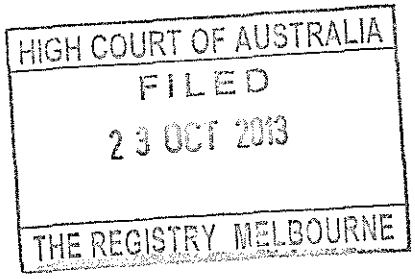
IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

No. M1 of 2013

BETWEEN:



SAVERIO ZIRILLI
Applicant

and

THE QUEEN
Respondent

RESPONDENT'S SUBMISSIONS

Part I - CERTIFICATION

1. These submissions are in a form suitable for publication on the internet.

Part II - ISSUES

2. The issues raised by the applicant's submissions at [2(a)] and [2(b)] are affected by an incorrect characterisation of the discussions between the parties leading to his guilty pleas and what transpired at the sentence hearing. When this is correctly understood, much of the case advanced on behalf of the applicant lacks a necessary factual foundation. In particular, the Crown, prior to the sentence hearing, made it clear to senior counsel appearing for the applicant at the sentence hearing that no Crown submissions on sentencing range would be made if the learned sentencing judge did not wish to hear them. This is addressed in Part IV below at [6] to [14].

3. The third issue in the applicant's submission at [2(c)], being a collateral question as to whether or not a submission as to sentencing range is a submission of law, is not separately raised by the terms of the order made by this Court on 16 August 2013 referring this matter to an enlarged Full Court, that order being confined to Ground 1 of the original application for special leave to appeal. Nor is this addressed by the applicant in his submissions. It does not appear to be an issue which requires determination in this application.

Commonwealth Director of Public Prosecutions
15/460 Lonsdale Street, Melbourne, Vic 3000

Telephone: 9605 4333
Fax: 9670 4295
Ref: Jan McAlpine

Part III - SECTION 78B *JUDICIARY ACT* 1903 (CTH)

4. It is certified that the respondent has considered whether any notice should be given in compliance with section 78B of the *Judiciary Act 1903* and determined that notice is not necessary.

Part IV - FACTS

The facts as to the offending

5. The applicant's submissions at [5], [7] and [8] sufficiently summarise the factual background. Paragraph [6] correctly records the three counts to which the applicant pleaded guilty.

Facts as to the plea negotiations, Crown range indication & sentence proceedings

6. The applicant's submissions, on several occasions, refer to a joint position involving both the applicant and Barbaro, which tends to suggest that this somehow was a combined process. In fact it was entirely separate, with each applicant separately represented by different legal firms and counsel throughout the totality of plea negotiations, which were concluded at different times. The plea negotiations were conducted entirely separately from each other, without any information being provided by the Crown in relation to the sentencing range relevant to the other. The applicant's filed submissions should be confined to the case of the applicant and not mixed or confused with the case for Barbaro.

7. The accuracy of the account of events leading up to the sentence hearing appears to have been adversely affected by the change in counsel representing the applicant. The applicant at arraignment on 15 December 2011 was represented by senior counsel who had earlier been engaged in all plea negotiations up to that time. Different counsel (senior with junior) were only later briefed for presentation of the plea submission in January 2012 and subsequently for the appeal to the Victorian Court of Appeal, neither of whom had been involved in any earlier plea negotiations on behalf of the applicant. A third lead counsel now appears for the applicant in this Court.

8. The Crown at no stage, in correspondence or otherwise, went further than to indicate to the applicant's then legal representatives what its sentencing range was. This indication was given in the context of the dual expectations set out in the majority decision in *R v MacNeil-Brown; R v Piggott* (2008) 20 VR 677 (***MacNeil-Brown***) at 678 [3], namely that it is reasonable for a sentencing court to expect a prosecutor to make a

submission on sentencing range if the court requests it, or if the prosecutor perceives a significant risk that the court will fall into error regarding the applicable range if the submission is not made.

