IN THE HIGH COURT OF AUSTRALIA
SYDNEY OFFICE OF THE REGISTRY No. S276 of 2013

BETWEEN: **BRIAN WILLIAM ACHURCH**

Appellant

10 **AND:** **THE QUEEN**

Respondent

APPELLANT'S SUBMISSIONS

PART I: CERTIFICATION

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

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PART II: CONCISE STATEMENT OF ISSUES

2. Section 43 of the *Crimes (Sentencing Procedure) Act 1999* (NSW) ("the Act') provides a mechanism allowing sentence proceedings to be reopened in circumstances where a penalty has been imposed that is contrary to law.

3. For the purposes of s 43, when is a sentence 'contrary to law'?

4. If a court sentences an offender on identified erroneous principles (here concerning
30 the fixing of the non-parole period) and that error affects the sentence imposed in a way adverse to the offender in terms of the length of the sentence, is that a sentence imposed contrary to law for the purposes of s 43 of the Act or was the NSW Court of Criminal Appeal correct in saying that, in addition, it was necessary to establish that the sentence was not open, i.e. it was manifestly excessive?

PART III: SECTION 78B NOTICES

5. The appellant considers that section 78B notices are not required in this appeal.

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PART IV: REPORTED REASONS FOR JUDGMENT IN THE COURT BELOW

6. The reasons for judgment of the Court below are not reported but have been published electronically as *Achurch v R (No 2)* [2013] NSWCCA 117. The earlier related decision of *R v Achurch* [2011] NSWCCA 186 is reported at (2011) 216 A Crim R 152. The remarks on sentence of the sentencing judge have not been published on the internet but are contained in the Appeal Book.

PART V: RELEVANT FACTS

7. In 2008 the appellant was convicted after a trial in the NSW District Court before Judge Woods QC and a jury of the following offences on indictment:

(1) On 7 March 2006 he did supply a prohibited drug (MDMA) (108.7 grams) contrary to s25(1) of the *Drug Misuse and Trafficking Act 1985* ('DMT Act').

(2) On 7 March 2006 he did supply a commercial quantity of a prohibited drug (MDMA) (270 grams) contrary to s25(2) of the DMT Act.

(4) On 30 May 2006 he did supply a large commercial quantity of a prohibited drug (methylamphetamine) (2.6 kilograms) contrary to s25(2) DMT Act.[1]

8. On 26 May 2010 in the District Court Judge Woods sentenced the appellant to an overall term of 14 years imprisonment with a non-parole period of 6 years. The sentence commenced on 16 August 2006. The appellant was to be eligible for release to parole on 15 August 2012. The total sentence was to expire on 15 August 2020.

9. On 6 September 2010 the Crown appealed the inadequacy of the sentences imposed upon the appellant by Woods DCJ. The appeal was heard on 27 May 2011, with judgment delivered on 16 August 2011 (Macfarlan JA, Johnson and Garling JJ): *R v Achurch* [2011] NSWCCA 186.

10. A substantial part of the Crown appeal (grounds 2-5) related to the asserted failure of Woods DCJ to sentence the appellant in accordance with Part 4 Division 1A of the *Crimes (Sentencing Procedure) Act 1999 NSW*, as both offences 2 and 4 attracted standard non-parole periods of 10 years and 15 years respectively.

11. The NSWCCA found that Woods DCJ had erred in his approach to sentencing for offences 2 and 4. In so finding, the Court applied the interpretation of the standard non-parole period legislation arising from earlier decisions of the Court, such as *R v Way* [2004] NSWCCA 131; (2004) 60 NSWLR 168; *R v Sellars* [2010] NSWCCA 133 and *R v Knight* [2007] NSWCCA 283; 176 A Crim R 338. The

[1] This was count 4 on the Indictment, as the appellant was acquitted on count 3.

Crown appeal was allowed and the appellant was resentenced to serve an overall sentence of 18 years imprisonment with a non-parole period of 13 years: *Achurch*.

12. On 5 October 2011 this Court handed down the decision of *Muldrock v The Queen* [2011] HCA 39; (2011) 244 CLR 120. It was held at [24] – [25] that *R v Way* and subsequent decisions including *Sellars* and *Knight* regarding the sentencing of offenders for standard non-parole offences had been wrongly decided.

13. On 28 March 2012 the appellant sought to have the Crown appeal proceedings reopened. The application relied on s 43(1)(a) of the *Crimes (Sentencing Procedure) Act 1999* (NSW) and argued that the circumstances warranted the reopening of the Crown appeal proceedings pursuant to s 43(2) of the Act.

