IN THE HIGH COURT OF AUSTRALIA

SYDNEY REGISTRY

No. S137 of 2011

BETWEEN:

JIHAD MAHMUD

Applicant

and

10

THE QUEEN

Respondent

SUBMISSIONS OF THE ATTORNEY-GENERAL FOR NSW,

INTERVENING

Part I

1. These submissions may be published on the internet.

Parts II - III

20 2. The Attorney-General intervenes under s 78A of the Judiciary Act, 1903 (Cth). These submissions are limited to the questions of constitutional validity.

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Part IV

3. The applicable constitutional and statutory provisions are sufficiently annexed to the Applicant's submissions.

Part V

SUMMARY OF ARGUMENT

4. In substance, the Applicant contends that Division 1A, Part 4 of the Crimes (Sentencing Procedure) Act 1999 (NSW) ('the Act') contravenes Chapter III of the Constitution because it is a Bill of Attainder or contravenes the principles stated in Kable v Director of Public Prosecutions (NSW) (1996) 189 CLR 51.

10 5. That submissions should be rejected for the following reasons:

(a) The sentences were for offences against the law of New South Wales and no federal jurisdiction was involved below.

(b) Properly understood, the impugned provisions give the sentencing judge, and the NSW Court of Criminal Appeal, a broad, albeit structured, judicial discretion, so foreclosing any Kable question.

(c) Even if that were not so, as both the NSW and Commonwealth Parliaments can fix a penalty which must be imposed even by a court exercising federal jurisdiction following conviction for a particular offence – such as was historically the case with mandatory death sentences for murder – there could
20 be no objection to the impugned provisions. Palling v Corfield (1970) 123 CLR 52 supports this conclusion; it is correct and leave to argue that it should be overruled, as required by Evda Nominees Pty Ltd v Victoria (1984) 154 CLR 311 at 316, should not be given as it has stood for many years, been relied upon and not questioned.

(d) As the sentences are not capital, there is no Bill of Attainder. The provisions do not amount to a legislative punishment without trial and thus do not amount to a Bill of Pains and Penalties.

The Legislative scheme

6. "The first step in the making of [an] assessment of the validity of any given law is one of statutory construction": Gypsy Jokers Motorcycle Club Inc v Commissioner Of Police (2008) 234 CLR 532 at [11]. Further, as the Chief Justice noted in South Australia v Totani [2010] 271 ALR 662 at [69], in turn citing Gummow J in Fardon v Attorney-General (Qld) (2004) 223 CLR 575 at 618 [104]:

> Each case in which the Kable doctrine is invoked will require consideration of the impugned legislation because: "the critical notions of repugnancy and incompatibility are insusceptible of further definition in terms which necessarily dictate future outcomes".

7. Generally, in relation to the construction of the Act, the Attorney adopts the submissions of the Respondent filed in the matter of Muldrock v The Queen, which is to be heard at the same time as this application for special leave. In essence, however:

   (a) s 54A of the Act provides that for the purposes of Division 1A, the standard non-parole period for an offence is as set out in the relevant item in the Table. In this case, for the drug offence of which the Applicant was convicted, the standard non-parole period was 20 years and, for the firearms offence, 10 years. It is then declared that, for sentencing purposes, these periods of time are to be treated as "in the middle of the range of objective seriousness", which contrasts them to the maximum penalty.

   (b) Under s 54B of the Act, the starting point for the sentence is that it shall be the standard non-parole period "unless the court determines that there are reasons for setting a non-parole period that is longer or shorter than the standard non-parole period". Those reasons can only be those set out in s 21A of the Act.

   (c) s 21A sets out a very long list of aggravating and mitigating factors, and special rules for child sexual offences but also requires the Court to take into account, under s 21A(1)(c), "any other objective or subjective factor that affects the relative seriousness of the offence".

8. In R v Way (2004) 60 NSWLR 168 the NSW Court of Criminal Appeal said at [59]:

> It is clear that the legislative policy in introducing Div 1A, so far as can be discerned from the legislation itself, was not to create a straightjacket for judges, since s 54B(2) does permit reference to be made to a range of circumstances that would justify a departure from the standard non-parole period. If reference to the second reading speech were necessary for that conclusion, it may be noted that the Attorney-General specifically observed that the amendments were not introduced as a form of mandatory sentencing, but rather were intended to provide "further guidance and structure to judicial discretion.

9. The scheme of the Act was to provide guidance and structure to judicial discretion by providing "in the case of a Table offence, ...two statutory guideposts or benchmarks or reference points [namely] the maximum sentence which the legislature has provided for the offence; and the non-parole period which applies to the offences specified in the Table.": Way at [50] (the second reading speech is extracted at [49]).

10. As four justices of this Court said in Markarian v The Queen (2005) 228 CLR 357 at [30]: "Judges need sentencing yardsticks."

11. The Act therefore gives the court a very wide discretion within a structured scheme. In practice, although the starting point may be the standard non parole period, that will rarely be the end point. In this case, neither the sentencing judge nor the Court of Criminal Appeal imposed the standard non parole periods for the offences.

