IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

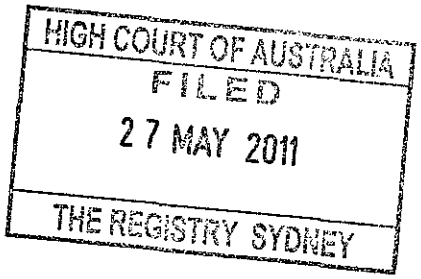
No S137 of 2011

BETWEEN:

JIHAD MAHMUD
Applicant

and

THE QUEEN
Respondent



APPLICANT'S REPLY

REPLY TO INTERVENERS

1. South Australia seeks to re-characterise the anchor point as a "*yardstick*". It is no yardstick for Parliament to set the standard non-parole period. It is no yardstick for Parliament to take into account matters relevant to a sentencing judge in setting the standard non-parole period. It is no yardstick to direct that the legislative sentence is to be applied unless reasons for departure are given. It is no yardstick when departure founds appellate intervention.

2. Secondly the interveners submissions fail to squarely identify and address the applicant's grounds of impermissible interference being:

   (a) the impairment of the separate judicial function; and/or

   (b) a fundamental departure from proper sentencing principles.

3. Thirdly, the interveners erroneously conclude that Division 1A of Part 4 of the Act could be validly enacted by the Commonwealth Parliament without reference to the nature[1], scope and impact of s73[2] in respect of the

[1] Crampton v The Queen (2000) 206 CLR 161 at 182-184 [47]- [53]; Mobil Oil Australia Pty Ltd v Victoria (2002) 211 CLR 1 at 38 -39[63]-[67]
[2] Section 2 of the *Judiciary Act 1903* picks up the constitutional meaning of judgment as including sentence and s35A picks up subject to the grant of special leave judgment as defined by s2 encompassing sentence.

JOHN HERTZ & ASSOCIATES
1106 Botany Rd
BOTANY NSW 2019

DX 4110 MAROUBRA
Tel: (02) 9666 6011
Fax: (02) 9666 3795
Ref: John Hertz

constitutionally entrenched appellate power over sentencing. As Western Australia acknowledge s.73 is a key source of *Kable* doctrine as well as the integrated court system.

4. The interveners all fail to address how the appellate power over "sentences" in s.73 can be a judicial function[3] that Federal Parliament or State Parliament may dictate. The content of the power of appeal referable to "sentences" cannot be a hollow rubber stamp of judicial authority devoid of the power of appellate review. The appellate power of review of "sentences" inherently entrenches the sentencing function as a judicial function that must be capable of appellate review referable to the individual's actual offence, the maximum punishment, the individualized facts and application of proper sentencing principles.

5. The nature and scope of the appellate power for "sentences" must have the content of embracing custodial sentence. This content is re-enforced by s. 44 (ii) and the reference to incapacity for serving in the Houses of Parliament after conviction "*is under sentence, or to be sentenced for any offence punishable under the law of the Commonwealth of a State by imprisonment for one year or longer*".

6. A detached discussion of penalties embracing forfeiture and fines and the cases thereon are of no assistance in addressing the work done referable to custodial sentences and the power of appellate review from all the courts from which appeals may be heard and determined within s.73.

7. To construe s73 in relation to the appellate power in respect of sentences as circumscribed by a duty to impose specific punishment as suggested by Barwick CJ in *Palling v Corfield*, or indeed an appellate power constrained by the legislative anchor shackled to the legislative fixing of the standard non-parole period is not an implication or limit that is to be found in s73, *Owners of the Ship Shin Kobe Maru v Empire Shipping Co Inc* (1994) 181 CLR 404 at 421 and 424.

[3] House v The King (19360 55 CLR 499 at 504-505

8. It cannot be sustained that if the statute nominates the sentence and imposes on the Court a duty to set that sentence, no judicial power or function is invaded. That is part of the core reasoning adopted by Barwick CJ in *Palling v Corfield.* That reasoning is contrary to s73 of the Constitution. That reasoning is contrary to the important sentencing function performed by courts. That reasoning is contrary to the appellate power to review the exercise of judicial discretion in sentencing.

9. Applying constitutional principles of interpretation to s.73 there is no scope for implying words of limitation such as "*sentences unless fixed by State or Federal Parliament*". Nor can s.73 be read as referring to "*sentences as directed by State or Federal Parliament*". But the starting premise of all the interveners is that Federal Parliament could pass Division 1A of Part 4 because of observations in *Palling v Corfield.* Those observations first do not accord with principle carefully worked out in a succession of cases based on s.73. Secondly *"the question at issue relates to an important provision of the Constitution dealing with individual rights central to the Constitution"*[4]. Thirdly *"the earlier decisions placed an incorrect interpretation upon it"*[5]. Fourthly *"the court has a responsibility to set the matter right"*[6].