9. Senior counsel for the applicant retained for the sentence hearing (and later for the Court of Appeal) sought to have the Crown adopt a stance going beyond *MacNeil-Brown*. Instead of that being agreed to, the approach dictated by *MacNeil-Brown* was expressly adhered to. This final position is made clear by the following exchange of correspondence:-[1]

(a) In an email sent by senior counsel for the applicant at 1.51 pm on Monday, 18 January 2012 to counsel for the Crown (being the day before the commencement of the sentence hearing on 19 January 2012), he sought to have included in the Crown plea summary provided to the sentencing court the following sentence:

> "*...The CDPP considers that the appropriate sentence range to be a head sentence of 21-25 years' imprisonment and a non-parole period of 16-19 years*".

That email attached and referred to a letter from the Melbourne Office of the Commonwealth Director of Public Prosecutions (**the Melbourne CDPP**) dated 7 October 2011, which contained that sentencing range indication.

(b) In an email sent at 2.38 pm the same day, Monday 18 January 2013, counsel for the Crown replied, *inter alia*:-

> "*The Plea summary would never have included this indication. The **Judge will be asked, at the most appropriate time** - and hopefully the most propitious time for your client - **whether she wishes to be informed of the range**. It would be urged that she should, given the seriousness of the matter, its complexity, and the fact that the CDPP have been obliged to consider the relative position of Mr. Zirilli vis a vis a large number of accused (most standing trial elsewhere). Issues of parity and factual difference are more complex than normal. The CDPP assessment has been made from a position of global appreciation of the facts of the cases of numerous accused persons - as well as the individual position of your client.*" [Emphasis added]

10. It was therefore clear and explicit that there was no willingness, let alone agreement on the part of the Crown, to provide the sentencing range if the sentencing judge did not wish to receive it. References in the applicant's submissions to an agreement to make

[1] Copies of this email correspondence will be available at the hearing if disputed by the applicant, or otherwise required, or can be provided sooner if required.

submissions as to sentencing range are misleading insofar as they suggest any willingness to do so when not sought by the sentencing judge.

11. It follows that there was no basis for any expectation, let alone any legitimate expectation, that the Crown sentencing range would form any part of the Crown submissions on sentence in the absence of either of the *MacNeil-Brown* obligations arising. It also follows that the applicant's characterisation of the position between the parties in his submissions at [9] is incorrect, and the submissions based upon that characterisation are correspondingly misplaced.

12. To the extent that the passages of the sentence hearing transcript referred to in the applicant's submissions at [12]-[13] and referenced at [24], quoting from arguments being advanced on his behalf by his then senior counsel, may have given the learned sentencing judge (and this Court) the impression that the Crown had agreed to make submissions as to range irrespective of whether the sentencing judge wished to hear them, that impression does not reflect the true position.

13. As events transpired, the learned sentencing judge made clear from the outset that her Honour did not wish to be provided with the Crown sentencing range, before any invitation to provide it was extended by the Crown. No basis for any perception of a significant risk of relevant sentencing error thereafter arose which triggered the second limb of the *MacNeil-Brown* obligations.

14. Senior counsel for the applicant in any event provided the learning sentencing judge with the Crown range and addressed upon it.[2]

Part V - CITATION OF REASONS FOR JUDGMENT

15. The applicant's submissions at [3] correctly cite the Court of Appeal's judgment, which remains unreported. The media neutral citation for the sentence judgment is *DPP v Barbaro & Anor* [2012] VSC 47.

Part VI - ARGUMENT

MacNeil-Brown, Crown sentencing ranges & sentencing practice in Victoria

16. It is important to place what transpired in this case into a sentencing practice context. The majority decision in *MacNeil-Brown* delivered in September 2008 produced a significant practical change in the conduct of sentencing plea proceedings in Victoria.[3]

[2] Plea transcript, 20.01.12, at p 157 line 30 to 18 line 11.

17. The long-established practice in Victoria prior to *MacNeil-Brown* was that the sentencing judge generally did not seek assistance from the Crown by being informed as to what should be the actual duration of any potential custodial sentence, or of any broader custodial sentencing range.

