IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

No S136 of 2011

BETWEEN:

HIGH COURT OF AUSTRALIA
FILED
09 MAY 2011
THE REGISTRY SYDNEY

JIHAD MAHMUD
Applicant

and

THE QUEEN
Respondent

APPLICANT'S SUBMISSIONS

Part I: Publication

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

Part II: Concise statement of issues

2. Whether the Court of Criminal Appeal erred in law by taking into account Division 1A of Part 4 of the *Crimes (Sentencing Procedure) Act 1999(NSW)* in allowing the appeal by reason of the said Division amounting to an impermissible legislative interference, contrary to the Chapter III constitutional mandate of continuing institutional integrity, in the manner of exercise of judicial discretion in respect of imprisonment arising from a criminal conviction.

3. Whether the Court of Criminal Appeal erred in law by holding that the sentences were manifestly inadequate when there was no error of principle or special circumstance that supported an appeal under s5D of the *Criminal Appeal Act 1912(NSW)* by the Crown.

Part III: Compliance Section 78B of the *Judiciary Act 1903*

4. The applicant certifies that there has been served notices under Section 78B of the *Judiciary Act 1903*.

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Part IV: Reasons for judgment

5. *R v Jihad Mahmud* [2010] NSWCCA 219.

6. *R v Jihad Mahmud*, NSWDC 15 June 2009, reasons for sentence, Acting Judge Graham.

Part V: Narrative of facts

7. On 15 June 2009 in the District Court of NSW sitting at Penrith his Honour Acting Judge Graham conducted a sentence hearing in respect of pleas of guilty by the applicant, entered on 19 March 2009 on his arraignment to two counts in an indictment accepted by the Crown in full satisfaction of that indictment. The sentencing judge, after hearing evidence including that of the applicant as to antecedents, nature and circumstances of the crimes and contested criminality, recorded the conviction in respect of Count 1:

> *On 15 January 2008 at Shalvey in the State of New South Wales, did supply a prohibited drug, namely methylamphetamine, being an amount not less than the large commercial quantity for that drug in contravention of s25(2) of the* Drug Misuse and Trafficking Act 1985.
>
> *Sentence:*
>
> *A total term of imprisonment of six years and six months comprising a non-parole period of three years and six months commencing on 15 January 2009 and expiring on 14 July 2012 with the balance of the term of three years commencing on 15 July 2012 and expiring on 14 July 2015.*

Count 2

> *On 15 July 2008 at Rooty Hill and Shalvey in the State of New South Wales did possess more than three firearms, namely being two prohibited pistols and two prohibited firearms which were unregistered and he, the said, Jihad Mahmud, was not authorised by licence or permit to possess the said firearms in contravention of s51D(2) of the* Firearms Act 1996.
>
> *Sentence*
>
> *Sentenced to a total term of imprisonment of three years and six months, comprising a non-parole period of two years and six months commencing on 15 January 2008 and expiring on 14 July 2010 and the balance of the term of 12 months commencing on 15 July 2010 and expiring on 14 July 2011.*

8. His Honour accumulated the sentences by 1 year resulting in a period of imprisonment of 4 years and 6 months to commence from 15 January 2009 and took into account eight related offences set out on a Form 1 certificate[1].

9. On a Crown appeal against sentence to the Court of Criminal Appeal (**CCA**) comprising Giles JA, Hulme J and Latham J, heard on 2 March 2010, the appeal was allowed on 24 September 2010 and the following fresh sentences imposed[2]:

> *First count imprisonment for a non-parole period of six years and six months commencing on 15 January 2009 and the balance of term of two years and six months.*
>
> *Second count imprisonment for a non-parole period of three years and nine months commencing on 15 January 2008 and the balance of term of one year and three months.*

10. The effect of the CCA orders was to increase the head sentence on Count 1 by three years and increase the non-parole period by three years. The effect on Count 2 was to increase the head sentence by one year and six months and to increase the non-parole period by one year and three months[3].

11. The standard non-parole period under Division 1A of Part 4 of the *Crimes (Sentencing Procedure) Act 1999* in relation to s25(2) of the *Drug Misuse and Trafficking Act 1985* is 15 years with a maximum penalty pursuant to s33(3) of imprisonment for life. The standard non-parole period in respect of s51D(2) of the *Firearms Act 1996* is 10 years with a maximum penalty under s51D of imprisonment for 20 years.