14. It was submitted that the NSWCCA had imposed a penalty upon the appellant that was contrary to law. The Crown appeal and subsequent resentencing of the appellant had proceeded upon an erroneous application of sentencing principle. The appropriate course was to reopen the proceedings and reconsider whether, in light of *Muldrock*, the Crown appeal should have been allowed in any event, and if so, whether some lesser sentence should have been imposed.

15. The application was heard before a bench of five (Bathurst CJ, McClellan JA, Johnson, Garling and Bellew JJ) on 24 October 2012 and 4 December 2012. On 22 May 2013 the application was refused.

PART VI: APPELLANT'S ARGUMENT

Background

16. In seeking to reopen the Crown appeal the appellant contended that discrete errors were made by the Court of Criminal Appeal in the 2011 proceedings. This occurred because of the Court's reliance on the approach to sentencing offenders for standard non-parole period offences set down in *R v Way* and subsequent decisions. As noted, this Court determined in *Muldrock* that *Way* had been wrongly decided.

17. Bathurst CJ and Garling J reviewed the essential aspects of the earlier Court of Criminal Appeal decision at [12] – [18].

18. The Court concluded that an examination of the earlier decision of the Court did demonstrate error in the approach taken to sentencing for an offence that carries a standard non-parole period (Bathurst CJ and Garling J at [70] – [73], McClellan JA at [110], Johnson J at [111], Bellew J at [164]).

19. The Court found that the errors in the original decision were:

(1) Johnson J had erred at [76]-[78] in placing too much emphasis on the relevant standard non-parole periods.

(2) Johnson J had erred in adopting the two stage approach to sentencing that was rejected in *Muldrock* at [25]-[26].

(3) Garling J had also erred in relying on the approach to sentence set out in *R v Way.*

10 (4) Johnson J made similar errors when resentencing of the offender at [76] and [166].

20. Having concluded that there was error, Bathurst CJ and Garling J then considered whether this meant that the sentence imposed on the appellant was a penalty imposed contrary to law, in accordance with s 43 of the *Crimes (Sentencing Procedure) Act 1999.*

21. Bathurst CJ and Garling J stated that the phrase "imposed a penalty that is contrary to law" in s 43(1) of the *Crimes (Sentencing Procedure) Act 1999* required:

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"For there to be jurisdiction, error must be identified and it must be shown that the error led to a penalty which was not otherwise open to the court to impose." [63]

"Section 43 is a discretionary provision designed principally, in our opinion, to correct manifest error. Generally speaking the only circumstances in which it should be exercised is where the error in question is apparent from the sentence itself, not from an analysis of the legal reasoning which underpins the sentence..." [66]

See also McClellan JA at [110], Johnson J at [112]

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22. Bathurst CJ and Garling J considered it appropriate in the circumstances of the application, there having been an earlier decision of the Court of Criminal Appeal, to decide if the pre-conditions to the exercise of jurisdiction under s 43 were made out in this case: [68] Their Honours considered that two subsidiary questions were raised:

(a) Was there error in the reasoning of the Court of Criminal Appeal in allowing the appeal?

40 (b) If there was, did it lead to the imposition of a penalty contrary to law? [69]

23. As noted, their Honours concluded that there had been error in the reasoning in the earlier Court of Criminal Appeal decision. However, to determine whether there had been the imposition of a penalty contrary to law it was necessary to decide whether:

(i) The Crown appeal should have been dismissed if correct legal principles had been applied. If this conclusion were reached then the penalty would be contrary to law. [73]

(ii) If applying the correct principles it remained the case that the sentencing judge was in error in his approach to sentencing, then the relevant question is whether or not the Court of Criminal Appeal, sentencing in accordance with correct principles, could have imposed the penalty which was in fact imposed. [73]

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24. Their Honours concluded that the Crown appeal had been correctly upheld because the primary judge had given undue weight to the appellant's medical condition in arriving at appropriate sentences.[2] [92]

25. After reviewing the essential features of the case at [94] – [97] their Honours concluded:

> "We are satisfied that the sentences which were imposed in the Court of Criminal Appeal were within the reasonable discretion of that Court and
20 could, in accordance with correct principle, have been lawfully imposed." [98]

Previous NSW decisions on the scope of s 43

26. The predecessor to s 43 of the Act was s 24 of the *Criminal Procedure Act 1986* (NSW). It was in similar terms to s43. In *R v Denning,* unreported, NSWCCA 15 May 1992 the appeal proceedings related to an earlier decision of the NSW District Court to grant an application made by the Crown to reopen sentence proceedings where there had been erroneous information provided to the sentencing judge
30 regarding the length of various sentences then being served.

