IN THE HIGH COURT OF AUSTRALIA
SYDNEY OFFICE OF THE REGISTRY

No. S 276 of 2013

BETWEEN:

BRIAN WILLIAM ACHURCH
Appellant
and

THE QUEEN
Respondent

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RESPONDENT'S SUBMISSIONS

Part I: Publication

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

Part II: Concise statement of issues

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1. Whether the power under s 43 to reopen proceedings to correct sentencing error extends to permit a rehearing on the merits and a redetermination of the sentence.
2. Whether s 43 permits re-sentencing for ***Muldrock*** error.

Part III: Section 78B of the Judiciary Act

This appeal does not raise any constitutional question. The respondent has considered whether any notice should be given in compliance with s78B of the *Judiciary Act 1903 (Cth).* No such notice is required.

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Part IV: Statement of contested material facts

4. 1 The appellant was the principal in an organised commercial drug operation.

4. 2 The 3 major offences arose from the arrangement to supply methylamphetamine to an undercover operative. On 7 March 2006 108.7 grams of ecstasy (400 pills) was supplied to the operative (count 1) for

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$4600. On the same day, the officer was supplied with a sample of 7 pills and offered a further supply of 1000 ecstasy pills, (270 grams) (count 2).

4. 3 Two months later premises connected to the appellant were searched and 2.6 kilos of methylamphetamine was found (count 4). The appellant's home was also searched and police found drug paraphernalia such as electronic scales, resealable plastic bags, acetone and a ledger of drugs and money referring to amounts up to $130,000 (CCA 27.5.11 at [20] – [21]).

4. 4 The appellant was 47 at the time of the offences with a significant criminal history, mostly for offences of stealing and receiving and including 3 counts
10 of armed robbery (CCA 27.5.11 at [25] – [27])

PART V: Applicable Legislative provisions

The respondent agrees with the appellant's list of legislative provisions.

PART VI: Statement of Argument

6. 1 The wide view of what constitutes "a penalty that is contrary to law" for which the appellant contends is that it includes any error in the sentencing process. The reasoning being that, where there has been any error of fact or law, the sentence is "contrary to law" because it is contrary to law to
20 impose a penalty affected by error.

6. 2 On this view, any error in the penalty or in the reasoning process could warrant re-opening under s 43. This encompasses all the categories of error set out in ***House***[1] (CCA at [106]) and renders correction under s 43 indistinguishable from rehearing on appeal.

6. 3 The CCA questioned this blurring of the distinction between correction and rehearing but applied the wide view because it was thought to have been the preferred approach in the earlier authorities. It was considered inappropriate to depart from these authorities when their correctness had not been challenged in the appeal (CCA at [61], [106], [117] – [118]).

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[1] ***House v R*** (1936) 55 CLR 499 at 505.

6. 4 Comity did not require such an approach as the distinction between correction and rehearing had always been maintained and none of the earlier cases undertook the complete reconsideration of the sentence that was called for in the present case.

Construction of section 43

6. 5 The text and structure of s 43 indicates that its scope does not encompass all or any error in the sentencing process.

6. 6 Firstly, s 43(1)(a) refers to "a *penalty* that is contrary to law"(emphasis added), indicating that the penalty is subject to error rather than error in the
10 reasoning behind the penalty. There is a clear distinction between error in the penalty and error in the reasoning. Some errors in the reasoning process do not result in a penalty that is contrary to law, and conversely, penalties may be contrary to law without any error in the reasoning leading to the penalty.

6. 7 Secondly, s 43 addresses two separate situations, a penalty contrary to law and failure to impose a penalty required by law. Section 43(1)(b) applies to failure to impose a penalty required by law. This addresses failure to impose a mandatory component of the penalty, such as a minimum period of disqualification. The inclusion of s 43(1)(b) to apply to failure to impose a
20 penalty required by law indicates that s 43(1)(a) does not apply to such errors. If s 43(1)(a) covered all errors in the sentencing process 43(1)(b) would be otiose because, by definition, failure to impose a penalty *required* by law would be contrary to law.

