sentences would inevitably have been imposed if procedural fairness was accorded to the applicant.[25]

PART VII: APPLICABLE LEGISLATION

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38. Not applicable.

PART VIII: ORDERS SOUGHT

39. The applicant seeks orders that:
    a) special leave to appeal granted;
    b) the appeal be allowed and the orders of the Court of Appeal be set aside; and
    c) the matter be remitted to the Court of Appeal for further hearing in accordance with the reasons of the Court.

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[24] *Criminal Procedure Act* 2009 (Vic), s 281 (1) (a).
[25] *Stead v State Government Insurance Commission* (1986) 161 CLR 141 at 145-146 per the Court; *Ucar v Nylex Industrial Products* (2007) 17 VR 492 at 514 [59] – 526 [97] per Redlich JA.

PART IX: ESTIMATE OF TIME FOR ORAL HEARING

40. The applicant estimates that one and a half hours will be required to present the oral argument.

Dated this 1st day of October 2013.

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