12. The applicant was born on 31 July 1981. At the time of sentence he had been in custody since 15 January 2008. He finished his School Certificate in Year 10 at Granville Boys High in 1996. He grew up in Mount Druitt. His mother and father had a lengthy and acrimonious divorce when he was about 8 or 9 years old. This gave rise to a lot of parental arguments to which the applicant was exposed. The applicant found this hard to cope with as he was tossed around between parents in matrimonial conflict. By Year 7 at the age

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1 All eight concerned 15 January 2008; three offences not keep firearms safely, two offences possess ammunition without licence, three offences possess prohibited weapons.

2 AB 165-166

3 The trial judge's total sentence consisted of a non-parole period of 4 years and 6 months expiring on 14 July 2012. The CCA's total sentence consisted of a non-parole period of 7 years and 6 months expiring on 14 July 2015 and a balance of term 2 years and 6 months expiring on 14 January 2018.

of 13 he had started using illegal drugs including cannabis. This taking of drugs started off a few times a week and then problems developed for the applicant at home with his father's new partner. The applicant by the age of about 15 or 16 years was using other drugs including amphetamines, ecstasy and cocaine.

13. Having left school at the age of 16 the applicant had disparate periods of employment, in particular worked at KFC as a kitchen hand, as a labourer for Miami Pools, a paid apprentice for two years, and then as brickie's labourer, and also as a storeman at Aldi supermarket. He also completed a security certificate course.

14. In 2004 he went into partnership with his cousin and purchased a tobacco business. In 2005 he pleaded guilty to a firearms offence and was sentenced to a custodial sentence of 18 months with a non parole period of 12 months.

15. After he was released from gaol in 2006 he commenced using drugs again including cocaine about a month after he was released. He did labouring work, although he would lose the job because he was *"too out of it"*[4] to work the next day. He would then have to look for another job. He was also using amphetamines, in particular speed and ice, which consumption gradually increased to every day us . He accumulated debts to dealers.

16. On 15 January 2008 he was driving a motor vehicle back to his home at Shalvey where he was living with his mother. A police patrol stopped the vehicle at Rooty Hill and found in the boot a loaded pistol. The police executing a search warrant then found two crude single shot bolt guns and another handgun at his home. In the kitchen a search revealed in a fridge a large commercial quantity (1.78 kilos) of the prohibited drug methylamphetamine which was analysed as having a purity of 2% – 2.5%.

17. In cross examination the applicant's drug taking history and drug dependence was not challenged. At the time of sentencing the applicant had been in custody for almost a year and a half and gave evidence that while he was on drugs he could not remember what he was doing from day to day. The applicant gave evidence that he was minding the drugs found in the

[4] AB 16.46

fridge in the hope that he would receive some free drugs for his efforts. The applicant's evidence as to having a fetish for firearms was not challenged. There was challenge to the applicant's evidence about hunting. The only relevant question about the Glucodin powder was as follows:

> Q. *Did you use that energy powder as a cutting agent, I think you call it, to mix amphetamine?*
>
> A. *No.*

18. Contrary to paragraph 28[5] of the judgment of Hulme J, it was not put to the applicant that no "*... reliance could be placed on anything [*he*] said that was challenged*".

19. In relation to paragraph 52[6] of the judgment of Hulme J it is not correct to suggest:

> "*... His Honour erred in saying that it was not put to the Respondent that his purpose in having the Glucodin powder was to cut the purity of drugs.*"

That proposition was not put contrary to the proposition by Hulme J. What the Graham ADCJ said was

> "*The offender was asked some questions about it in cross examination but it was not put to him that his purpose in having the Glucodin was to dilute or cut the purity of drugs ... The existence of the Glucodin is consistent with the accused's own account that he was, in effect warehousing the drugs and the Glucodin, while not itself being illegal, was an item which it might readily be thought could be kept with the drugs themselves. It certainly was not put to him that that was the purpose for which he had them"* (Jdt p 8)[7].

No proposition of association was put and the proposition by Hulme J of erring in the treatment of Glucodin is unsupported.

20. The only cross examination on this was:

> Q. *Did you use that energy powder as a cutting agent, I think you call it, to mix with amphetamine?*
>
> A. *No* (T 31)[8].