6. 8 The separate operation afforded to s 43(1)(a) and s 43(1)(b) suggests that s 43(1)(a) does not apply to all errors. It is plainly not intended to cover omissions. The presence of s 43(1)(b) indicates that the omission of a mandatory penalty does not render the penalty "contrary to law" within the meaning of s 43(1)(a) even though such omission is obviously an error of law.

30 6. 9 Thirdly, the heading to s 43, "**Court may reopen proceedings to correct sentencing errors**", indicates that the section operates for the correction of error. The title to Division 5, in which s 43 appears, is also headed

"*Correction and Adjustment of Sentences [s 43]*" further indicating that the subject of s 43 is correction.

6. 10 Correction of a penalty is a distinct process from the determination of a penalty.

6. 11 The determination of a penalty involves consideration of all the relevant facts and circumstances to arrive at a sentence which appropriately reflects them all. It requires that all the relevant considerations be assessed together for each will take on an a particular significance in the context of the others in the individual case.

10 6. 12 Correction assumes the penalty has already been determined. It does not involve a re-assessment of the relevant considerations but an adjustment of some specific integer of an existing penalty. For that reason, the errors amenable to correction will be those integers of the sentence which can be adjusted without affecting the assessment of the sentence as a whole.

6. 13 The sort of errors amenable to such correction will be limited, not by the express terms of the section, but by the nature of the sentencing process and the concept of correction for it is generally not possible to single out and amend a significant feature of a sentence and leave the remainder of the determination unaffected. As Gleeson CJ pointed out in ***Gallagher***[2], the
20 various considerations "*form a complex of inter-related considerations, and an attempt to separate out one or more of those considerations will not only be artificial and contrived, but will also be illogical.*" That interrelatedness means that it is generally not possible to correct significant errors in the reasoning process, particularly where the error involves the weight to be given to a feature such as the objective seriousness of the offence, because altering so integral an element necessarily involves re-considering the sentence as a whole.

6. 14 The approach adopted in the previous authorities that s 43 be construed widely needs to be comprehended within the concept of correction. This
30 was the basis on which some authorities held that s 43 did not apply to factual error. The reason was that some factual errors, such as whether the

[2] ***R v Gallagher*** (1991) 23 NSWLR 220 at 228B, quoted in ***Wong v R*** (2001) 2007) CLR 584 at 611 – 12 and ***Markarian v R*** (2005) 228 CLR 357 at 374 [37].

offender had a prior criminal record were not considered capable of correction but required re-assessment of the sentence, or even the conviction, in light that additional fact. This is because, as this Court pointed out in ***Veen (No 2)***[3], prior criminal record may affect a number of the considerations relevant to the determination, such as moral culpability and the prospects of rehabilitation, and an error on this issue may require the sentence be reassessed. It is not generally a matter which permits a simple adjustment of a specific element of the penalty. On the other hand, some factual errors may be amenable to correction. For example an error as to
10 pre-sentence custody and the appropriate commencement date of a sentence, can be corrected by adjusting the commencement date to reflect time served without reconsidering the sentence itself.

6. 15 The distinction rests on the process required to accommodate the error. If the issue can be resolved by an adjustment of some element of the sentence without requiring a reconsideration of the sentence as a whole then it is a matter capable of correction. However, if the issue requires a reassessment of the weight to be given to some relevant factor or to the appropriateness of the sentence as a whole then that constitutes a redetermination and is a matter to be undertaken under procedures which
20 authorise such rehearing, such as an appeal, or an application for a review of the sentence under s 78 of the *Crimes (Appeal and Review) Act* 2001.

6. 16 The appellant refers to the apparently contradictory approaches adopted by the interstate authorities as to whether re-opening is permissible in respect of factual error, most commonly, error about the defendant's prior convictions, although the different decisions are readily reconcilable in light of the particular factual situations concerned.

6. 17 ***Shortland v Heath***[4] involved the factual issue commonly raised in these cases, that is, that the defendant was sentenced for a driving offence on the basis that he had no prior convictions when in fact the defendant had a prior
30 conviction for this kind of offence which meant he was liable to a higher sentencing range. The sentence imposed was contrary to law on the true facts because the prior conviction meant that the defendant was subject to a

[3] ***Veen v R (No2)*** (1988) 164 CLR 465 at 477.
[4] ***Shortland v Heath*** [1977] WAR 61.

mandatory minimum penalty which had not been imposed. The issue was whether the proceedings could be re-opened to impose the mandatory minimum sentence required on the true facts. Jackson CJ held that the relevant provision, similar to s 43, could be used to reopen the proceedings and impose the higher sentence that would have applied on the true facts.

