IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

No. S271 of 2015

BETWEEN:

PHILIP NGUYEN
Appellant

and

THE QUEEN
Respondent

APPELLANT'S SUBMISSIONS

Part I: Certification

1. This submission is in a form suitable for publication on the internet.

Part II: Issues raised

2. Does the principle in *The Queen v De Simoni* (1981) 147 CLR 383 ("*De Simoni*") prohibit a sentencing judge from having regard to the absence of a factor which, if present, would render an offender guilty of a more serious offence?
3. Does the principle in *De Simoni* prohibit a sentencing judge from having regard to the absence of a factor which, if present, would render an offender guilty of a more serious offence where that factor is not an element of the more serious offence?
4. Is it permissible for a sentencing judge to have regard to the absence of a factor which, if present, would render an offender guilty of a more serious offence where that factor is not an element of the more serious offence?
5. Is it open to a sentencing judge to impose concurrent sentences in the exercise of his or her discretion and applying the totality principle where the genesis of the offences was the one act, performed with the same state of mind and where the same aggravating factors apply but where the act had different consequences?

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Part III: Notices

6. The appellant has considered whether any notice should be given in compliance with s78B of the *Judiciary Act 1903* (Cth) and has concluded that no such notice is necessary.

Part IV: Citation

7. The citation of the reasons for judgment of the NSW Court of Criminal Appeal is: *R v Nguyen* (2013) 234 A Crim R 324. The citation of the reasons for judgment of the NSW Supreme Court is *R v Nguyen* [2013] NSWSC 197.

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Part V: Facts

Background

8. On 19 July 2012 the appellant pleaded guilty to two offences: the manslaughter of Constable William Crews ("the deceased") contrary to s18(1)(b) of the *Crimes Act 1900* (NSW); and wounding with intent to cause grievous bodily harm to the deceased contrary to s33(1)(a) of the *Crimes Act*. Both offences carry a maximum penalty of 25 years imprisonment; the wounding offence also carries a standard non-parole period of 7 years. Two offences were included on a Form 1 to be taken into account on the sentence for manslaughter in accordance with s33 of the *Crimes*
20 *(Sentencing Procedure) Act 1999* (NSW). The first offence was the unauthorised possession of a prohibited firearm contrary to s7(1) of the *Firearms Act 1996* (NSW). The appellant used this firearm to commit the substantive offences. The second offence was the possession of 3.21 grams of methylamphetamine for the purposes of supply contrary to s25(1) of the *Drug Misuse and Trafficking Act 1985* (NSW).

9. On 15 March 2013 Justice Fullerton sentenced the appellant to 9 years and 6 months imprisonment with a non-parole period of 7 years for the manslaughter offence and 6 years and 3 months imprisonment with a non-parole period of 4 years
30 and 9 months for the wounding offence ([2013] NSWSC 197 ("ROS")). The sentences imposed were wholly concurrent and commenced on 8 September 2010. The sentence for the manslaughter offence was to expire on 7 March 2020 and the non-parole period was to expire on 7 September 2017.

10. The Crown appealed against the sentences imposed on the appellant on four grounds alleging both patent and latent error pursuant to s5D of the *Criminal Appeal Act 1912* (NSW). On 28 August 2013 the Court ("CCA") (constituted by Beazley P, Johnson and RA Hulme JJ) upheld grounds 1 (error in assessing the objective seriousness of the manslaughter offence), 3 (error in applying the
40 principle of totality) and 4 (manifest inadequacy) ([2013] NSWCCA 195). The

CCA exercised its discretion to intervene and re-sentenced the appellant to 16 years and 2 months imprisonment with a non-parole period of 12 years for the manslaughter offence and 8 years and 1 month imprisonment with a non-parole period of 6 years for the wounding offence. The sentences imposed were partially cumulative so that the sentence for the manslaughter offence commenced on 8 September 2011, one year after the sentence for the wounding offence commenced, which was on 8 September 2010. The total effective sentence was 17 years and 2 months imprisonment with a non-parole period of 13 years. The earliest date the appellant will be eligible for parole is 8 September 2023.

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The Facts

11. On 8 September 2010 a search warrant was issued in relation to the appellant's residential unit and Garage 8 of the unit complex. Det Senior Constable Roberts was the officer in charge of the execution of the warrant. Eight police officers were deployed to execute the warrant. Three of the officers were in police uniform and the remaining officers, including the deceased and Det Senior Constable Roberts, were in plain clothes. The deceased and Det Senior Constable Roberts were armed with firearms. The operation was deemed by police to be low risk and it was not anticipated that there would be firearms in the appellant's premises or at his
20 disposal (CCA at [10]).