21. In relation to the objective criminality as to Count 1 the applicant gave unchallenged evidence as to the methamphetamine being in his fridge "*it got*

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5 AB 146
6 AB 153
7 AB 107
8 AB 34.34

given to me to put there" T.16.8[9] and "*I was just holding it for someone*" T16.11[10] with an arrangement for someone to come and collect it, T16.15[11], for which storing the applicant expected *"just to get my debt paid off and just to get some drugs for free"* T16.18[12]. Graham ADCJ found "*As I have said, the evidence properly analysed, leads to the conclusion that his role was in the nature of a warehouse keeper for the drugs*" Jdt p 14[13]. Graham ADCJ found that "*there is no evidence to support the proposition that the offender was motivated to take this role in relation to the drugs for the purpose of making a profit*" Jdt p 14[14] and there was "*no challenge to the assertion that he was himself addicted to drugs at the time"* Jdt p 12[15].

22. In relation to the objective criminality as to Count 2, the applicant gave unchallenged evidence that he did not recall if it was loaded T.25.40[16], was not in the habit of carrying around loaded firearms T.25.44[17] and did not have a clue as to how it got loaded T 25.46[18]. Further, contrary to paragraph 73[19] of the judgment of Hulme J, the unchallenged fetish was an explanation for the illegal possession of the firearms. Graham ADCJ at p 13[20] after referring to the applicant's fascination and fetish about firearms said "*I have formed the conclusion that the explanation offered by the offender himself does contain the more likely explanation for his collection of firearms".*

Part VI: Applicant's argument

Invalidity Division 1A of Part 4

23. Section 54A of the *Crimes (Sentencing Procedure) Act 1999(NSW)* (**the Act**) and the Table it applies creates a legislative anchor point characterised as being "*the middle of the range of objective seriousness for such an offence*". The mandatory standard non parole period specified by s54A (1) articulates

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[9] AB 19.8
[10] AB 19.11
[11] AB 19.15
[12] AB 19.18
[13] AB 113.53
[14] AB 113.33
[15] AB 111. 24
[16] AB28.40
[17] AB28.44
[18] AB 28.46
[19] AB160
[20] AB 112

no sentencing principle and is not a judicial precedent. The anchor point creates a phantom offence with a phantom level of criminality that is a legislative precedent mandated to be applied in sentencing for offences in the Table to the said Division 1A of Part 4 of the Act.

24. This anchor point means that the offender is being sentenced not only for the offence committed but also by reference to a phantom offence, contrary to the fundamental sentencing principle[21].

25. The anchor point is a binding substantive rule that impermissibly interferes with the flexibility of judicial discretion for custodial sentencing. The interference constitutes such an impairment of the separate judicial function and such a fundamental departure from proper sentencing principles as to distort the "*institutional integrity which is guaranteed for all State courts by Chapter III of the Constitution*"[22].

26. The Second Reading Speech, for the 2002 Act No 90 amendments that introduced Division 1A of Part 4 of the *Crimes (Sentencing Procedure) Act 1999*, refers to the legislature having "*set ...*" the standard non-parole periods by the legislature "*... taking into account the seriousness of the offence, the maximum penalty for the offence and current sentencing trends for the offence ...*"[23].

27. It is no function of the legislature to fix the custodial sentence for a criminal offence. The taking into account of the seriousness of the offence by the applicant, the maximum penalty and comparative sentences are matters of function for the sentencing judge, not the legislature. The legislative standard non-parole period fixed by Division 1A of Part 4 of the Act amounts to an impermissible legislative determination of the sentencing function, which must be "*rigidly" and mechanistically applied*"[24] so that the trial judge no longer has a proper flexible judicial discretion in fixing the custodial punishment by reference to all the subjective and objective circumstances of the actual offence.

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[21] *R v De Simoni* (1981) 147 CLR 383 at 389
[22] *South Australia v Totani* (2010) 85 ALRJ 19 at [4]
[23] NSW, *Parliamentary Debates*, Legislative Assembly, 23 October 2002, 5813 at 5815(Bob Debus, Attorney-General)
[24] *Wong v R* (2001) 207 CLR 584 at 644 [168]

28. It was the 2002 amendment that introduced the new Division 1A of Part 4 and also caused a new s44 of the Act to be introduced according to the Second Reading Speech. Under the old s44 a Court set the total sentence and then fixed the non-parole period. Under the new s44 the Court is required to set the non-parole period for the sentence before setting the balance of the term of the sentence. The standard non-parole periods in the Table applied by s54A 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.