6. 18 In ***Power v Steele*** the defendant was fined for driving while unlicensed. The true facts were that he was not merely unlicensed but "legally disentitled" to hold a licence. The offence of driving while legally disentitled carried a greater penalty than driving unlicensed, including a minimum period of disqualification. It was held that the proceedings *could* be reopened on the basis of the newly discovered facts, although whether they *should* be reopened in these circumstances was doubted[5].

6. 19 The authorities were reviewed in ***Traegar v Pires De Albuquerque***[6] where, as in ***Shortland v Heath***, the defendants were sentenced for driving offences on the basis that they had no prior convictions when in fact they had prior convictions which required imposition of higher mandatory minimum penalties. The earlier WA authorities, including ***Shortland v Heath*** and ***Power v Steele*** were followed[7] and it was held that the court could reopen the proceedings to impose the penalty required by law even though the sentence was not contrary to law on the facts before the court. The interstate authorities, in particular ***Boyd v Sandercock***[8], which were thought to hold otherwise, were not followed.

6. 20 In fact, there was no contradiction with ***Boyd v Sandercock***. In ***Boyd v Sandercock*** the defendant had been sentenced for driving with the prescribed concentration of alcohol on the basis that he had not been convicted of a relevant offence in the previous 5 years when in fact the defendant had a relevant conviction which made him liable to a higher sentencing range. However, the penalty imposed was not contrary to law because the magistrate had imposed a penalty above the mandatory minimum applicable for a first offence. He had imposed a penalty within the

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[5] ***Power v Steele*** (1992) 16 MVR 362 at 363.50, 366.30.
[6] ***Traegar v Pires De Albuquerque*** (1997) 18 WAR 432.
[7] ***Traegar v Pires De Albuquerque*** (1997) 18 WAR 432 at 447E.
[8] ***Boyd v Sandercock; Ex parte Sandercock*** (1989) 46 A Crim R 206

range for an offence where there was a previous conviction[9]. Therefore, the penalty was within range even on the true facts and thus not contrary to law. The fact that the magistrate would have imposed a greater penalty had he known of the previous conviction did not render the penalty contrary to law. This was a crucial factual distinction. It raised the issue of whether the sentence could be re-opened, not because it was contrary to law, but because a higher penalty would have been imposed had the true facts been known. The difference between increasing a sentence to impose a minimum penalty required by law and increasing a sentence by an indeterminate amount based on a discretionary assessment of the significance of an additional fact hinges on the distinction between correction and redetermination. The distinction is highlighted by the fact that, paradoxically, the Queensland provision, s 147A of the *Justices Act*[10] expressly permitted correction of orders based on error of fact whereas the WA provision did not.

6. 21 In ***R v Biggs***[11] the defendant was sentenced summarily on the basis that he had produced 20 cannabis plants weighing less than 500 grams when the true situation was that he had produced considerably in excess of 100 plants. The prosecution sought to have the conviction quashed and the matter proceed to trial on indictment based on the new evidence. Even though the Queensland equivalent of s 43 contained an express provision in relation to convictions based on errors of fact (unlike s 43) it was held[12] that the power to set aside a conviction "to conform with the facts", as the section provided, meant to conform with the facts already before the court. It was not an invitation to re-open the proceedings to present new evidence. The reason was that the provision was aimed at the correction of error in sentencing and the new evidence did not disclose error in the penalty imposed. What was sought was a new trial for a more serious offence. This did not constitute a correction of sentence but the initiation of new proceedings for a different offence.

[9] ***Boyd v Sandercock; Ex parte Sandercock*** (1989) 46 A Crim R 206 at 208.
[10] ***Boyd v Sandercock; Ex parte Sandercock*** (1989) 46 A Crim R 206 at 207.
[11] ***R v Biggs*** (1988) 36 A Crim R 228 at 229.
[12] ***R v Biggs*** (1988) 36 A Crim R 228 at 229 at 232.