12. It matters not for the purposes of the constitutional argument, whether:

    (a) as stated in R v Way when sentencing under s 54B, the judge is to ask and answer the question "are there reasons for not imposing the standard non-parole period", which question is to be answered by considering, first, the objective seriousness of the offence, so as to determine whether the offence is in the mid-range of seriousness, and thus one to which the standard non-parole period ought attach; and secondly, the subjective circumstances of aggravation and mitigation particular to the offender being sentenced. That approach, as the Court of Criminal Appeal there held, eg, at [127] and [130], meant that there was a single process and no need to depart from the traditional intuitive or instinctive synthesis approach to sentencing previously used; or

(b) as noted in the submissions in Muldrock by the Respondent at 6.20-6.26, there is a two step process – first fixing a non-parole period by assessing objective seriousness, and then deciding whether to change that first period by considering aggravating or mitigating circumstances.

The present form of the Kable principle

13. After a long period during which the only statute struck down by this Court under the Kable doctrine was the statute considered in that case, the principle first stated in that case has now been utilised on four occasions, namely, Kable itself; Re Criminal Proceeds Confiscation Act [2004] 1 Qd R 40; International Finance Trust Company Limited v New South Wales Crime Commission (2009) 240 CLR 319; and most recently Totani.

14. A useful statement of the various aspects of the Kable doctrine is set out in the judgment of the Chief Justice in Totani at [69].

15. It remains the case that invalidation of a State law by operation of the Kable doctrine will always be "extraordinary" or "quite exceptional": Kable at 98 (Toohey J) and 134 (Gummow J).

16. In Totani, this Court invalidated a provision which stated:

> The [SA Magistrates] Court must, on application by the Commissioner, make a control order against a person (the defendant) if the Court is satisfied that the defendant is a member of a declared organisation.

17. Fundamentally, that provision was found to be invalid as it authorised the executive government to enlist the Magistrates Court by requiring it to implement decisions of the executive in a manner incompatible with that court's institutional integrity: per French CJ at 82, Gummow J at [149], Crennan and Bell JJ at [436], Kiefel J at [481]. The rationale for this conclusion differs among those Justices.

18. The Chief Justice:

(a) regarded as important (at [81]) "...the dominance of the executive act of declaration of an organisation and the findings of fact behind it in determining for all practical purposes the outcome of the control order application."

(b) concluded that s 14(1) "require[s] the Magistrates Court to make a decision largely by executive declaration for which no reasons need to be given, the merits of which cannot be questioned in that Court and which is based on executive determinations of criminal conduct committed by persons who may not be before the Court." [4]

19. Gummow J concluded at [149] that:

> ...the practical operation of s 14(1) of the Act is to enlist a court of a State, within the meaning of s 77(iii) of the Constitution, in the implementation of the legislative policy stated in s 4 by an adjudicative process in which the Magistrates Court is called upon effectively to act at the behest of the Attorney-General to an impermissible degree, and thereby to act in a fashion incompatible with the proper discharge of its federal judicial responsibilities and with its institutional integrity.

20. Crennan and Bell JJ at [436] found s 14(1) to be invalid as it:

> ...requires the court to exercise judicial power to make a control order after undertaking an adjudicative process that is so confined, and so dependant on the executive's determination of the declaration, that it departs impermissibly from the ordinary judicial processes of an independent and impartial tribunal.... This has the effect of rendering the court an instrument of the executive, which undermines its independence.

21. Kiefel J at [481] said that s 14(1) "involves the enlistment of the Court to give effect to legislative and executive policy. It impinges upon the independence of the Court and thereby undermines its institutional integrity".

22. The contrast with the Act, as construed above, is complete as there is a slightly more structured but otherwise traditional sentencing discretion conferred by the Act. There is nothing about the Act which attracts Kable.

23. The Applicant states that "it is no function of the legislature to fix the custodial sentence for a criminal offence": submissions [27]. That is obviously incorrect.

24. Until 1989 in NSW, although the executive could issue "tickets of leave", "the judicial power to impose sentence upon a person convicted of murder was confined: "the only sentence that could be passed was that the offender suffer penal servitude for life." Baker v R (2004) 223 CLR 513 at [29] per McHugh, Gummow, Hayne and Heydon JJ. See s 5(b) Crimes (Amendment) Act 1955 (NSW) although it might be noted that in

some circumstances after 1982 a lesser sentence might be passed: s 442 Crimes Act 1900 (NSW). Previously, there had been a mandatory sentence of death: s 19 Crimes Act 1900 (NSW).