10 29. It is submitted that contrary to *Wong v R* (2001) 207 CLR 584 at 605 [57], the legislative set anchor point of the standard non-parole period under s54A of the Act binds and stifles judicial discretion as a legislative sentence precedent, not founded upon a statement of principle.

30. Accordingly the discretionary exercise of judicial power in sentencing is impermissibly impeded by reference to the rigid legislative anchor points for offences dealt with by Division1A of Part 4 of the Act. The anchor point is further impermissibly embedded by s101A. This legislative interference upon the judicial function of custodial sentencing could not be imposed on a Chapter III court[25].

20 31. The unidentifiable factual assumptions for the standard no-parole period[26] and illusory legislative range applied by the anchor point impermissibly interfere with the essential judicial function being the determination of a custodial sentence. The appellate jurisdiction in respect of this separate judicial function under s73 of the Constitution "*to hear and determine appeals from all ... sentences of the Supreme Courts*"[27] is impaired by Division 1A of Part 4 of the Act because of the absence of reviewable evaluative principle or reviewable comparative foundation of the standard non-parole period or reviewable legislative range.

32. The invalidity is not saved by any judicial discretion arising from Division 1A
30 because of the impermissible interference with judicial function and because

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[25] *Hili v The Queen* (2010) 85 ALJR 195 at [36] – [38], [44]; cf *R v Whyte* [2002] NSWCCA 343
[26] *R v Way* (2004) 60 NSWLR 168 at [72] – [73]
[27] *Kirk v Industrial Relations Commission* (2010) 239 CLR 531 at [98]

the manner of exercise is shackled by a mandatory legislative sentence anchor point not founded upon any identifiable principle or identifiable factual foundation and unreviewable as a legislative precedent.

33. This interference by Division 1A of Part 4 of the Act with the appellate judicial power in s73 of the Constitution in respect of the courts of the State of NSW, means the incompatible function created by the said Division cannot be imposed on either a Chapter III created court or a State court within Chapter III.

34. Further contrary to *Wong v R*, supra at [76] – [78], the legislative anchor point creates a two stage process contrary to proper principle as sentencing requires an instinctive synthesis approach taking into account all the circumstances of the offence and the offender. The anchor point artificially creates a single numerical value of the middle of the illusory legislative range and is a mandatory shackled first reference point, which then distorts the difficult, but essential, discretionary balancing exercise which the sentencing judge must perform.

35. The 2002 legislative switch required by Division 1A, as to the first sentencing task, from head sentence fixing of custodial punishment to standard non-parole period fixing of eligibility for executive action of mercy permitting service of sentence outside of prison, compounds the impermissible rigidity.

36. The standard non-parole period provisions of Division 1A of Part 4 of the Act impermissibly interfere with the discretionary judgment involved in sentencing offenders as first it removes the sentencing yardstick of the maximum sentence[28]. The importance of parity[29] and sentencing consistency based upon discretionary judgment is in effect usurped by the legislative fixed sentence shackle point presumptively applied by Division 1A. Equally the totality principle[30] is undermined in considering what is just and appropriate when shackled by the standard non-parole period anchor point. Division 1A

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[28] *Markarian v R* (2006) 228 CLR 357 at 372 [30] – [32]
[29] *Postiglione v R* (1997) 189 CLR 295 at 301
[30] *Mill v The Queen* (1988) 166 CLR 59 at 63

also impermissibly shackles the judicial discretion to ensure "*the punishment fits the crime*"[31].

37. The switch distorts principles applying to the punishment fitting the crime, parity, totality and the principle as to Crown proof of aggravating matters referred to in *R v Olbrich*[32]. These fundamental sentencing principles are not directed to fixing the non-parole period which has a different purpose[33].

38. Further the purpose of the principles found in s21A of the Act as to aggravating or mitigating factors are directed to fixing the head sentence and accord with the application of sentencing principle as to custodial punishment. That purpose is materially different from the public interest underlying parole and breadth of considerations that inform the eligibility for service of sentence outside of prison. The fixing of that executive mercy eligibility date is not a relevant factor in the judicial determination of the punishment of an offence by fixing of the head sentence.

39. The judicial fixing of a non-parole period eligibility date is as a matter of sentencing principle to facilitate executive mercy and non-prison service which are founded upon different considerations to that of punishment for an offence. Accordingly the anchor point impermissibly rigidifies and impedes sentencing principles as to punishment by reference only to a shackled legislative precedent of middle of the range objective criminality concerning non prison service eligibility, s54B(3).