18. In *MacNeil-Brown* it was noted that the provision of a sentencing range to assist the Court had previously been sanctioned: 20 VR 677 at [16]-[21] and [34]-[36]. The change was that this was required of the Crown if sought by a sentencing judge, as well as the Crown being required to provide a range if there was perceived a substantial risk of error as to the applicable range in the absence of such a submission.

10 19. Prior to *MacNeil-Brown,* submissions were regularly made and received as to whether a custodial sentence was appropriate and, if so, whether the particular circumstances of the offender and the offending warranted a substantial or lesser sentence as against the statutory maximum, without any more precise quantification. Those submissions frequently referred to the actual terms of sentences previously imposed upon other offenders in relevant circumstances.

20. Following *MacNeil-Brown*, the Melbourne CDPP invariably prepares an indicative sentencing range which is available to be provided to a sentencing judge if such assistance is sought. That range would also be available to be referred to by the prosecutor if it was perceived that a significant risk error as to the applicable range.

20 21. By 2011, *MacNeil-Brown* had resulted in a practice of defence practitioners seeking a prosecution sentencing range for their clients in advance of the plea, and for those figures to then be provided by the prosecuting authorities. Since October 2012, providing this information to the defence in advance of a guilty plea has not been the practice of the Victorian State OPP.[4] The practice has been continued by the Melbourne CDPP. The sentence range information is not provided by the Melbourne CDPP otherwise than as advance notification of the prosecution position responsive to *MacNeil-Brown*. The information is never provided upon the basis that the prosecution will make a submission as to that range otherwise than in accordance with *MacNeil-Brown*.

---

[3] An application by MacNeil-Brown for special leave to appeal to this Court, supported by the respondent, the Victorian Director of Public Prosecutions, was unsuccessful: *MacNeil-Brown v The Queen* [2008] HCATrans 411 (5 December 2008) per Hayne and Kiefel JJ.

[4] The Court of Appeal noted that the Victorian Director of Public Prosecutions directed, in October 2012, that *"the Crown's position on sentencing range will henceforth play no part in plea negotiations"*: [2012] VSCA 288 at [26] and footnote 19.

22. It is important to note that any range formulated by the Crown may be subject to change, should the necessity arise. The unexpected occurrence of features of mitigation or aggravation during the course of a plea hearing, or indeed an error made by the Crown in originally formulating its range, may necessitate the Crown changing its view as to the appropriate sentencing range.

23. The Crown's overriding duty is to assist the court. A person being sentenced and his/her legal representatives cannot and should not assume that an earlier indication of a sentencing range will remain unchanged, nor that a court is bound to accept the Crown range. It is incumbent upon defence lawyers to advise their clients accordingly: see *Talbot v The Queen* [2012] VSCA 118 at [47-50]. In exceptional circumstances, the Crown may even depart from a range given at sentence on a Crown inadequacy appeal, because the ultimate responsibility for the imposition of an appropriate sentence rests with the sentencing judge rather than the prosecutor, but subject to correction on appeal: see *R v Henderson; Ex parte Attorney-General (Qld)* [2013] QCA 63 at [51] (special leave refused 11 October 2013: [2013] HCATrans 241).

24. It is the experience of the Melbourne CDPP that judges in the County Court more regularly seek assistance, though not in every instance. Senior counsel for both applicants variously acknowledged this.[5] Her Honour's reluctance to hear the Crown's sentencing range was therefore unsurprising, even though her Honour ultimately did hear what the Crown sentencing range was from senior counsel for the applicant.

25. Since the handing down of *MacNeil-Brown*, there have been cases in which sentencing ranges were prepared by the Crown for the court, and duly communicated to defence practitioners, but which were ultimately never proffered to the sentencing judge. The formulation and provision to defence practitioners of a *MacNeil-Brown* sentencing range offers no guarantee that it will ever be put before a court, or that it will remain unchanged, or that it will be accepted by a court.