6.22 Similarly in ***Deacon***[13] the defendant pleaded guilty to unlawfully producing a dangerous drug, heroin, in circumstances of aggravation, namely the production of in excess of 2 grams when the true position was that he had produced only 1.163 grams. The prosecution sought to have the conviction quashed to "set the record straight". It was held that the penalty was not contrary to law because it was a penalty within the prescribed limits for the offence on the facts before the court. ***Deacon*** was an unusual case in that the defendant was not concerned about having been convicted of the aggravated form of the offence[14] and neither party sought any change in the
10 sentence[15]. Accordingly, there was no issue of correction of sentence, what was sought was a setting aside of the conviction and the substitution of a different offence. That was considered beyond the scope of the section, as in ***Biggs***, because it did not involve correction but essentially different proceedings.

6.23 ***Woodford***[16] again involved a sentence imposed on the incorrect basis of no prior record. The Queensland Court of Appeal held, following the above line of authorities, that the sentence could not be reopened to correct this factual error[17]. The reason the sentence was not contrary to law was that there was no mandatory minimum penalty. The sentence was more lenient than it
20 might have been on the true facts but that did not render it contrary to law. What was sought on re-opening was not a correction but a different, more severe, sentence based on different evidence.

6.24 The Court of Appeal in ***Woodford*** recommended that the provision be amended to enable reopening where the original sentence was based on "clear factual error"[18]. The following year, 1997, section 188 of the *Penalties and Sentences Act* 1992 was amended to include power to reopen where the sentence was imposed "on a clear factual error of substance" (s 188.(1)(c)).

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[13] ***R v Deacon*** (1993) 65 A Crim R 261.
[14] ***R v Deacon*** (1993) 65 A Crim R 261 at 262.
[15] ***R v Deacon*** (1993) 65 A Crim R 261 at 263.
[16] ***R v Woodford*** (1996) 89 A Crim R 146.
[17] ***R v Woodford*** (1996) 89 A Crim R 146 at 148.
[18] ***R v Woodford*** (1996) 89 A Crim R 146 at 148.

6. 25 The addition of 188(1)(c) to allow a court to reopen the proceedings where there was a clear factual error of substance indicated that the power did not exist before the amendment. Even more significant changes were made to s 188 indicating the relative narrowness of the provision prior to amendment.

6. 26 Before the 1997 amendment s 188 provided that a court may reopen proceedings where the sentence was "not in accordance with the law" and may impose a sentence "that is in accordance with the law". That provision, in very similar terms to s 43, focussed on error in the sentence and correction of the error as distinct from rehearing or redetermining the sentence itself. However, the 1997 amendments expanded the power by providing that on reopening the court may "resentence" the offender (s 188.(3)(b)). This expansion from correction to "resentencing" was necessary because the basis for reopening was a "clear error of substance", which, as a matter "of substance", was likely to have a commensurately substantial impact on the sentence.

6. 27 The change was reflected in the heading to s188. Prior to the 1997 amendments the heading was "**Supreme or District Court may reopen proceeding to correct sentencing errors**". That heading was almost identical to the heading to the current s 43. In 1997 the words "to correct sentencing errors" were removed and the heading became "**Court may reopen sentencing proceedings**". The omission of the reference to correction was appropriate as the section now extended to "resentencing".

6. 28 The 1997 amendments made a further significant change in allowing re-opening for failure to comply with an undertaking to cooperate with authorities. The amended s 188 allows re-opening where a sentence had been reduced because of an undertaking to cooperate with authorities which the offender failed to fulfil. This is not a matter of error, or even of imposing a sentence that is contrary to law, it is simply a change in events subsequent to sentence which affected the basis on which the sentence was originally determined.

6. 29 In NSW this is the province of appeal. The reconsideration of the sentence where there has been a failure to fulfil an undertaking to co-operate with authorities is provided for under s 5DA of the *Criminal Appeal Act* 1912.

6. 30 The lack of such express terms to allow for "resentencing" on the wider basis specified in the amendments to s 188, indicates that s 43 has a more confined application in the statutory context operating in NSW.