27. The errors had been made because of mistakes in calculating the effect of remissions on the respondent's sentences. Denning had been sentenced on 21 July 1989. The application to re-open was not made until 21 November 1991, only four days before he was eligible for release to parole. The application was granted and his overall sentence was increased.

28. The Court of Criminal Appeal concluded that it had been an error to re-open the proceedings in the circumstances. The appropriate course was to refuse the
40 application in the exercise of discretion, given the inordinate unexplained delay.[3] Members of the Court made various statements about the function of s 24.

29. Carruthers J described s 24 as *"a beneficial provision designed to avoid unnecessary appeals and to permit the expeditious correction of sentencing*

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[2] This had been ground 6 in the Crown appeal: *R v Achurch*, at [104]
[3] Carruthers J at page 4.

errors".[4]

30. Smart J noted that jurisdiction arose either where a court imposed a penalty that was contrary to law or failed to impose a penalty that was required to be imposed. He stated:

> *"As a general principle error should be corrected but circumstances can readily be envisaged in which it would be unjust to do so notwithstanding the error. ... Everything must depend on the circumstances of the particular case."*[5]

31. Grove J held:

> *"It is critical to appreciate that it is a condition precedent to exercise of the power of reopening that there has been unlawful imposition or omission.....*[6]
>
> *It seems to me, however, that the grant of power to rectify an unlawful sentence should not be construed as limited to those rectifications which can be achieved by mechanical adjustment. Inherent must at least be power to make the correction so as to achieve the intended effect of the otiose earlier imposition....*[7]
>
> *It appears to me that the purpose of the grant of power to reopen was the avoidance of unnecessary appellate proceedings where identifiable error of a particular kind could be brought to the attention of the original tribunal. What is enabled is the rectification of that perceived error. I do not consider that it strains or exceeds the signification of the provision to construe it so as to include scope for the fullest relief which fairly can be comprehended within the concept of correction:* Bull v Attorney General of NSW *(1913) 17 CLR 370"*[8]

32. A line of cases has been developed since *Denning* that have been applied in NSW and in other Australian jurisdictions.

33. The most recent prior NSW decision is *Meakin v DPP* [2011] NSWCA 374. The Court of Appeal considered the scope of s 43 of the Act and noted:

> "29. Section 43 is not confined to error in respect of the existence or terms of a statutory provision. It is sufficient that the penalty imposed was contrary to principles of law as expounded in the case law: see *Ho* per Kirby P at 402-403. See also *Staats v The Queen* (1998) 123 NTR 16; *Melville v The Queen*

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[4] Carruthers J at page 4.
[5] Smart J at page 11.
[6] Grove J at page 17
[7] Grove J at page 17 - 18
[8] Grove J at page 18

(1999) 150 FLR 296. In *Ho* Kirby P pointed out at 403, in obiter comments in respect of the Criminal Procedure Act 1986, s 24 (the predecessor provision to s 43), that the phrase "contrary to law" is wider than the phrase "imposed a penalty that is not provided by law" ...

30. In *Finnie (No 2)* Howie J (Spigelman CJ and Dunford J agreeing) noted, at [32], that s 43 could be engaged where there had been an erroneous finding of fact or an omission to find, or take into account, a relevant fact. The section, on its terms, was not limited to "error of law"...

...

33. A similar construction was given to s 43's predecessor provision, the *Crimes Sentencing Procedure Act,* s 24. In *R v Denning* (New South Wales Court of Criminal Appeal, 15 May 1992, unreported), Grove J noted that s 24 was not limited to rectifications of error that could be achieved by mechanical adjustments. The section also applied to make a correction "to achieve the intended effect of the otiose earlier imposition". His Honour stated that the purpose of the power granted by s 24 was the avoidance of unnecessary appellate proceedings where identifiable error of a particular kind could be brought to the attention of the sentencing tribunal. His Honour stated that was the section that enabled "the rectification of that perceived error ".