12. At approximately 9pm the police arrived at the unit complex. Det Senior Constable Roberts led the officers into the basement and a police officer gave them directions to Garage 1 in the mistaken belief that it was Garage 8. Earlier that day the appellant and an associate of his, Mr Chung, discussed a drug deal with three other men. The men also discussed an existing drug debt that Mr Chung owed to the men as a result of the supply of drugs to Mr Chung the previous day. The three men left shortly before the police arrived at the unit complex. The appellant and Mr Chung remained inside Garage 1. The door to Garage 1 was open when the police arrived.
30 Three other men were inside Garage 8 (CCA at [10]).

13. Det Senior Constable Roberts and the deceased walked towards Garage 1 (believing it was Garage 8). Other officers in plain clothes were close behind them and the uniformed officers were further behind. No officer had his firearm drawn. As the police officers approached Garage 1 they announced that they were police a number of times. The deceased then yelled out that the appellant had a firearm. Det Senior Constable Roberts saw the appellant walk out of Garage 1 in a crouched position holding a firearm. The appellant was pointing the firearm in various directions including in the direction of the police. Det Senior Constable Roberts

and the deceased identified themselves as police again and directed the appellant to put down the firearm (CCA at [10]).

14. In the space of seconds five shots from three firearms were fired. The appellant fired at the deceased with the bullet penetrating the soft tissue of the deceased's left arm causing a 2 millimetre puncture wound (CCA at [11], ROS at [58]). The deceased fired three shots in quick succession none of which hit the appellant. Det Senior Constable Roberts fired a shot at the appellant. It was later confirmed that the shot fired by Det Senior Constable Roberts struck the deceased in the neck and fatally wounded him (CCA at [11]). Det Senior Constable Roberts saw the appellant try to use his firearm but it appeared jammed. The appellant then picked up the battering ram and simulated its use as a firearm by pointing it at the police officers (CCA at [11]).

15. The appellant and Mr Chung retreated to the appellant's unit. The appellant repeatedly told Mr Chung that the men were "fake police" and he believed they thought he had money. The appellant told his wife that someone was trying to break into the garage, that he had shot a man and thought he was going to die (CCA at [11]). The police ultimately arrested the appellant after he barricaded himself in the unit for a period of time (CCA at [12]).

16. In his record of interview the appellant said he and Mr Chung went to the garage to smoke some heroin. The appellant said Mr Chung was, at the time, organising a drug deal involving 8 ounces of cocaine. The appellant acknowledged involvement in the transaction (CCA at [12]).

17. In his record of interview the appellant said he heard a lot of people shouting and screaming whilst he was inside the garage. He believed the two men standing at the entrance of the garage were there to rob him. Police later independently confirmed that approximately two weeks prior to the offences the appellant was the victim of an attempted robbery whereby two masked men armed with bats attempted to rob him while he was in Garage 8. He told his wife these men had cricket bats and the police that they had knives. The appellant shouted at these men and they ran off but left a mobile phone. Police officers located this mobile phone during the search of the premises. Police located one of these men who told them that he and another man were wearing balaclavas, were armed with bats and intended to rob the appellant (Agreed Facts at [48]). The appellant obtained the pistol after this incident to protect himself in the event of another robbery (CCA at [13]). In his record of interview the appellant agreed that he was aware (from a previous search warrant executed on his premises) that not all police officers wear uniforms when

executing search warrants (CCA at [14]). There was no further evidence as to when that search warrant was executed or the circumstances in which it was applied for (CCA at [14]).

18. Small concentrations of morphine, amphetamine and methyl amphetamine were detected in the appellant's blood, which was tested the following morning after the offences (ROS at [28]). This would not have had any relevant impact on his perception at the time (ROS at [28]).

Relevant matters on sentence

19. The sentencing judge found that both offences were aggravated by three factors. First, the use of the weapon in the offences was an aggravating factor to be afforded "significant weight" (ROS at [43], s21A(2)(c) *Crimes (Sentencing Procedure) Act*). Second, the offences were committed without regard to public safety (ROS at [55], s21A(2)(i) *Crimes (Sentencing Procedure) Act*). Third, the victim was a police officer and the offence arose because of his occupation (ROS at [53], s21A(2)(a) *Crimes (Sentencing Procedure) Act*). This last factor was afforded slightly less weight because the appellant was not aware that the deceased was a police officer but ought reasonably to have foreseen the possibility that he might have been one (ROS at [53], see also CCA at [96]).

20. The sentencing judge found the wounding offence was within the mid range of offending having regard to, on the one hand, the use of a weapon, the presence of an intent to cause grievous bodily harm and the aggravating factors balanced against the appellant's belief that the police officers were men there to rob him and that her Honour was unable to conclude that the wound was serious (ROS at [58]).

21. The sentencing judge inferred that the appellant was involved in the drug transaction with Mr Chung earlier that day (CCA at [12] and [93]; ROS [40]). The Crown contended that the seriousness of the offences had to be assessed in the context of the appellant being a drug dealer and arming himself after the attempted robbery to facilitate his drug dealing activities. The sentencing judge rejected this contention because there was insufficient evidence to support it (ROS at [38]-[40]).