10. As was said in Richardson v Forestry Commission [7] *"Plainly enough, if, as is the case, I do not think that the Constitution admits of any other interpretation, it is the words of the Constitution rather than authority which should govern any decision I might make....This court has never held itself to be bound by its own decision and ultimately it is the Constitution itself, and not authority, which must dictate the answers which we give".*

11. It is contrary to principle for State or Federal Parliament to be able to impose a minimum sentence of custodial punishment. To do so impermissibly interferes with the reviewable judicial function in sentencing because it distorts sentencing principle, impermissibly relieves the Crown of the burden of proof as to the facts to support that minimum custodial sentence, creates a phantom level of criminality and imposes a mandated minimum custodial

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[4] Street v Queensland Bar Association (1989) 168 CLR 461 at 489; see also 518-519; 549, 569-570, 588
[5] Ibid. No proper principles of Constitutional interpretation were applied; Supra at 527
[6] Ibid
[7] (1988) 164 CLR 261 at 321-322

sentence referable to the phantom offence, and impairs appellate review of that mandated minimum sentence set by the legislature.

12. Inherent in any fixed custodial sentence or minimum custodial sentence is the entry by the legislature into the actual sentencing function. There is a marked difference between the legislature identifying reviewable principles to be applied in sentencing and on the other hand the legislature purporting to set a fixed custodial sentence, to set a minimum custodial sentence or to set an anchor point standard sentence.

13. It is not a case of a court enforcing a valid law of Parliament as that is the issue raised by *Kable* and s.73. A law which fixes the legislative sentence or fixed legislative minimum, enters the arena of the separate judicial institutions recognized in Chapter III, in which the function of sentencing is vested in the appellate review power of the apex of the integrated judiciary. To remove sentencing discretion of the integrated courts must impair the function of appellate review. A law that imposes a mandatory fixed custodial sentence of its nature involves no reviewable discretion of fact or principle as conviction is a separate, earlier and different judicial function. Such a law in the criminal arena of custodial punishment must not impair the reviewable exercise of judicial function in sentencing entrenched by s.73.

14. The decision in *Fraser Henleins Pty Ltd v Cody* (1945) 70 CLR 100 is distinguishable from the legislation in the present case because in Division 1A of Part 4 the legislature purports to set a legislative sentence after taking into account certain sentencing principles. However, for the same reasons as developed in relation to *Palling v Corfield*, the applicant seeks leave to challenge the correctness of that decision so far as it supports a principle that Parliament may impose a mandatory custodial sentence for an offence or impose a mandatory minimum custodial sentence for an offence. Specifically, the proposition that such a Parliamentary interference in sentencing does not "*constitute any evasion of the judicial functions of the courts referred to in s71 of the Constitution*" utterly fails to address s73 and the reference therein to "*sentences*" and fails to address the consequential distortion of fundamental sentencing principles. Insofar as the reasoning of

Starke J in *Frazer Henleins* supports Parliamentary power to specify the potential maximum punishment in terms of custodial punishment, that is not the argument developed by the applicant in this case.

15. So far as necessary the applicant seeks leave to challenge *The King v Bernasconi* (1915) 19 CLR 629 at 634-635 to the extent that it supports *Frazer Henleins* and relies on the same grounds as developed above in relation to *Palling v Corfield.*

16. The UK, US and Canada have no equivalent to provision to s. 73. Nor does a history of legislative departure from the Constitution entrench a legislative power inconsistent with Chapter III and .s73. Nor can the pre-existing penalties at the time of federation freeze the important provisions of Chapter III. There is every reason consistent with the supremacy of the rule of law to require the most important function of criminal sentencing for custodial punishment to be performed by Chapter III courts and without impermissible impairment of the function by the legislature.

17. No construction is developed explaining why s54A is not a legislative direction to the Courts "*as to the manner and outcome of the exercise of the jurisdiction ...*" which impairs "*the character of the Courts as independent and impartial tribunals*", *Gypsy Jokers Motorcycle Club Incorporated v Commissioner of Police* (2008) 234 CLR 532 at [39]. The existence of a discretion is not disputed. The impairment is in the anchoring of the manner and outcome of the exercise by the non reviewable standard non-parole period.

18. The character of the particular law imposed by Division 1A of Part 4 of the *Crimes (Sentencing Procedure) Act 1999 (NSW)* is to constrain the power and function of the sentencing court by requiring application of the legislative sentencing anchor point and, as such, is likely to undermine public confidence in the courts' exercising the impaired sentencing function. Public confidence is also likely to be undermined by the shackled legislative sentencing power being exercised by reference to the phantom offence of "*the middle of the range of objective seriousness*". Public confidence in the courts as integrated institutions under Chapter III and the necessity for

reviewable function of sentencing s.73 is undermined by Division IA of Part 4. Further public confidence must be undermined where the sentencing power is not being exercised by reference to the actual offence, but rather a phantom offence[8].