34. The scope of s 43 was also considered in *Erceg v The District Court of NSW* (2003) 143 A Crim R 455. The appellant in that case had sought declaratory relief to resolve doubts about the length of a non-parole period. The Court of Appeal held (McColl JA, Palmer J, Sheller J dissenting) that the jurisdiction to reopen sentences pursuant to s 43 of the *Crimes (Sentencing Procedure) Act 1999* (NSW) confers a broad power, intended, at least in part, to permit the correction of errors in the sentencing process:

104 The statutory power to reopen is a remedial/beneficial provision which should be construed broadly: *R v Tolmie* (1994) 72 A Crim R 416 at 420 per Hunt CJ at CL; per Smart J at 421. It should not be given a narrow construction - "For the correction of arguable mistakes in sentencing, the section should be given the widest possible operation": *Ho v DPP* (1995) 37 NSWLR 393 at 398, 403 per Kirby P, with whom Gleeson CJ and Sheller JA agreed. It is intended to be available to permit the judge who made the original error to correct it, without the affected party having either to appeal or to rely upon some administrative action being taken to ensure that the proper penalty is imposed: *R v Petrou* (NSWCCA, unreported, 13 February 1990, BC9002736, Hunt, Finlay and Allen JJ) per Finlay J. It is intended to avoid unnecessary appeals and to permit the expeditious correction of sentencing errors: *R v Denning* (NSWCCA per Carruthers J, BC9203052 at 7); it is "for the benefit of the individual affected and the community at large": *R v Denning* (NSWCCA per Smart J, BC9203052 at 11); it should be

construed to include scope for the fullest relief which fairly can be comprehended within the concept of correction: *R v Denning* (NSWCCA per Grove J, BC9203052 at 13); approved in *R v Tangen*.

105 In considering whether to exercise the discretion to reopen, consideration should be given to the strong public interest in sentences which are correct in law being imposed, to the time the application is made, whether there has been delay, what of relevance and importance has happened in the intervening period and whether a sentence may be spent or the people affected may have altered their position on the faith of what was done: *R v Denning*...

109 This discussion of the principles applying to the s 43 power to reopen emphasise the breadth of the material to which the Court can have regard in considering an application to invoke the s 43 power. The Court is clearly not limited to the formal record of the sentence, but may have regard to all the circumstances relevant to the imposition of the penalty. Once it has determined the course it should pursue, then the formal record of the penalty may, if necessary, be amended. (Emphasis added)

35. The provision does not create an opportunity for an unsuccessful appellant to have a second appeal. As noted above, the provision has been described as providing a timely, efficient and cost effective procedure to reconsider errors made in the sentencing process, so as to avoid the need for unnecessary appeals. The availability of the provision is subject to discretion and, without a patent error being apparent in either the orders or the reasons underpinning them, the provision properly has no application.

Other jurisdictions

36. Similar legislation exists in each of the other States and Territories,[9] with the exception of Victoria, where the power to correct sentencing error is more restricted.[10]

37. In Western Australia the power to reopen sentence proceedings was considered in *Traeger v Pires De Albuquerque and others* (1997) 18 WAR 432; (1997) 97 A Crim R 166.[11] The case focused on the failure of the prosecution at first instance to put all relevant evidence before a sentencing court.

38. The relevant provision, s 37 of the *Sentencing Act 1995* (WA), was construed so as to permit the reopening of proceedings where a magistrate was erroneously of the understanding that the accused had no prior convictions for a related offence of

[9] *Summary Proceedings Act* (SA) s76A, s76B; *Crimes (Sentencing) Act 2005* (ACT), s61; *Sentencing ct 1997* (Tas) s94; *Sentencing Act 1995* (WA), s37; *Penalties and Sentences Act 1992* (Qld), s188; *Sentencing Act 1995* (NT), s112

[10] s412 *Criminal Procedure Act* 2009 (Vic); s104A(3) *Sentencing Act* (Vic).

[11] A recent example of the exercise of this power is *Beasley v Western Australia* [2012] WASCA 80

drink driving. Had the information been known to the magistrate at first instance a higher sentence would have been mandatory, that is: a different sentence would have been required as a matter of law.

39. The Court reviewed decisions in other jurisdictions and endorsed the approach adopted by Smart J in the NSW case of *Denning v R* (unreported; SCt of NSW (CCA) 15 May 1992) and in *Tolmie* (1994) 72 A Crim R 416 to the effect that the similar NSW provision be construed widely and not be circumscribed. Earlier decisions of *Fletcher v Fowler* (unreported F Ct S Ct of WA 25 September 1985) and a Queensland case of *Boyd v Sandercock*[12] that both precluded the reopening of proceedings in similar circumstances were not followed.

40. Kennedy J observed, when agreeing with the reasons of Steytler J, it was *"highly desirable, unless there is good reason to the contrary, that statutory provisions should be interpreted in the same manner throughout Australia."*

41. More recently in *The State of Western Australia v Wallam* [2008] WASCA 117 it was held (Miller JA, Murray AJA, McLure JA dissenting) that an erroneous failure to take into account the abolition of remissions when re-sentencing an offender after a successful Crown appeal did not provide a basis for the sentence to be corrected under s 37 of the *Sentencing Act WA* because the sentence imposed was one which could lawfully be imposed under the *Sentencing Act* or the law under which the offence was committed: [59] In a dissenting judgment McLure JA considered that s 37 was available to allow for the correction of the erroneous sentence previously imposed by the WA Court of Appeal.[13] [32]

42. A Queensland example of the approach to re-opening proceedings is *R v Thorpy* [1996] 2 Qd R 77 where the case was reopened under s 188 of the *Penalties and Sentences Act 1992* (Qld) so as to allow a parole order to be made, in circumstances where it had been overlooked at first instance.