40. Further, Division 1A of Part 4 of the Act is in the nature of a Bill of Attainder imposing a fixed legislative anchor point sentence of 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[34].

41. The applicant submits that Division 1A of Part 4 of the Act impermissibly inflicts a legislative fixed punishment being the middle of the range specified

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[31] *Baumer v R* (1988) 166 CLR 51 at 58; *Veen v R* (1979) 13 CLR 458 at 468
[32] (1999) 270 CLR 270 at [24] – [26]
[33] *Bugmy v The Queen* (1990) 169 CLR 525 at 531; *The Queen v Shrestha* (1991) 173 CLR 48 at 67 – 69, 73
[34] *Chu Kheng Lim v Minister for Immigration Local Government & Ethnic Affairs* (1992) 176 CLR 1 per McHugh J at 70, see also *Polyukhovich v Commonwealth ("War Crimes Act case")* (1991) 172 CLR 501 at 536, 617,645-648,706, 721

term without "*a judicial trial*" properly understood[35] as there would be no such anchor point in a judicial trial. The phantom offence and phantom criminality play a decisive role in the sentencing that is a pre-determined legislative sentence, not determined by judicial trial and not itself amenable to appellate review.

42. It is submitted that Division 1A of Par 4 of the Act is an impermissible usurpation of judicial power in a criminal case[36] because the standard non-parole period pre-judges the issue of custodial sentence with respect to the individual by a legislative fixed grid sentence anchor point and requires the Court to exercise its sentencing function accordingly[37].

43. The effect of the non-parole offences grid point sentences undermines the administration of criminal justice by impermissibly interfering with an essential and exclusive function[38] in the exercise of judicial discretion in sentencing. This rigidity in legislative sentencing by the fixed grid standard non-parole period impermissibly impedes an essential feature of judicial sentencing that is necessary for public confidence in the integrity of the judiciary as an institution[39].

44. Further, the legislative punishment in Division 1A of Part 4 of the Act imposed a custodial sentence applied by the CCA, not by reference to the source of the power of imprisonment being the respective substantive provision specifying the offence and maximum imprisonment penalty exposure, but rather by reference to a rigid legislative standard non-parole period and it may be inferred by reference to rigidification embedded by s101A of the Act. That is really an imposition of an anchored legislative punishment arising out of the *Crimes (Sentencing Procedure) Act 1999*, rather than application of judicial discretion taking into account the maximum penalty exposure identified by the substantive offence. This shackled approach by the CCA is reinforced by the absence of reference to the head sentence being imposed

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35 *International Finance Trust Company Limited v New South Wales Crime Commission* (2009) 240 CLR 319 at [166]

36 *Nicholas v The Queen* (1998) 173 CLR 173 at 186-188 [16] – [20], 232-233 [144] – [148]; *Chu Kheng Lim v Minister for Immigration* (1992) supra, 232-233,

37 *Leeth v Commonwealth(1992) 174 CLR 455 at 469-470; Nicholas v R* (1998) supra at 192 [28]

38 *Bachrach Pty Ltd v Queensland* (1998) 195 CLR 547 at 562 [15]; *Waterside Workers' Federation of Australia v J W Alexander* (1918) 25 CLR 434 at 444; cf *Baker v R* (2004) 223 CLR 513 at [40] – [51]; *Fardon v Attorney-General* (2004) 223 CLR 575 at [92] – [93]

39 *Kable v DPP* (1996) 189 CLR 51 at [103] (Gaudron J) and [134] (Gummow J); *South Australia v Totani* (2010) 271 ALR 662; 85 ALJR 19 at [1], [62], [64], [70], [206]

in the re-sentencing, the absence of reference to the maximum penalty exposure in re-sentencing, and by the form of order by the CCA which specified only the non-parole period and balance of term.

45. The *Interpretation Act (1987) NSW*, s31, cannot save Division 1A of Part 4 of the Act as it is not possible to read down the Constitutional invalidity given the meaning and operation of the provisions addressed above[40].

46. Insofar as necessary the applicant seeks leave to challenge the correctness of the decision in *Palling v Corfield* (1970) 123 CLR 52. The reasoning in that case does not accord with *International Finance Trust Company Limited v NSW Crime Commission*[41].