22. The sentencing judge declined to take the drug supply offence on the Form 1 into account in the sentence imposed for manslaughter (ROS at [27]). It is unclear precisely how the sentencing judge took the remaining offence on the Form 1 into account although the Crown's submissions on the subject were recorded at ROS [42]. The CCA found the firearm offence on the Form 1 called for a "*significantly longer sentence being imposed for manslaughter*" (CCA at [110]).

23. The appellant received a 10% discount for his plea of guilty (CCA at [31]). The sentencing judge accepted that he was remorseful but said that its weight as a mitigating factor was largely overwhelmed by the collective weight of the aggravating features on sentence (CCA at [32]).

Relevant matters regarding the appellant

24. The appellant was born in Vietnam. In 1977 he escaped Vietnam and arrived in Australia in 1978 after spending 6 months in a refugee camp (Pre Sentence Report dated 22 February 2013 p.1). He was 55 years old at the time of the offences. He married his first wife in 1982 and they divorced in 1996 (CCA at [22]). He and his first wife had three children together (CCA at [23]). He remarried in 2001 and his second wife arrived from Vietnam in 2003. Shortly after he was arrested and taken into custody for these offences he and his second wife separated (CCA at [24]). The appellant's first wife was murdered in 2001 and he assumed the care of his children (CCA at [25]). The appellant was greatly affected by his first wife's death (Pre Sentence Report p.3). Ms McMahon, the author of the Pre Sentence Report, stated that the appellant presented as hypersensitive in relation to the safety of himself and his family and that this "*may have been a major contributing factor to his offending behaviour*" (Pre Sentence Report p.3).

25. The appellant started using heroin and crystal methamphetamine after the death of his first wife and as means of coping with her death (CCA at [28], Pre Sentence Report p.3). This eventually led to the breakdown of the appellant's relationship with his children in 2009 (Pre sentence report p.2). In 2010 he was using heroin and crystal methamphetamine and reported that he was under the influence of these drugs at the time of the offences (Pre Sentence Report p.3). At about the time of sentence his daughter had recommenced contact with the appellant (Pre Sentence Report p.2).

26. Although the appellant had difficulties accepting the conviction for manslaughter he acknowledged that his actions were wrong (Pre Sentence Report p.4). He said that at the time of the offences he felt threatened and that he was going to be killed (Pre Sentence Report p.4). He said he had no intention to harm anyone and accepted that obtaining the firearm was a poor decision in hindsight (Pre Sentence Report p.4). The appellant had suffered a stroke in November 2012 (Pre Sentence Report p.4).

27. The appellant had a prior criminal history (CCA at [26]-[27]). This deprived him of leniency and increased the weight to be given to specific deterrence (ROS at [56]).

Part VI: The argument

Ground 2.1

28. By pleading guilty the appellant admitted to all the elements of the offences for which he was charged namely, the manslaughter of the deceased and the wounding of the deceased with intent to cause grievous bodily harm (*R v Olbrich* (1999) 199 CLR 270 at [4]). Here, the appellant's culpability was also defined by the application of the partial defence of self defence in s421 of the *Crimes Act 1900* (NSW). Except to the extent that his culpability was defined by the elements of the offence (either expressly or by necessary implication) the appellant's culpability was a matter for the sentencing judge (*Cheung v The Queen* (2001) 209 CLR 1 at [5][1]).

29. Certain factual findings necessarily followed from the appellant's pleas of guilty to the manslaughter offence and the wounding offence and from the prosecution's acceptance of the appellant's pleas in full satisfaction of the indictment. These were set out in a document titled Crown Case Summary (Ex 3) which became the agreed facts on sentence.[2] The appellant was sentenced on the basis identified in the Crown Case Summary document (see ROS at [32]-[35], CCA at [15] and [16]).[3]

30. The appellant's plea of guilty to manslaughter necessarily involved an acceptance that he caused the death of the deceased although he did not fire the fatal shot (CCA at [15]). The sentencing judge said "*The issue of causation was conceded by his acceptance of the proposition that the discharge of the pistol (which caused the wound the subject of the wounding charge) substantially contributed to the exchange of gun fire in the course of which* [the deceased] *was fatally shot by a fellow officer, and in circumstances where it was reasonable foreseeable that someone in the vicinity of an exchange of gun fire may be fatally (even if inadvertently) shot*" (CCA at [15]).

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[1] *Cheung v The Queen* considered whether and to what extent a sentencing judge is constrained by the jury's verdict when finding facts for the purpose of sentence. It is submitted that the general observations at [5]-[8] apply so far as is practicable to a sentencing judge's findings of fact on sentence where an offender has pleaded guilty.