19. The institutional integrity of the integrated courts under Chapter III is impaired by the legislative sentence found in s54A, by the impairment of reviewable sentencing function affected by Division IA of Part 4 and by the distortion of fundamental sentencing principles.

20. It is submitted that on the necessary comparator test for repugnancy, if Division 1A of Part 4 of the *Crimes (Sentencing Procedure) Act 1999 (NSW)* were to be incorporated as a new Division 1A to Part 1B of the *Crimes Act 1914* by the Federal Parliament, it would be repugnant and invalid in the exercise of Federal Court jurisdiction.

21. The Bill of Attainder submission by the State of New South Wales omits the passage in *Chu Kheng Lim v Minister for Immigration Local Government & Ethnic Affairs* (1992) 176 CLR 1 at 70, which refers to including all "*legislative acts, no matter what their form, that apply either to named individuals or to easily ascertainable members of a group in such a way as to inflict punishment on them without a judicial trial*". The breadth of those words catches a legislative form of inflicting punishment by a standard non-parole period of the kind found in Division 1A of Part 4. The omitted passage continues to refer to a law:

> "*(1) directed to an individual or a particular group of individuals*
> *(2) which punishes that individual or individuals*
> *(3) without the procedural safeguards involved in a judicial trial.*"

22. The interveners have omitted to address the applicant's submission as to why, in the present case, "*the procedural safeguards involved in a judicial trial*" have been distorted and impermissibly interfered with by Division 1A of Part 4.

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[8] *Fardon v Attorney-General* (2004) 223 CLR 575 [102]

REPLY TO RESPONDENT

23. The discount for a plea of guilty did not establish appellable error by the proposition that it should usually fall in the range of 10% to 25%[9], nor is it appellable error to allow a discount for a plea of guilty on arraignment of more than 15%[10]. The discount was not itself capable of being identified as manifestly excessive.

24. The trial judge found that the plea was entered "*before there was any need for the matter to be prepared for trial in the District Court*"[11] and the trial judge took into account that the trial would have taken some time[12], that the Court would probably have been required to view video evidence[13] and that there were various other matters to be taken into account on the Form 1 providing a utilitarian value for the plea of guilty[14]. Further the plea, as if often the case was a result of negotiation and thus could not have been entered earlier than it was.

25. The approach adopted by the CCA at AB 151 [43] was an irrelevant judicial preference for limiting the discount for a plea on first arraignment to 15%. There is no such 15% principle. The selection by the CCA of a figure halfway between 10% and 25% in the circumstances where the trial judge allowed 20%[15], was inappropriate tinkering, *Dinsdale v The Queen* (2000) 2002 CLR 321 at [62]. The halfway approach could just as easily have started at 15% and 25% which reflects the 20% allowed. The halfway figures show no error of principle.

26. Specifically, the pre-sentence report was of no consequence and was not the subject of any relevant findings by the trial judge, nor cited in the CCA. It cannot now be used by the respondent to support any relevant to manifest inadequacy. The pre-sentence report has only partial statutory foundation directed to non-custodial alternatives. Whilst the pre-sentence report is

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9 AB 150 at [41]
10 AB 150 at [41]
11 AB 101.48
12 AB 101.52
13 AB 101.56
14 AB 102.1
15 AB 102.10

relevant to subjective circumstances in determining eligibility for parole, it is not a document to be used on appeal in determining objective criminality.

27. Moreover, it is material in this regard that no significant street value was proved by the Crown in relation to the purity of 2.5% of the total 1.78 kilos[16] which reflects less than 5 grams of pure methylamphetamine.

28. What the respondent has not addressed is the use of the standard non-parole period by the CCA to find error.

29. Applying s101A, it is clear that the trial judge had regard to the standard non-parole period[17]. It is an important error of principle to use the statutory sentence, when regard has been had to the same, to find error or to establish that the sentence is manifestly inadequate. No other ground to support manifest inadequacy is developed by the respondent[18].

Dated: 27 May 2011

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A W Street SC
Telephone: (02) 8224 3005
Facsimile: (02) 9233 1849
Email: streetsc@sevenwentworth.com.au

G D Wendler
Telephone: (02) 9232 2944
Facsimile: (02) 9223 1262
Email: gdwend@windeyerchambers.com.au

A Tokley
Telephone: (02) 8815 9100
Facsimile: (02) 9232 8995
Email: atokley@wentworth.com.au

[16] AB 110.18 – .22
[17] AB 100.38; 101.1
[18] Skinner v the King (1913) 16 CLR 336 at 342-343