43. A comparable situation to the issue arising in this appeal was considered in the Northern Territory in the cases of *R v Staats* (1998) 101 A Crim R 461 at 469, 471 and *Melville* [1999] NTSC 55; (1999) 107 A Crim R 70 (NTCCA), and the subsequent decision of *Melville* [1999] NTSC 56; (1999) 105 A Crim R 421 (Kearney J).[14]

44. In *Staats* (1999) 123 NTR 16 a sentencing judge had imposed a non-parole period on the basis that the abolition of remissions did not apply in the instant case. At the time of sentence the issue was the subject of proceedings in this Court in *Siganto v The Queen* (1998) 194 CLR 656; [1998] HCA 74. Upon judgment in *Siganto* it was recognized that the original basis for the sentence in *Staats* was erroneous. An

[12] *Boyd v Sandercock; ex parte Sandercock* [1990] 2 Qd R 26

[13] An application for special leave to appeal this decision was refused. *Wallam v The State of Western Australia* [2009] HCA Trans 171

[14] See also *DPP v Edwards* [2012] VSCA 293

application under s 112 of the *Sentencing Act 1996* (NT) was allowed and a longer non-parole period was imposed. On appeal the NTCCA upheld the decision on the basis that the original non-parole period had been decided on an incorrect view of the applicable law.

45. In *Melville* the sentencing court had in 1993 treated as an aggravating feature on sentence the fact that the victim of a sexual assault had had to give evidence five times. *Melville* had appealed to the NTCCA in 1995, however the appeal was dismissed. In 1998 the High Court of Australia held that the reasoning used at first instance was impermissible: *Siganto v The Queen*.

46. On 25 February 1999, Melville sought leave to reopen his appeal in the NT Court of Criminal Appeal under s 112 of the *Sentencing Act 1995*, the Northern Territory equivalent of the then s 24 *Criminal Procedure Act 1986* (the predecessor to the current s 43 *Crimes (Sentencing Procedure) Act 1999*). The Court (Martin CJ, Kearney and Priestley JJ) concluded the phrase 'imposed a sentence that is not in accordance with the law' included a legal error of the type made in the sentencing of the applicant. At [27] Kearney J stated:

> "s112(1) enables the correction of an error of law in sentencing when, in the course of a binding decision in the appellate hierarchy in another case, it is stated that the sentence in the instant case was not imposed in accordance with the law which governs the proper exercise of the sentencing discretion. I consider that this beneficial interpretation of s112(1)(a), a remedial provision, results in its operation being fairer and more convenient; this interpretation provides in the Territory a convenient means of correcting an error of this type."

47. Kearney J (Martin CJ and Priestley J agreeing) expressed agreement with the reasoning of Kirby P (Gleeson CJ and Sheller J agreeing) in *Ho v DPP* (1995) 37 NSWLR 393 at [23] as to the broad construction of s24 *Criminal Procedure Act* 1986 (NSW) (the predecessor to s43 *Crimes (Sentencing Procedure) Act*).

48. The Court in *Melville* considered that the application had been made to the wrong court, because the sentence had been *"imposed"* by a single Justice of the Supreme Court, not the NT Court of Criminal Appeal. As the sentence had not been *"imposed"* by the Court of Criminal Appeal and the appeal had been dismissed, there was no jurisdiction under s 112(1)(a) for the Court of Criminal Appeal to entertain the application. The Court observed that an application to re-open should properly be made to the court which had *"imposed"* the sentence, in that case, a single judge of the Supreme Court, either the trial judge or another single judge of the Supreme Court.

49. The application to a single judge of the Supreme Court was made on the afternoon that the judgment of the Court of Criminal Appeal was delivered. While noting the importance of the original sentencing judge hearing such an application, in

circumstances where the sentencing judge was unavailable and there was some urgency to the application, Kearney J heard and granted the application.