[2] The solicitor for the appellant indicated the facts in the Crown Case Summary document were agreed with the exception of one matter (T16.43-.47). The fact not agreed was that the 3.21gms of methamphetamine found in the appellant's garage did not belong to him (T16.44-.47). This was the subject of one of the offences on the Form 1 and ultimately not taken into account by her Honour (ROS at [27]).

[3] The issues associated with proof of aggravating/mitigating factors and what is relevant and known to the court did not arise in the appellant's case (see s21A(1)(a) and (b) of the *Crimes (Sentencing Procedure) Act 1999* (NSW), *Filipou v The Queen* (2015) 89 ALJR 776 at [66] et seq; *R v Olbrich* at [17]).

31. The plea of guilty to manslaughter was accepted by the Crown on the basis that there was a reasonable possibility that the appellant "*genuinely believed that it was necessary to shoot at the person who proved to be* [the deceased] *in order to defend himself (based as it was on his mistaken belief that the officer was someone who was intent on robbing him and someone who might have posed a serious risk to his safety). It also entails acceptance by the* [appellant] *that a reasonable person in his position would not have considered it necessary to shoot that person in defence of himself or his property.*" (CCA at [15]). Accordingly, the partial defence of self defence under s421 of the *Crimes Act* applied. Section 421 of the *Crimes Act* has the effect that murder is reduced to manslaughter in circumstances where the person believes his or her conduct is necessary to defend himself or herself or the deprivation of his or her or another person's liberty and where the conduct involves the infliction of death but that conduct is not a reasonable response in the circumstances as he or she perceives them.

32. The appellant's plea of guilty to the wounding offence entailed an acceptance by the appellant that he shot at the deceased intending to cause him grievous bodily harm and wounded him but self defence under s418 of the *Crimes Act* was not available because it was not a reasonable response in the circumstances (CCA at [16]). The act causing the death of the deceased and the act causing the wounding of the deceased were the same act of the appellant, namely the discharge of the firearm.

33. The sentencing judge found that the circumstances of the offences including the aggravating factors rendered both offences "objectively serious" (ROS at [57]). This was so notwithstanding the following: he caused the deceased's death despite not firing the fatal shot; the appellant did not know the deceased was a police officer when he shot him; and at the time he discharged his firearm he had a genuine (albeit mistaken) belief that he needed to defend himself against a perceived threat of harm (ROS at [57]). These last two matters were inextricably linked.

34. The sentencing judge rejected the Crown's contention that the manslaughter offence was in the "most serious category" and said "*It would have been otherwise were the offender to have shot at* [the deceased] *intending to inflict grievous bodily harm knowing or believing he was a police officer, or were he with that same state of awareness to have pleaded guilty to manslaughter on the basis that* [the deceased] *was killed by his unlawful and dangerous act in shooting at him.*" (ROS

at [57]). This was the passage that the Crown successfully challenged on appeal (see CCA at [39]-[41], [52]).

35. The CCA found the sentencing judge erred in assessing the objective seriousness of the manslaughter offence (CCA at [52], [54]). In reaching that conclusion the CCA used the following reasoning:
    i. "*if the* [appellant] *had known or believed that he was shooting at a police officer, the basis upon which he was rendered liable to conviction for manslaughter, and not murder, would have been removed.*" (CCA at [47]);
    ii. the principle in *De Simoni* prohibits a court from taking into account, as an aggravating factor, circumstances which would have warranted conviction for a more serious offence (CCA at [49]);
    iii. the *De Simoni* principle also prohibits a court from taking into account the absence of a factor which, if present, would constitute a more serious offence (CCA at [50]-[51]); and
    iv. the sentencing judge erred by having regard to the absence of a factor which, if present, would have rendered the appellant guilty of murder for the purpose of assessing the objective seriousness of the offence and by doing so her Honour took into account an extraneous or irrelevant consideration (CCA at [52]). This last finding necessarily involved the proposition that the appellant's lack of knowledge or awareness that the deceased was a police officer was an "absence of a factor".

36. It is submitted that this reasoning is erroneous. In *De Simoni* Gibbs CJ held: "*However, the general principle that the sentence imposed on an offender should take account of all the circumstances of the offence is subject to a more fundamental and important principle, that no one should be punished for an offence of which he has not been convicted. Section 582 reflects this principle. The combined effect of the two principles, so far as it is relevant for present purposes, is that a judge, in imposing sentence, is entitled to consider all the conduct of the accused, including that which would aggravate the offence, but cannot take into account circumstances of aggravation which would have warranted a conviction for a more serious offence.*" (at p389).[4]

37. The *De Simoni* principle does not prohibit a sentencing judge from having regard to the absence of a factor which, if present, would have rendered an offender liable to a more serious offence (cf. CCA at [50]-[53]). Further the *De Simoni* principle (by