6. 31 The fourth indication that s 43 does not allow reopening for any error at any time is that it is a procedural section the terms of which contain no suggestion that it's operation was to override the principle of finality and radically alter the appellate structure in NSW.

6. 32 Such fundamental changes necessarily follow if s 43 were construed as allowing reopening of a sentence on any ground at any time.

10 6. 33 There are no time limits for applications under s 43 and such applications may be made many years after the sentence was imposed, as in ***R v Denning***[19], and the present case. There is also no limit on the number of applications that can be made. There is nothing in the section to prevent more than one application in respect of the same sentence. This occurred in ***Erceg***[20] where the sentence was relisted before the sentencing judge under s 43 to clarify the terms used (***Erceg*** at [64]). The sentencing judge attempted to clarify the sentence. On appeal, a declaration was refused, in part, because it was considered more appropriate that the matter be relisted before the sentencing judge for a further s43 application (***Erceg*** at [154] –
20 [155]). That would have been the second s 43 application in relation to the same sentence.

6. 34 Section 43 also provides that the court may act on its own initiative. As such, a rehearing under s 43 is not confined by grounds of appeal in the notice of appeal or the issues sought to be argued by the parties. In this sense, s 43 would confer a broader jurisdiction than the appeal provisions.

6. 35 Section 43 was clearly intended as an exception to finality albeit a qualified exception providing "a simple mechanism for the correction of error", as it was described in the second reading speech (quoted at CCA [21]). On the wide view that s 43 allows rehearing on any ground at any time, this
30 qualified procedural exception would almost entirely displace the concept. The section recognises the distinction between correction and appeal by

[19] ***R v Denning*** NSW CCA 15 May 1992 (unreported)
[20] ***Erceg v District Court (NSW)*** (2004) 143 A Crim R 455.

providing that nothing in the section affects any right of appeal (s 43(4)), the implication being that the correction procedure undertaken under the section is a different process to appeal (CCA at [59]).

6. 36 Without clear words expressly warranting such a construction s 43 should not interpreted in such terms, particularly where there is an obvious construction available which gives effect to the stated purpose of the section: ***Potter v Minahan*** (1908) 7 CLR 277 at 304.

6. 37 The CCA referred to these considerations (CCA at [66],[155]) but adopted the wide view in deference to the previous authorities which were unchallenged (CCA at [106], [117]). The difficulties created by such a construction were thought to be avoidable by exercising the discretion in s 43, so that while the section was technically applicable to ***Muldrock*** error, it should not be used in such cases as a matter of discretion (CCA at [66],[108] – [109], [159]).

Consistency with earlier authorities

6. 38 The appellant submits that the decision in the present case is in conflict with earlier decisions in NSW and the other jurisdictions, in particular, the recent decisions of ***Meakin*** and ***Erceg*** in NSW, and the CCA failed to "recognise or confront" this inconsistency (AWS at [60]). It is true that the earlier authorities have held that s 43 should be given a wide interpretation but no decision has gone so far as to extend the section to permit complete redetermination of the sentence.

6. 39 The earlier authorities have always maintained as the central tenet of their approach to s 43 that it affords the fullest relief comprehended within the concept of correction. Another way of expressing this was that s 43 does not permit a general rehearing and is not a substitute for an appeal. Almost all of the previous authorities have included one or other of these statements. If there is any inconsistency in the CCA's decision to apply s 43 to ***Muldrock*** error it is not that it is a narrower construction than previously adopted, but on the contrary, it is that it extends the concept of correction in a way indistinguishable from a rehearing on the merits.