26. In light of the above and contrary to the burden of the applicant's submissions, the legal significance of a *MacNeil-Brown* range when provided to a sentencing court should not be exaggerated, especially following the subsequent decision in *Hili v The Queen* (2010) 242 CLR 520. Consistently with *Hili* at [54]-[56], a Crown range cannot exceed the significance of prior intermediate appeal court sentence decisions as a yardstick against which to examine a proposed sentence.

[5] Mr Dunn QC (for Barbaro) at page 115 line 10; Mr Croucher SC (for Zirilli) at pages 157 - 158, lines 2-3.

27. A Crown range cannot and does not bind, as opposed to guide or assist, a sentencing court as to what the upper or lower limits of a particular sentence might be. If a sentence falls outside such a range, that may or may not mean that there is manifest excess or inadequacy, but if it does, that will be because of all of the circumstances, not the range *per se*.

28. As a matter of first principle, a sentencing court cannot or should not be compelled to hear from the Crown on sentencing range if it is not required; see *R v Felicite* [2011] VSCA 274; (2011) 211 A Crim R 266 at [29]. Indeed, the respondent would prefer it if the provision of a range on judicial request was not mandatory, but rather was permitted if requested or otherwise considered appropriate, in accordance with any other submission on sentence by the Crown.

29. In the above context, the applicant's submissions at [17]-[33] exaggerate the role and significance of a Crown sentencing range, or indeed any such range advanced on behalf of an offender. While such a range when proffered undoubtedly represents a submission as to what a party considers an appropriate sentence should approximate, it is overstating it to submit, in effect, that "*a range*" put forward by a party is necessarily "*the range*". A proffered range may not represent the legally permissible upper and lower limits reflecting the outer limits of "*the generous ambit of reasonable disagreement*": *Norbis v Norbis* (1986) 161 CLR 513 at 540, per Brennan J.

30. Exceeding the sentencing range suggested by the Crown will not necessarily constitute manifest excess, nor falling below it manifest inadequacy. That is especially so when a suggested range necessarily is provided prior to any findings of fact made by the sentencing judge, which may well justify a more severe or more lenient sentence than the range proffered. As was noted in *MacNeil-Brown* 20 VR 677 at [5], [12] and [68]-[69], a range proffered at a sentence hearing can only ever be *indicative* of the limits within which the sentencing discretion may lawfully be exercised.

31. It is important that a proffered range represents assistance to a sentencing court, not a fetter or restraint on the exercise of this most difficult discretion.

Procedural Fairness

32. The questions referred to this enlarged Full Court were confined to the impact of the sentencing court's refusal to hear the prosecution's submissions on sentencing range. The applicant's extraction of sentencing hearing transcript passages in his submissions at [11] fail to differentiate between the sentencing judge initially having resisted provision of the prosecution sentencing range by any party, and a claimed broader

refusal to hear any submissions on range by defence counsel. The latter refusal was not maintained by her Honour because the former senior counsel for the applicant did end up making those submissions as well as general submissions regarding the duration of sentence.[6] The content and breadth of those submissions made by senior counsel for the applicant was not confined by her Honour.

33. Contrary to the applicant's submissions at [21]-[22], there was no error on the part of the Court of Appeal in concluding at [20] that 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. Nor did the Court of Appeal err at [21] in correctly noting that that the focus of the law of procedural fairness is on an opportunity to meet adverse matters, that is, the case put against a party, in circumstances where the applicant had full notice of all adverse matters that the prosecution wanted the judge to take into account. If refusal to hear from a party at a sentence hearing results in a sentencing error, the remedy lies in an appeal as to the result, not a public law complaint about the process, or else the sentencing process will become mired in form over substance.

34. Procedural fairness is concerned with "*practical injustice*": *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex Parte Lam* (2003) 214 CLR 1 at 13-14 [37]. There was no injustice, let alone practical injustice, occasioned by the sentencing court not receiving the Crown sentencing range directly from the Crown, and the applicant's then senior counsel deciding to make the submission incorporating that range himself. To the extent it mattered, the Crown sentencing range in respect of the applicant was before the learned sentencing judge, so that her Honour could not have been in any doubt as to what the Crown's position was. Accordingly he was given an opportunity to be heard in the matter complained about, and was in fact heard on that topic. It is therefore unclear as to how it can be said that the applicant was at any time forced into adopting a course contrary to his interests.