50. Kearney J considered that what was required was *"an assessment of the effect of the identified legal error on the original sentence, and an adjustment of that sentence to take into account that error"* [13] He concluded that there could be no doubt that the sentencing error **would have** resulted in the imposition of a sentence higher at first instance than otherwise appropriate. [14] The emphasis on the erroneous principle in the remarks on sentence made it clear that it was given considerable weight, with the error affecting both the head sentence and the non-parole period. His Honour did not consider that *"the matter should more appropriately be dealt with by a proceeding on appeal." Melville* [1999] NTSC 56; (1999) 105 A Crim R 421.

The appellant's argument

51. That s 43 of the Act was available to the NSWCCA to reopen an earlier decision if the Court was satisfied that a penalty had been imposed that was contrary to law was not in dispute. To this extent, the decision of this Court in *Burrell v The Queen* [2008] HCA 34; 238 CLR 218 regarding the power of an intermediate court of criminal appeal to reopen proceedings seems to be of no application.

52. Despite the original Crown appeal having been allowed and the appellant re-sentenced upon erroneous legal reasoning, the application to reopen the Crown appeal was dismissed because the NSWCCA considered the sentences imposed were not contrary to law for the purposes of s43. [99] The sentences imposed upon the appellant were within the reasonable discretion of the Court and **could have** been lawfully imposed in accordance with correct principle. [98]

53. What was sought on the appellant's behalf in this application under s 43 was consistent with authority. In fact, the use made of s 43 of the Act and equivalent provisions in a number of earlier cases went much further than what was sought in this instance.

54. On the hearing of this application there was no challenge to the previous line of authority in NSW giving s43 a broad interpretation: [23] The Court did not conclude that any of the earlier decisions had been wrongly decided: [56], [61] Despite this, the scope and application of s 43 of the Act has been construed much more narrowly in this case than in previous NSW decisions and in decisions in other Australian jurisdictions.

55. By deciding that s 43 usually has application only when the penalty is patently contrary to law without recourse to the legal reasoning behind it, s 43 is now largely restricted to the correction of errors such as penalties imposed in excess of jurisdiction. The decision even precludes recourse to s 43 to correct many of the routine problems that the provision has previously been used for, such as the

failure to correctly backdate a sentence[15], a mistake as to the available maximum penalty,[16] the failure to take into account assistance to the authorities when re-sentencing after a successful Crown appeal[17] and to give effect to an intention that the offender serve the sentence as a juvenile[18].

56. In the limited class of cases where s 43 can now be used to correct an error of legal reasoning that may have affected the penalty imposed on an offender, such as that complained of in this matter, it is now necessary to demonstrate patent error and also establish that the resulting sentence was one that could not have been imposed.

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57. The decision requires an applicant to establish that the penalty was not open; that effectively, in the language of the *Criminal Appeal Act 1912* (NSW), the resulting sentence was 'manifestly excessive'. This process of reasoning produces the result that an offender who has been sentenced on identifiably wrong legal reasoning and has received a higher sentence as a result, can only have the proceedings re-opened if he can also satisfy the same Court that the resulting sentence was manifestly excessive.

58. *Meakin v DPP* and *Erceg* are authority for the true width of s 43 *Crimes*
20 *(Sentencing Procedure) Act 1999*. A sentence imposed after reliance on the application of erroneous legal principle is a penalty imposed that is contrary to law.

59. The decision of the Court of Criminal Appeal in this case strips from s 43 much of its capacity to provide an efficient, timely and inexpensive remedy in cases where a court has failed to take into account a relevant sentencing fact or principle, or incorrectly applied a relevant sentencing principle or applied a principle later found to be erroneous. It had been the consistent approach in both NSW and other Australian jurisdictions that the power to reopen existed to address these circumstances.[19]

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60. As noted at ASA [21] above, the Court held at [66] that 'generally speaking' s 43 of the Act should only be exercised where an error is apparent from the sentence itself and not from the legal reasoning which underpins it. That is, it will usually be available only to rectify sentences that were not capable of being imposed. This conclusion is in conflict with *Meakin* and *Erceg*. This must mean that these and other earlier NSW decisions were wrongly decided. The Court did not recognise or confront the inconsistency of this judgment with earlier decisions. The decision is also in conflict with the Northern Territory cases of *Melville and Staats*. The interpretation now given to the scope of s43 of the Act may also be in conflict with

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[15] *R v Finnie (No 2)* [2004] NSWCCA 150; *Ho v DPP* (1995) 37 NSWLR 393
[16] *Traeger v Pires de Albuquerque and others*, supra
[17] *R (Cth) v Chalmers (No 2)* [2007] NSWCCA 340
[18] *R v GDP* [2010] NSWSC 1408
[19] See *Ho v Director of Public Prosecutions* (1995) 37 NSWLR 393 at [402] – [403], *Staats v The Queen* (1998) 123 NTR 16; *Melville v The Queen* [1999] NTCCA 55; (1999) 9 NTLR 29; *Melville v The Queen* [1999] NTSC 56; (1999) 105 A Crim R 421; *R v Finnie* (No 2) [2004] NSWCCA 150 at [31]; Meakin v Director of Public Prosecutions [2011] NSWCA 373; (2011) 216 A Crim R 128 at [29]

the approach taken to comparable provisions in Western Australia[20] and Queensland.