47. The reasoning of Barwick CJ in *Palling v Corfield*, supra at 58, amounts to permitting Parliament to direct the manner and outcome of the exercise of judicial power. The judicial character of the function of imposition of penalty being a judicial act is recognised by Barwick CJ but the empowering to impose without independent exercise of judicial power does not sit with current Constitutional doctrine as to the integrity of the courts mandated by Chapter III. The separate judicial function of all courts reviewable under s73 of Chapter III does not sit with the sentencing function being performed by the legislature. Section 120 of the Constitution in the reference to "*punishment of persons convicted*" should be construed consistently with Chapter III and s73 as reflecting punishment imposed by exercise of judicial power.

48. Further, the Constitutional challenge in *Palling v Corfield* appears to have been directed to a mandate given to the prosecuting party. As the Constitutional argument, now advanced was not addressed in *Palling v Corfield* it is so far as necessary an appropriate case to give leave to challenge its correctness. For the reasons advanced in the argument above the interference with the judicial function by a mandated custodial sentence by the legislature is incompatible with the integrated court system mandated by Chapter III and *Palling v Corfield* should be overruled.

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[40] *K–Generation Pty Ltd v Liquor Licensing Court* (2009) 237 CLR 501 [46-48]
[41] (2009) 240 CLR 319 at [50]

49. Alternatively, *Palling v Corfield* should be distinguished given the very different and broader legislative interference in both judicial function and sentencing principles by Division 1A of Part 4 of the Act.

50. The decision of the South Australian Full Court in *R v Ironside* (2009) 104 SASR 54 dealt with similar legislation although there are a number of material differences. First, the head sentence is still fixed first in the usual manner, see 10(1a). Secondly, s32A of the *Criminal (Sentencing) Act 1988 (SA)* refers to the "*lower end of the range*" rather than the "*middle of the range*" as referred to in s54A(2) of the Act. Thirdly, s32A of the SA statute provides a different set of criterion in respect of varying the mandatory minimum non-parole period, compare s21A and s54B of the Act. It is also clear that the SA Full Court focused upon the prescribed period being four fifths of the head sentence, s32(ba) of the SA statute, and the SA statute does not set out a Table with specified standard non-parole period years provided by s54A[42] of the Act.

51. The decision in *Ironside* should be distinguished because the head sentence remained a matter at large without shackling of the judicial discretion as has occurred in the NSW statute and the SA statute does not mandate the distortion of sentencing principle by reference to a phantom offence. Further, *Ironside* may be distinguished as the core argument developed was based on unequal treatment [61], not the issues advanced in the present case. Insofar as necessary the applicant submits *Ironside* is wrong, that it applied *Palling v Corfield* which should be overruled for the reasons addressed above and accordingly should not be followed.

Not manifestly inadequate

52. The applicant was sentenced on 15 June 1999 by an experienced trial judge after hearing evidence and submissions on 15 June 2009. No error of principle was identified by the CCA that could justify quashing the sentences imposed under s5D of the *Criminal Appeal Act 1912*.

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[42] Although s32(5)(ab) specifies 20 years non-parole period for the offence of murder. It is hard to understand how in the legislative range the specified term of 20 years in the South Australian statute can be "*the lower end of the range*" when in New South Wales the same specified term is said to be "*the middle of the range*".

53. A Crown appeal against sentence is a matter that requires identified error of the kind within *House v R* (1936) 55CLR 499 at 504 – 5 or some special circumstances to warrant interference with the discretion of the sentencing judge by the Crown, *Griffiths v R* (1977) 137 CLR 293[43]. No relevant error or special circumstances whatsoever emerge from the reasoning in the CCA[44].

54. On the first count, involving the illegal drug offence, the bare conclusion of being manifestly inadequate is identified in paragraph 80[45] and incorporates the standard non-parole period in the reasoning through paragraphs 74[46] and 75[47]. The three cases referred to in paragraph 80[48] were acknowledged as having differences and the only feature identified in paragraph 80 appears to be "*those who assist in the trade must also expect heavy sentences*". That is not a feature capable of supporting a sentence being manifestly inadequate.

55. Departure from the Table applied by s54A of the Act is not a ground or feature that supports manifest inadequacy, and there was no exceptional circumstance[49] to justify the bringing of the appeal or the 80% increase in sentence[50]. The 80% increase was a serious error of principle and on any view was not within the lower end of the range available[51], which an appellate court should impose, on a Crown appeal, where rare leave is granted for error of principle.