35. Contrary to the applicant's submissions at [26], there was no error on the part of the Court of Appeal at [23] placing reliance on the fact that senior counsel for the applicant was permitted to refer to the provided prosecution sentencing range and to make submissions about that range. The content and breadth of those submissions were not curtailed. Senior counsel for the applicant referred to the Crown range as to head sentence as "*their range on top is sensible*",[7] and this was exceeded by only one year (26 years cf a Crown range of 21-25 years). The end result was that the non-parole

[6] Plea transcript, 20.01.12, at pp. 155-9.
[7] Plea transcript, 20.01.12, at pp. 158, line 3.

period was within the Crown range (18 years cf a Crown range of 16-19 years). It is difficult to see what opportunity was in fact lost.

36. The real substance of the complaint made in the applicants' submissions at [27]-[30] seems to be that the submissions made on behalf of the applicant to sentence *below* the Crown range for the non-parole period was unsuccessful. However there is nothing to suggest that the Crown uttering the numbers constituting the Crown range, rather than senior counsel for the applicant doing so, could possibly have made the slightest difference.

37. The suggestion in the applicant's submissions at [29] that the reasoning and submissions underpinning the Crown range was somehow absent is incorrect, as set out at [47]-[48] below. Had the Crown range been advanced by the Crown instead of by the applicant, nothing more was left to be said.

38. Contrary to the applicant's submissions at [31]-[33], there was no error on the part of the Court of Appeal at [26] in concluding that any agreement reached between the parties could not and did not bind the way in which a sentencing court proceeds. A sentencing judge was entitled to refuse to hear a Crown submission as to range unless there was a perceived substantial risk of error as to the sentencing range under consideration. The bar set for the second limb of MacNeil-Brown is high enough to avoid a court being compulsorily burdened with speculative submissions about errors that are not perceived to be at any substantial risk of occurring.

39. It is suggested by the applicant that *Ahmad v The Queen* [2006] NSWCCA 177 at [23] means that a court will be bound to receive a submission if that is what the parties have agreed should take place. If that is what McClellan CJ at CL meant, which is doubtful, it is submitted that cannot be correct: see *GAS v The Queen* (1984) 217 CLR 198 at 211 [31]. However that does not need to be determined as it has no factual application to this case. Not only was there no such agreement in this case, but counsel for the Crown made it clear to senior counsel appearing for the applicant at the sentence hearing that the Crown would not make any submission as to range if the learned sentencing judge did not wish to receive it, a stance entirely consistently with *MacNeil-Brown*.

Relevant Considerations

40. Contrary to the applicant's submissions at [23], there was no error in the Court of Appeal at [22] declining to accept that a submission on sentencing range is not a "*relevant consideration*" in the public law sense. The term "*relevant consideration*" was

used in support of hearing from the Crown as to its sentencing range,[8] but there is nothing to indicate that this was other than in the ordinary parlance, rather than the specialised meaning of that phrase in public law, namely in effect a mandatory consideration: *Minister for Aboriginal Affairs v Peko-Wallsend* (1986) 162 CLR 24 at 39-40.

41. The assertion of error is made, but nothing more is said to make good that assertion. No attempt is now made to identify, let alone establish, any legislative or other basis for concluding that a Crown submission on sentencing range is a "*relevant*" (i.e. mandatory) consideration in the relevant public law sense. It is difficult to see how a submission by a party to litigation could ever be a mandatory consideration, not least because it is difficult to see when such a submission would or would not be required to be received, nor why this should be confined to a Crown sentence range. The question of whether a party should have been heard on an issue is amply protected by the rules of procedural fairness and general appeal remedies as to the outcome.