25. As was said in Palling v Corfield (1970) 123 CLR 52 at 58 by Barwick CJ (Menzies J (at 64-65); Windeyer J (at 65); Owen J (at 67); Walsh J (at 68); Gibbs J (at 70) to the same effect on this point):

> It is beyond question that the Parliament can prescribe such penalty as it thinks fit for the offences which it creates. It may make the penalty absolute in the sense that there is but one penalty which the court is empowered to impose and, in my opinion, it may lay an unqualified duty on the court to impose that penalty. The exercise of the judicial function is the act of imposing the penalty consequent upon conviction of the offence which is essentially a judicial act. If the statute nominates the penalty and imposes on the court a duty to impose it, no judicial power or function is invaded: nor, in my opinion, is there any judicial power or discretion not to carry out the terms of the statute. Ordinarily the court with the duty of imposing punishment has a discretion as to the extent of the punishment to be imposed; and sometimes a discretion whether any punishment at all should be imposed. It is both unusual and in general, in my opinion, undesirable that the court should not have a discretion in the imposition of penalties and sentences, for circumstances alter cases and it is a traditional function of a court of justice to endeavour to make the punishment appropriate to the circumstances as well as to the nature of the crime. But whether or not such a discretion shall be given to the court in relation to a statutory offence is for the decision of the Parliament. It cannot be denied that there are circumstances which may warrant the imposition on the court of a duty to impose specific punishment. If Parliament chooses to deny the court such a discretion, and to impose such a duty, as I have mentioned the court must obey the statute in this respect assuming its validity in other respects. It is not, in my opinion, a breach of the Constitution not to confide any discretion to the court as to the penalty to be imposed.

26. True it is that sentencing legislation has markedly changed since 1970. As the plurality stated in Wong v R (2001) 207 CLR 584:

> [36] Passing sentence on a convicted person was once a ritual which neither required nor permitted the exercise of any judgment by the judge. Now, apart from some very rare cases, a judge who is required to pass sentence on an offender must choose which of several forms of disposition should be made and must decide how great the punishment will be. The legislature prescribes the maximum punishment that may be imposed. In some (relatively few) cases it will prescribe a minimum. The judge must decide, having regard to what the offender has done and whatever may be urged in aggravation or mitigation, what sentence should be passed.

27. But at least when dealing with sentencing for State offences, as here, Palling v Corfield remains good law. It was, for example, recently applied by the full court of the Supreme Court of South Australia in R v Ironside (2009) 104 SASR 54. In that case Doyle CJ, with whom Kourakis J relevantly agreed at [168], said of the terms of the Act there in question:

> [71] Whatever one might think about the complexity of the process required by the 2007 Act, and whatever one might think about the utility of constraining the ability of the court to fix what it considers to be an appropriate non-parole period in the light of all the circumstances (and this is a matter that has been resolved by Parliament by enacting the 2007 Act) there is nothing about the task of a sentencing court under these provisions that is foreign or inimical to the exercise of judicial power. Nor is there anything about the task of the court that could cause one to say that the task is not one appropriate for a court.

28. These observations are apt here. Nor, it may be added, does the Act in any way make the NSW Supreme Court an unsuitable repository for the exercise of federal jurisdiction.

29. For these reasons, the applicant's submissions cannot be correct when they state:

(a) "The anchor point [created by s 54A] is a binding substantive rule that impermissibly interferes with the flexibility of judicial discretion for custodial sentencing (at para 25).

(b) "The standard non-parole periods in the table applied by s 54A of the Act are a legislative sentence, for the particular offence, set by Parliament, and this impairs the separate function to be performed by the sentencing court." (at para 28).

(c) "Division 1A... impermissibly shackles the judicial discretion to ensure "the punishment fits the crime"(at para 36).

Bills of Pains and Penalties

30. It is submitted by the Applicant (at para 40) that "Division 1A of Part IV of the Act is in the nature of a Bill of Attainder, imposing a fixed legislative anchor point sentence on the applicant without the safeguards involved in the flexible exercise of judicial discretion in fixing custodial imprisonment punishment for the actual subjective and objective circumstances of the criminal offence."

31. In International Finance Trust Company Limited v New South Wales Crime Commission at [166] Heydon J said:

> Like a bill of attainder, a bill of pains and penalties is a legislative enactment which inflicts punishment without a judicial trial.

32. In Chu Kheng Lim v Minister for Immigration Local Government & Ethnic Affairs (1992) 176 CLR 1 McHugh said (at 69-70):

> The term "Bill of Attainder" was used in respect of Acts imposing sentences of death, the term "Bill of Pains and Penalties" in respect of Acts imposing lesser penalties... No express prohibition against the enactment of Bills of Attainder or Bills of Pains and Penalties is to be found in the Constitution. However, it is a necessary implication of the adoption of the doctrine of the separation of powers in the Constitution that the Parliament of the Commonwealth cannot enact such Bills...An Act of the Parliament which sought to punish individuals or a particular group of individuals for their past conduct without the benefit of a judicial trial or the procedural safeguards essential to such a trial would be an exercise of judicial power of the Commonwealth and impliedly prohibited by the doctrine of the separation of powers. Such an Act would infringe the separation of judicial and legislative power by substituting a legislative judgment of guilt for the judgment of the courts exercising federal judicial power.

33. For the reasons set out above, the Act is in no sense legislative punishment without judicial trial.

34. The constitutional challenge should be dismissed.

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