[4] There was a statutory provision relevant to the issue raised in *De Simoni* however, the principle identified by Gibbs CJ was derived from the common law (dating back to the 18th Century) and was reflected in the relevant statutory provision (see at 389, 391-392).

analogy or otherwise) does not prohibit a sentencing judge from having regard to particular circumstances of an offence in the manner identified by the CCA (cf. CCA at [50]-[53]). The *De Simoni* principle is ameliorative and operates to the benefit of the offender. It cannot be relied upon to justify the imposition of a more severe sentence than would otherwise have been appropriate. Nothing in *De Simoni* suggests it is a principle that the Crown can invoke (by analogy or otherwise) to restrict the circumstances to be taken into account by a sentencing judge when determining the appropriate sentence. Further, the prohibition identified by the CCA is contrary to the general principle in *De Simoni*, that a sentencing judge is to take into account all the circumstances of the offence.

38. The *De Simoni* principle is related to the principle that a sentencing judge does not review or inquire as to the reasons why a particular charge was preferred or plea accepted by the prosecution. The prosecutor alone has the responsibility of deciding the charge to be preferred against an accused *(GAS v The Queen* (2004) 217 CLR 198 at [28], see also *Barbaro v The Queen* (2014) 253 CLR 58 at [47], *Magaming v The Queen* (2013) 252 CLR 381 at [20]). However, it is for the sentencing judge to determine the relevant facts for the purpose of sentencing an offender and these must be either admitted formally or proved by evidence (*GAS v The Queen* at [30], see also *Barbaro v The Queen* at [47]). In *De Simoni* Gibbs CJ said "*where the Crown has charged the offender with, or has accepted a plea of guilty to, an offence less serious than the facts warrant, it cannot rely, or ask the judge to rely, on the facts that would have rendered the offender liable to a more serious penalty.*" (at 392).

39. In the appellant's case, the prosecution accepted his pleas of guilty. The reasons for that acceptance are not relevant for the purposes of sentence. It is not for the sentencing judge to review the reasons for the Crown's acceptance of those pleas for the purpose of determining what factors can and cannot be taken into account on sentence.

40. In applying the *De Simoni* principle an important distinction is to be drawn between circumstances that are an element of the more serious offence and circumstances which would establish a more serious offence in the context of a particular case.[5] The elements of the offence define, in the abstract, its scope. The circumstances of the offence are the facts that give rise to criminal liability. Similarly, the elements

[5] The importance of drawing distinctions between questions of guilt and culpability and issues and facts relevant to the issues when making findings of fact for the purposes of sentence has been emphasised (*Cheung v The Queen* at [7]).

of any partial defence define its scope and the circumstances giving rise to the application of the defence are the facts that limit criminal liability.

41. The *De Simoni* principle applies to the elements of an offence (or matters that must be alleged on the indictment) but not the factual circumstances that may establish a more serious offence (at 389, 392). The appellant's belief that the men in the garage were "fake police" and were there to rob him was a matter on which his subjective belief that his conduct was necessary to protect himself was based. The appellant's lack of awareness that the deceased was a police officer was a circumstance that founded his claim for excessive self defence. Knowledge or awareness that the deceased was a police officer was not an element of murder. Nor was the lack of such knowledge an element of the defence. Conversely, it would not breach the *De Simoni* principle if a sentencing judge took into account that an offender knew the deceased was a police officer in imposing a sentence for manslaughter.

42. The corollary of the "fundamental principle" referred to in *De Simoni* is that the offender is to be punished for the offence of which they are convicted. That sentence is to be arrived at by the process of instinctive synthesis and must be proportionate to the offender's conduct (*Markarian v The Queen* (2005) 228 CLR 357, *Muldrock v The Queen* (2011) 244 CLR 120 and *Veen v The Queen (No 2)* (1988) 164 CLR 465). The prima facie position in *De Simoni* is that the sentencing judge is to have regard to all the circumstances of the offence (at 389). A person's state of mind at the time of the impugned conduct is often critical to the assessment of the offender's culpability and the proportionate sentence to be imposed for that offence. Removing an integral aspect of a person's state of mind (here, the belief that the deceased was not a police officer but "fake police" and a man who was there to rob him) from the instinctive synthesis of the appropriate sentence is apt to distort the sentencing process and result in the imposition of a disproportionate sentence.