61. The Court recognised as a 'possible exception' those cases heard before the Court of Criminal Appeal where erroneous legal reasoning underpinned a sentence. [67] It was this limited circumstance that brought about the Court's consideration of the appellant's case and the establishment of the hurdle an applicant now has to overcome: to positively satisfy the Court hearing the application that the sentence imposed was both contrary to law **and** manifestly excessive; that is: the impugned sentence could not have been imposed in accordance with correct application of sentencing principle. Consideration of these issues will often be made, as occurred in this case, by the judge or judges who made the impugned decision.

62. As noted at ASA [24], the Court concluded that the earlier Crown appeal had been correctly upheld because ground 6 was validly made out. None of the other five grounds of appeal alleging patent error remain arguable grounds after *Muldrock.* Similarly, the conclusion that the original sentence was manifestly inadequate (ground 7) was largely informed by an application of earlier Court of Criminal Appeal decisions such as *Knight* and *Sellars* that were disapproved by this Court in *Muldrock.* The conclusion that the Crown appeal was correctly upheld because ground 6 was made out ignores the discretionary considerations that may well have come into play had the appeal only been allowed on such a limited basis. The decision says nothing about whether the sentences were infected with error and were higher than otherwise appropriate.

63. The test for the exercise of the discretion whether to apply s43 is also at odds with the approach in both sentence and Crown appeals set out in the Criminal *Appeal Act 1912* (NSW). In an appeal against the severity of a sentence and upon identification of legal error, a court of criminal appeal is required to come to a positive conclusion, prior to intervening, that some lesser sentence is warranted, s6(3) *Criminal Appeal Act.* This was the approach taken by Kearney J in *Melville.* Similarly, in a Crown appeal a court of criminal appeal upon concluding that there was error, is required then to decide whether or not to intervene in the exercise of discretion, *s5 Criminal Appeal Act.*

PART VII: APPLICABLE STATUTORY PROVISIONS

Section 5D, Criminal Appeal Act, 1912, NSW

Section 43, Criminal Procedure Act, 1986, NSW

Section 112 *Sentencing Act* 1995 (NT)

Muldrock v The Queen [2011] HCA 39; (2011) 244 CLR 120

[20] The majority decision in *Wallam v Western Australia*, supra, is broadly in keeping with the decision the subject of this appeal.

R v Denning (New South Wales Court of Criminal Appeal, 15 May 1992, unreported

Meakin v DPP [2011] NSWCA 374; (2011) 216 A Crim R 128

Erceg v The District Court of NSW (2003) 143 A Crim R 455

Melville v The Queen [1999] NTSC 55; (1999) 107 A Crim R 70 (NTCCA)

Melville v The Queen [1999] NTSC 56; (1999) 105 A Crim R 421

Staats v The Queen [1998] NTCCA 13; (1998) 101 A Crim R 461

Traeger v Pires De Albuquerque and others (1997) 18 WAR 432; (1997) 97 A Crim R 166

10 *The State of Western Australia v Wallam* [2008] WASCA 117 (S)

PART VIII: ORDERS SOUGHT BY THE APPELLANT

(1) The appeal is allowed.

(2) The orders of the Court of Criminal Appeal made on 22 May 2013 are set aside.

(3) The application to re-open the proceedings is remitted to the Court of Criminal Appeal to be determined according to law.

PART IX: ESTIMATE OF THE TIME REQUIRED FOR THE PRESENTATION OF

20 THE APPELLANT'S ORAL ARGUMENT

64. It is anticipated that the time required for the presentation of the appellants oral argument will be no more than two hours.

Dated: 13 December 2013

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IN THE HIGH COURT OF AUSTRALIA
SYDNEY OFFICE OF THE REGISTRY No. S276 of 2013
2013

BETWEEN: **BRIAN WILLIAM ACHURCH**

Appellant

AND: **THE QUEEN**

Respondent

Annexure A to Appellant's ~~summary of argument~~ Submissions

Applicable legislative provisions (Part VII)

Crimes (Sentencing Procedure) Act 1999 NSW (as at 22 March 2012)

43 Court may reopen proceedings to correct sentencing errors

(1) This section applies to criminal proceedings (including proceedings on appeal) in which a court has:
(a) imposed a penalty that is contrary to law, or
(b) failed to impose a penalty that is required to be imposed by law,
and so applies whether or not a person has been convicted of an offence in those proceedings.