56. On the second count, involving the drug offence, paragraph 73[52] of the CCA judgment appears to be a conclusion of being manifestly inadequate by reference to little more than paragraph 72[53] and the reference to the standard non-parole period in the Table applied by s54A of the Act. There is no special circumstance or feature[54] identified in the reasoning that supports the conclusion of inferred error of principle. The departure from the standard non-parole period, the only matter clearly referred to in relation to the second

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43 See also *Whittaker v R* (1928) 41 CLR 230 at 248; *Malvaso v R* (1989) 168 CLR 227 at 234
44 *Lacey v Attorney-General of Queensland* [2011] HCA 10 at [16] – [20]
45 AB 162
46 AB 160-161
47 AB 161
48 AB 162
49 *Everett v The Queen* (1994) 181 CLR 295 at 299 – 300
50 *Lacey v Attorney-General of Queensland* [2011] HCA 10 at [15]
51 *Dinsdale v The Queen* (2000) 202 321 at 341 [62]; *R v Wall* (2002) NSWCCA 43 at [70]
52 AB 160
53 AB 160
54 *Malvaso v The Queen* (1989) 168 CLR 227 at 234 – 235

count involving the firearms offence, is not a ground or feature that supports a finding of manifest inadequacy.

57. Manifest inadequacy to justify appellate intervention cannot be based upon the legislative precedent identified in the standard non-parole period. To permit interference on this basis would entrench and rigidify sentencing discretion. The inadequacy must be informed by the level of criminality that is so disparate as to shock the public conscience[55] whereby error must have occurred. There is no reasoning to support any such disparity.

58. It is submitted that the conclusion of manifest inadequacy by the CCA based upon s54A is a specific error that demonstrates a manifestly unreasonable and erroneous exercise of the sentencing function that requires correction to avoid a serious miscarriage of justice[56].

59. Indeed, the sentence on each count by the experienced trial judge was a proper exercise of discretion, taking into account the nature and circumstances of the offences, given the early plea of guilty, at the time of arraignment, the age of the applicant being 28 years at the time of sentencing on 15 June 2009, the uncontested drug habit of the offender, and the fairly low level, 2% – 2.5% of purity, of the 1.7 kilos of methylamphetamine seized, explanation of warehousing and explanation of firearm fetish, as well as taking into account the applicant's criminal history and dysfunctional upbringing. Although the offences required custodial punishment, both involved the lower end of the range of criminality for the respective offence. There was no analysis, reasoning or findings by the CCA of the applicant's knowledge referable to the objective criminality or any other feature warranting severity[57] to establish manifest error.

60. The weight of the narcotics was itself insufficient to establish appealable error, *Wong v R* (2001) 207 CLR 584 at 609 and the numerical or quantitative approach of a grid anchor point to establish error is contrary to sentencing principle[58]. There was no warrant for interfering with the sentence of the trial

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55 *R v Osenkowski* (1982) 30 SASR 212 at 213 ; *Wong v R* (supra) at [8]
56 *Ryan v R* (2001) 206 CLR 267
57 *Hili v The Queen* (2010) 85 ALJR 195 [59] – [62]
58 See also *Wong v R*, supra at [65], [74] – [75], [78], [168]

judge and on the findings of the trial judge as to the limited objective criminality the re-sentencing by the CCA was itself manifestly excessive.

61. There is no special feature properly identified by the CCA which supported intervention on the basis of the sentence imposed by Graham ADCJ being manifestly inadequate.

Part VII: Applicable provisions

62. See Annexure A.

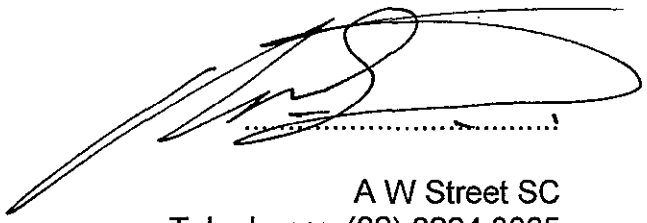
10 **Part VIII: Orders sought**

63. That special leave be granted.

64. That time for filing the application for special leave be dispensed with under Part 41 Rule 41.05 of the High Court Rules.

65. That the appeal be allowed and the orders of the CCA, Supreme Court of New South Wales pronounced on 24 September 2010 be set aside and in lieu thereof order the appeal to that Court be dismissed.

20 Dated: 9 May 2011



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