43. There is no principle that prohibits a sentencing judge from having regard to the absence of a factor, which if present would have rendered an offender guilty of a more serious offence (cf. CCA at [52]). Such a fetter on the sentencing discretion ought not be introduced without principled reason. It has been recognised by this Court that it is "*important to avoid introducing "excessive subtlety and refinement" to the task of sentencing.*" (*Weininger v The Queen* (2003) 212 CLR 629 at [24] quoting from *Storey* [1998] 1 VR 359 at 372 with approval, see also *Pearce v The Queen* (1998) 194 CLR 610 at [39]). Further, the width of the discretion reposed in sentencing judges reflects the notion that "*the administration of the criminal law involves individualised justice*" (*Elias v The Queen* (2013) 248 CLR 483 at [27],

see also *Bugmy v The Queen* (2013) 249 CLR 571). Limiting the circumstances that a sentencing judge can have regard to in the manner identified by the CCA introduces further complexity in the sentencing process. The limitation identified by the CCA has the capacity to impair a sentencing judge's ability to do individualised justice. Strictly applied the principle identified by the CCA in the appellant's case would, in a more complex case, require the sentencing judge to perform a potentially hypothetical, detailed and complicated analysis of the factual circumstances of the offence and identification of factors, which if present would warrant a conviction for a more serious offence. The two primary constraints presently imposed on the sentencing judge's fact finding exercise are firmly grounded in general principle: the principle that no one should be punished for an offence for which they have not been convicted (*De Simoni*); and the inscrutability of the jury's verdict (*Cheung*). Although it is recognised that these principles may artificially constrain the sentencing judge's view of the facts (see also problems associated with proof of aggravating/mitigating factors in *Filipou v The Queen* (2015) 89 ALJR 776) the importance of the principles underlying the constraints requires it. It is submitted that there is no principled justification or basis for further limiting the consideration a sentencing judge can have regard to in relation to the principle identified by the CCA. It is not necessary to impose the restriction to guard against inadequate sentences.

44. It is not correct to say that if the appellant had known that the deceased was a police officer then the basis upon the appellant was rendered liable to manslaughter would have been removed and he would be liable for murder (cf. CCA at [47]). The question for the application of the partial defence in s421 of the *Crimes Act* was whether or not the appellant believed that his conduct was necessary to defend himself or prevent the deprivation of his liberty not whether or not he knew the deceased was a police officer. If the appellant had known that the deceased was a police officer he would likely not have genuinely believed that he was a man who was there to rob him and, therefore, he would not have thought it necessary to protect himself by discharging the firearm. The only relevant belief is whether or not the appellant believed that his conduct was necessary to protect himself. In this case it included a belief that the men were "fake police", but this was not necessary to found the partial defence.

45. Another difficulty with the CCA's conclusion at [47] is that it is entirely hypothetical to suggest that if the appellant had known that the deceased was a police officer then he would be guilty of murder. If the appellant had known that the deceased was a police officer then he may not have discharged his firearm at all because he would not have believed it necessary to do so to protect himself. Put

another way, in the circumstances of this case, the appellant's belief that the deceased was "fake police" and there to rob him was a basis on which he had the subjective belief that he needed to act to protect himself. If this was removed then he may not have had grounds for believed that he needed to act to protect himself. In those circumstances he may not have chosen to discharge the firearm. This state of mind was critical to his criminal liability for the act causing death – that is, the offence of manslaughter by the application of excessive self defence (s421 *Crimes Act*). His conduct and his state of mind could not be divorced from each other and his state of mind (including that he did not know the deceased was a police officer) was equally relevant to his criminal liability and the sentence to be imposed for manslaughter.

46. There is a further difficulty with the CCA's reasoning in this case. A partial defence reduces a charge of murder to manslaughter (see for example, s421 of the *Crimes Act*). In all cases where the partial defence of excessive self defence is made out, the elements of murder have been established. The appropriate and proportionate sentence in such cases is highly dependent on the offender's state of mind. The principle identified by the CCA means that a sentencing judge cannot consider an offender's subjective belief that he or she thought it necessary to do what he did in cases where that belief is mistaken when imposing sentence. In the appellant's case, the sentencing judge was required to (and did) proceed on the basis that the appellant discharged the firearm in the belief that it was necessary in order to defend himself but that the discharge of the firearm was not a reasonable response in the circumstances.[6]

47. It was also incorrect to characterise the appellant's lack of knowledge that the deceased was a police officer as an "absence of a factor". A person's state of mind is different from an external and quantifiable factor or element, for example, where no weapon is used it can be said that there is an absence of a weapon. A person's state of mind may not necessarily be amenable to precise characterisation and human behaviour cannot always be described as a dichotomy (*Weininger* (2003) 212 CLR 629 at [22] and [24]). The evidence before the sentencing judge was not just that the appellant failed to appreciate that the deceased was a police officer but that he thought the people in the garage were "fake police" who were there to rob him and that he needed to defend himself against a perceived threat of harm (ROS at [57]).