(2) The court may reopen the proceedings (either on its own initiative or on the application of a party to the proceedings) and, after giving the parties an opportunity to be heard:
(a) may impose a penalty that is in accordance with the law, and
(b) if necessary, may amend any relevant conviction or order.

(3) For the purposes of this section, the court:
(a) may call on the person to whom the proceedings relate to appear before it and, if the person does not appear, may issue a warrant for the person's arrest, or
(b) if of the opinion that the person will not appear if called on to do so, may, without calling on the person to appear before it, issue a warrant for the person's arrest.

(4) Subject to subsection (5), nothing in this section affects any right of appeal.

(5) For the purposes of an appeal under any Act against a penalty imposed in the exercise of a power conferred by this section, the time within which such an appeal must be made commences on the date on which the penalty is so imposed.

(6) In this section:
impose a penalty includes:

(a) impose a sentence of imprisonment or a fine, or
(b) make an intensive correction order, home detention order or community service order, or
(c) make an order that provides for an offender to enter into a good behaviour bond, or
(c1) make a non-association order or place restriction order, or
(d) make an order under section 10, 11 or 12, or
(e) make an order or direction with respect to restitution, compensation, costs, forfeiture, destruction, disqualification or loss or suspension of a licence or privilege.

Section 43 (6) (e) was amended by the Crimes and Courts Legislation Amendment Act 2013 No 80 as of 29 October 2013 (change underlined):

43 Court may reopen proceedings to correct sentencing errors

(1) This section applies to criminal proceedings (including proceedings on appeal) in which a court has:
(a) imposed a penalty that is contrary to law, or
(b) failed to impose a penalty that is required to be imposed by law,
and so applies whether or not a person has been convicted of an offence in those proceedings.

(2) The court may reopen the proceedings (either on its own initiative or on the application of a party to the proceedings) and, after giving the parties an opportunity to be heard:
(a) may impose a penalty that is in accordance with the law, and
(b) if necessary, may amend any relevant conviction or order.

(3) For the purposes of this section, the court:
(a) may call on the person to whom the proceedings relate to appear before it and, if the person does not appear, may issue a warrant for the person's arrest, or
(b) if of the opinion that the person will not appear if called on to do so, may, without calling on the person to appear before it, issue a warrant for the person's arrest.

(4) Subject to subsection (5), nothing in this section affects any right of appeal.

(5) For the purposes of an appeal under any Act against a penalty imposed in the exercise of a power conferred by this section, the time within which such an appeal must be made commences on the date on which the penalty is so imposed.

(6) In this section:
impose a penalty includes:

(a) impose a sentence of imprisonment or a fine, or
(b) make an intensive correction order, home detention order or community service order, or
(c) make an order that provides for an offender to enter into a good behaviour bond,

or
(c1) make a non-association order or place restriction order, or
(d) make an order under section 10, 11 or 12, or
(e) make an order or direction with respect to restitution, compensation, costs, forfeiture, destruction, disqualification or loss, suspension or variation of a licence or privilege.

Sentencing Act 1995 NT s112 (this provision is still in force)

112 Court may reopen proceeding to correct sentencing errors

(1) Where a court has in, or in connection with, criminal proceedings (including a proceeding on appeal):

(a) imposed a sentence that is not in accordance with the law; or

(b) failed to impose a sentence that the court legally should have imposed;

the court (whether or not differently constituted) may reopen the proceedings unless it considers the matter should more appropriately be dealt with by a proceeding on appeal.

(2) Where a court reopens proceedings, it:

(a) must give the parties an opportunity to be heard; and

(b) may impose a sentence that is in accordance with the law; and

(c) may amend any relevant conviction or order to the extent necessary to take into account the sentence imposed under paragraph (b).

(3) A court may reopen proceedings:

(a) on its own initiative at any time; or

(b) on the application of a party to the proceedings made not later than:

(i) 28 days after the day the sentence was imposed; or

(ii) such further time as the court allows.

(4) An application for leave to make an application under subsection (3)(b)(ii) may be made at any time.

(5) Subject to subsection (6), this section does not affect any right of appeal.

(6) For the purposes of an appeal under any Act against a sentence imposed under subsection (3)(b), the time within which the appeal must be made starts from the day the sentence is imposed under subsection (2)(b).

(7) This section applies to a sentence imposed, or required to be imposed, whether before or after the commencement of this section.