42. The applicant's alternative submission at [25] that the prosecution submission was a "*material consideration*" does not form part of ground 1 referred to this enlarged Full Court and is not in any event any recognised part of the public law ground of judicial review of "*relevant considerations*" relied upon by the applicant. As noted at [32] above, senior counsel for the applicant upon the plea was not constrained in making any material submissions in relation to the prosecution sentencing range. Given that this was provided to her Honour, the real complaint is not that the Crown sentencing range was not before her Honour, but that she did not consider herself constrained by it. No basis therefore arises to "*enliven appellate review of a discretionary judgment*" beyond the review of the applicant's claim of manifest excess already considered and rejected by the Court of Appeal.

43. Sentencing law is already heavily burdened by explicit legislative obligations and strongly guided by a large and detailed body of sentencing case law. There would appear to be no useful work to be done by the application of public law concepts of relevant (or irrelevant) considerations to criminal sentencing proceedings.

The question of remittal if either ground is made out

44. The respondent submits that the formal receipt of the Crown's sentencing range could not have made any difference to the sentence imposed having regard to the careful approach of the learned sentencing judge as set out in her detailed remarks on

[8] Plea transcript, 20.01.12, at pp. 156, line 12.

sentence. Her Honour's views as to the objective extreme seriousness of the offending meant that receipt of the Crown sentencing range from the Crown rather than from senior counsel for the applicant could not have made a difference. As noted above at [35], the head sentence exceeded the provided Crown range by one year and the non-parole was one year less than the upper limit of the Crown range.

45. Contrary to the applicant's submissions at [28], there is no significance in the sentencing reasons not including any reference to the Crown sentencing range. The claim that "*it is clear that the judge did not even consider the limited submissions on range made by counsel for the applicant*" is without proper foundation, as opposed to those submissions obviously not finding favour and not warranting any specific reference. The submissions made seeking a substantially lesser minimum term for the applicant were unrealistic having regard to the extreme seriousness of the offending, including magnitude, duration and role.

46. The obligation of the prosecution to provide a *MacNeil-Brown* range to assist a sentencing judge may or may not involve the need to actually provide more detailed information in support. This was not a case in which more was required from the Crown even if a sentencing range had been given by counsel for the Crown rather than indirectly by senior counsel for the applicant. The level of assistance required to be provided will necessarily depend upon the degree of assistance sought by the particular judge. The sentencing judge in this instance had very extensive experience in the most serious of crimes, including the most serious examples of narcotics trafficking.

47. Her Honour was clear about the assistance that was required and did request,[9] and was provided with,[10] information relating to the national and international ranking of the most serious of the charged crimes (count 1). Her Honour additionally sought, and was provided with, details of other sentences imposed for the most serious narcotic offences.[11] The prosecutor did additionally provide submissions in relation to the issues of remorse,[12] rehabilitative potential,[13] totality[14] and concurrency, all being matters being favourable to the applicant. The tendered evidentiary summary was very substantial and detailed.

---

9 Plea transcript, 19.01.12, at pp. 18-19.
10 Plea transcript, 20.01.12, at pp. 160-161.
11 Plea transcript, 20.01.12, at pp. 161-162.
12 Plea transcript, 20.01.12, at pp. 171-172. Relied upon by the applicant in the original appeal and in the original application for special leave.
13 Plea transcript, 20.01.12, at p.176.
14 Plea transcript at page 172.

48. Prosecution submissions were also made disputing the applicant's claim that a lower minimum parole term be fixed than was contemplated in the provided Crown range.[15] All of the relevant features of the case standing behind the Crown range, including those in mitigation, were forcefully made by the Crown.

Part VII - Time Estimate

49. Subject to anything unexpected emerging from the applicant's oral submissions, it is expected that the respondent's oral argument in this and the related case of Zirilli will take in the order of an hour combined.

10

Robert Bromwich

Phone: 02 6206 5601
Email: robert.bromwich@cdpp.gov.au

Brent Young

Phone: 0411261542
Email: brent.young@iinet.net.au

Counsel for the respondent

21 October 2013

[15] Plea transcript at p.178.