48. Whilst the passage said to disclose error in the sentencing judge's approach is found in the final two sentences at ROS [57] (see CCA at [39], [42]), the remarks

[6] see by analogy *Maxwell v The Queen* (1996) 184 CLR 501 at 515.

need to be construed in context. The sentencing judge in that passage was addressing the Crown's contention that the offence fell within the worst category of offending for manslaughter. The passage does not disclose error. The comparison conducted by the sentencing judge in that passage was a permissible and appropriate approach to the sentencing exercise (see *Elias v the Queen* (2013) 248 CLR 483 at [27], *Markarian v The Queen* at [31], *Ibbs v The Queen* (1987) 163 CLR 447 at 451-452). In that passage the sentencing judge merely expressed the view that she considered the manslaughter of a police officer in circumstances where the offender knew the deceased was a police officer was more serious than the appellant's case (ROS at [57]). The approach taken in that passage is consistent with authority (*Little v R* [2010] NSWCCA 210, *R v Twala* (NSWCCA, unreported, 4 November 1994). Once it is accepted that it is permissible to have regard to the appellant's belief that the deceased was not a police officer then this comparison was legitimate.

49. By upholding the Crown's complaint in this respect the CCA erroneously removed an important consideration in the assessment of the objective seriousness for the manslaughter offence. The appellant's knowledge or belief that the deceased was "fake police" intending to rob him was the basis upon which he was guilty of manslaughter by excessive self defence as opposed to murder. It was also a factor operating in his favour in the determination of the appropriate sentence. It was the context in which he chose to discharge the firearm. It could not be isolated from the determination of the appropriate sentence. The consequence of the CCA's conclusion on this ground was that the appellant's belief that the deceased was a man who was there to rob him and not a police officer was not taken into account when assessing whether the sentence imposed was manifestly inadequate (see CCA at [91] and [95]). Nor was it taken into account on resentence. The sentencing judge was correct to take this circumstance into account on sentence and the CCA erred in not having regard to it when assessing whether the sentence imposed was manifestly inadequate and when resentencing the appellant.

Ground 2.2

50. The question for the CCA was whether the sentencing judge erred in the approach to the totality principle in determining that the overall criminality could be comprehended by the sentence for manslaughter (CCA at [8]). The sentencing judge imposed concurrent sentences because the same criminal conduct was common to both offences despite the different consequences of that act (ROS at [69]). It was in these circumstances that her Honour was satisfied that the total criminality of the offending could be comprehended by the sentence for

manslaughter (which was accepted to be the more serious offence due to the loss of life (ROS at [69])).

51. In addition to the fact that the genesis of both offences was the one act, the aggravating factors identified above at [19] were common to both offences. The sentencing judge was cognisant of both of these considerations (ROS at [43], [53] and [55], [69]). Further, the appellant had the same state of mind for both offences.

52. The CCA upheld the complaint that the sentencing judge erred in her approach to the totality principle in determining that the overall criminality could be comprehended by the sentence for manslaughter (CCA at [84]). The CCA accepted the Crown's submissions in support of this ground and held "*the nature and seriousness of the wounding offence was such that the sentence for manslaughter could not sufficiently comprehend the criminality involved*" in it and that "*a measure of accumulation was necessary*" (CCA at [83]). A key aspect of the Crown's submissions was that there were two "distinct" and "separate" acts with separate consequences (CCA at [73] and [74]). The CCA found that the offences were "*distinct offences caused by different bullets causing very different consequences*" (CCA at [82]).

53. Whether or not the sentences imposed on an offender are to be made wholly or partially concurrent is a matter of discretion for the sentencing judge applying the principle of totality (*Johnson v The Queen* (2004) 78 ALJR 616 at [26], *Pearce v The Queen* (1998) 194 CLR 610 at [46], *Mill v The Queen* (1988) 166 CLR 59 at 62-63; see also s55 *Crimes (Sentencing Procedure) Act 1999* (NSW)). The discretionary nature of the finding was accepted by the CCA at [77]. The authorities recognise that a sentencing judge should be afforded as much flexibility in sentencing an offender as is possible under the applicable statutory regime and consistent with principle (*Johnson v The Queen* at [26], *Mill v The Queen* at 66, *Pearce v The Queen* at [39], [46]).

54. Careful consideration to the principle of totality was required when sentencing the appellant and when considering the ground of appeal alleging error in the application of the principle in the appellant's case (see *Johnson v The Queen* at [33]). The single act of the appellant was the genesis of both offences; the act was committed with the same state of mind; and the aggravating factors were common to both offences.

55. In *R v Hoar* (1981) 148 CLR 32 at 38 this Court said that "*a person should not be twice punished for what is substantially the same act*" (at 38). Although in *Pearce*

it was noted the principle might be more confined to the proposition that no person shall be punished twice for the same offence (see *Pearce v The Queen* at [34]). Identification of the common elements of the offences the appellant pleaded guilty to was critical: "*The identification of a single act as common to two offences may not always be straightforward. It should, however, be emphasised that the inquiry is not to be attended by "excessive subtleties and refinements". It should be approached as a matter of common sense, not as a matter of semantics.*" (*Pearce v The Queen* at [42]).

10 56. In *Pearce v The Queen* it was held that "*To the extent to which two offences of which an offender stands convicted contain common elements, it would be wrong to punish that offender twice for the commission of the elements that are common. No doubt that general principle must yield to any contrary legislative intention, but the punishment to be exacted should reflect what an offender has done; it should not be affected by the way in which the boundaries of particular offences are drawn.*"(at [40], see also *Johnson v The Queen* at [27]).

57. The application of the principle of totality requires a sentencing judge to consider whether the total effective sentence imposed on the offender is just and appropriate
20 and reflects the overall criminality (*Mill v The Queen* (1988) 166 CLR 59 at 63, *Pearce v The Queen* at [40] and *Johnson v The Queen* at [18], [19]). In this respect, the principle of totality is related to the principle of proportionality (*Veen (No 2)* (1988) 164 CLR 465). Concurrent sentences are likely to be "just and convenient" where an offender was engaged in "one multifaceted course of criminal conduct" as opposed to where there are multiple "incursions into criminal conduct" (*Johnson* at [4] per Gleeson CJ quoting from *Attorney General v Tichy* (1982) 30 SASR 84 at 92-93 per Wells J).

58. There was only one act of the appellant: the discharge of the firearm. This act
30 caused the wound, which was the subject of the wounding offence. It was also the act that caused the death of the deceased (CCA at [11], [15]; ROS at [18], [33]). The appellant stood to be sentenced for his conduct and the principle of totality required the CCA to consider whether the sentence imposed reflected his total criminality (*Pearce* at [40]). By his plea of guilty to manslaughter the appellant accepted this act caused the deceased's death notwithstanding the fatal shot was the act of another person. However, the fact that there were two acts (one of the appellant and one of another person) did not mean the appellant was criminally liable for those two acts (cf. CCA at [73]-[74], [81]). His criminal liability arose from the one act. His liability for the different consequences reflected in the fact
40 that he stood to be sentenced for the two different offences. In these circumstances

it was erroneous to find that the exercise of the discretion required a measure of accumulation in the sentences imposed on the appellant on the basis that "*they were distinct offences caused by different bullets caused very different consequences.*" (CCA at [81]).

59. Moreover, the act of wounding (which was the subject of the wounding offence) and the act causing death were the same act (the discharge of the firearm). The state of mind, namely to cause grievous bodily harm, was the relevant state of mind for the wounding offence and for murder (which was reduced to manslaughter by operation of the partial defence of self defence in s421 of the *Crimes Act*). The appellant believed it necessary to carry out the conduct to defend himself and/or his property although the conduct was not a reasonable response in the circumstances (s418 and s421 of the *Crimes Act*). The only additional characteristic of the offence of manslaughter, which was not present in the offence of wounding, was that the appellant's act caused the death of the deceased. Her Honour (and the CCA) accepted that the manslaughter offence was the more serious offence as it involved the loss of life (ROS at [69], CCA at [82]). The sentence imposed for manslaughter was longer than the sentence imposed for wounding because it also reflected the fact that it involved the loss of life. Analysed this way, the sentence imposed for the manslaughter offence compared to the wounding offence reflected the fact that, by his plea, the appellant admitted to causing the deceased's death. There was nothing in the wounding offence that was additional to or separate from the manslaughter offence. In the appellant's case, the application of the principle of totality militated strongly in favour of concurrent sentences. In such circumstances, it could not be erroneous for a sentencing judge to impose concurrent sentences (cf. CCA at [83]-[84]).

60. The sentencing judge found that although the consequences of the appellant's act are different "*the same criminal conduct is common to both offences.... In these circumstances ... the total criminality constituted by his offending can be comprehended by the sentence for the manslaughter*" (CCA at [69]). This approach was consistent with that set out in *Pearce v The Queen* and approved in *Johnson v The Queen*. It was a proper application of the principle of totality. The CCA erred by not endorsing it and finding that the sentencing judge erred in applying the principle of totality. Not only was it open to the sentencing judge to impose wholly concurrent sentences it was a compelling case for the imposition of concurrent sentences.

Part VII: Applicable provisions

61. Sections 18, 24, 33, 418 and 421 of the *Crimes Act 1900* (NSW), ss21A and 55 of the *Crimes (Sentencing Procedure) Act 1999* (NSW), s5D of the *Criminal Appeal Act 1912* (NSW).

Part VIII: Orders sought

62. The following orders are sought:

1. The appellant is granted an extension of time within which to file this application
2. The appeal is upheld.
3. The orders made by the New South Wales Court of Criminal Appeal on 28 August 2013 are set aside.
4. The Crown appeal is dismissed or alternatively, the appeal is remitted to the New South Wales Court of Criminal Appeal to be dealt with in accordance with law.

Part IX: Oral argument

63. It is estimated the presentation of the appellant's oral argument will take approximately 1 hour.

Dated 28 January 2015

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