6. 40 The formulation that the scope of s 43 is comprehended by the concept of correction comes from a passage in the judgement of Grove J in ***R v Denning***[21]. The appellant quotes this passage twice (AWS at [31] and [34]). On the second occasion, when quoting from ***Erceg***, to the effect that s 43 should be construed "*to include scope for the fullest relief which fairly can be comprehended within the concept of correction*", the passage is underlined in the appellant's submissions (AWS at [34]). That emphasis is not found in the original but it is entirely appropriate. It makes clear that, even affording a wide scope to s 43, its operation is to be comprehended
10 within the concept of correction. In ***R v Tangen***, the CCA accepted that there seemed to be a divergence of views between the wide and narrow construction of s 43[22], especially as to whether the court could receive new evidence of what had transpired since the original sentencing on the question whether to re-open and on the question of the sentence to be imposed. Badgery-Parker J (with whom Gleeson CJ and Hidden J agreed) held that the wide view should be adopted and that the Court should have regard to what has transpired since the original sentencing, but even so, that was to be done within the concept of correction: "*This court should, in my view, follow **Denning** and should, in the words of Grove, J. construe the*
20 *section "so as to include scope for the fullest relief which fairly can be comprehended within the concept of correction"*[23]. This statement has been adopted many times in the earlier authorities and has never been contradicted. It was adopted by the CCA in the present case (CCA at [27]). However, by applying s 43 to ***Muldrock*** error, the Court appears not to have afforded the concept its full import.

6. 41 There is a clear distinction between the correction of a penalty and the redetermination of a penalty. The process of adjusting an existing penalty is entirely different from reassessing all the relevant factors to determine the penalty afresh ([6.10] – [6.13] above).

30 6. 42 The distinction is illustrated in ***Tolmie***[24] where the offender was sentenced for a number of offences the sentences for which were made partly

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[21] ***R v Denning*** NSW CCA 15 May 1992 (unreported) at p 18.
[22] ***R v Tangen*** NSW CCA 21 June 1996 p 5 - 6.
[23] ***R v Tangen*** NSW CCA 21 June 1996 p 7.
[24] ***R v Tolmie*** (1994) 72 A Crim R 416 at 420.

cumulative upon each other. When one of the convictions was quashed on appeal an adjustment was required to the commencement dates of the remaining sentences. As Hunt CJ at CL pointed out, there is a distinction between varying the commencement dates of the remaining sentences to accommodate a gap created by the quashed sentence and a consideration of whether the remaining sentences were less than would have otherwise been imposed to take account of totality with the sentence since quashed. Both courses would result in varying the terms of the remaining sentences but one was an adjustment to reflect the true circumstances, the other a
10 redetermination on the merits. In ***Tolmie***, it was held that s 24, the predecessor of s 43, did not permit such redetermination for that was matter for appeal.

6. 43 It has been said that s 43 applies to "patent" or "technical" errors[25] but it may be more correct that its operation is not defined by the characterisation of the error but by the concept of correction. If the process to be undertaken requires a redetermination of the sentence then the error is not amenable to correction and therefore not within the scope of s 43. As ***Tolmie*** illustrates, the same problem, the variation of the term of a sentence, may be addressed by correction or redetermination.

20 6. 44 Section 43 is also sometimes seen as requiring two separate steps, firstly, whether the sentence is contrary to law and should be reopened, and secondly, the extent of the power conferred on re-opening[26]. Although these questions involve some different considerations, it is also the case that the scope of the power on reopening informs whether the error is amenable to correction.

6. 45 The other way in which the correction concept has been expressed is that s 43 does not permit a rehearing (CCA at [64], [66], [118]). This has also been repeatedly stated and never contradicted. In ***Ho***[27] Kirby P noted that the section did not permit a general rehearing (***Ho*** at 403D) and that the
30 limitations on the application of s 43 were those described in ***Boyd v***

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[25] ***R v Tolmie*** (1994) 72 A Crim R 416 at 420.
[26] ***R v Tangen*** NSW CCA 21 June 1996 p 4 - 5.
[27] ***Ho v DPP*** (1995) 37 NSWLR 393.

Sandercock (***Ho*** at 403A). Even in ***Melville***[28] it was accepted that adjustment of the sentence to correct error was "*not the same as a resentencing on appeal*". Therefore, ***Melville*** was correct on the question of construction, but the application of the power to the particular circumstances of that case seemed to go beyond correction.

6. 46 In ***Melville*** the error was that the sentencing judge had taken into account as an aggravating circumstance the distress suffered by the victim in having to give evidence. This was held to render the sentence "not in accordance with the law". The error was held to have resulted in an increase of 12 months on the head sentence and 6 months on the non-parole period. The sentence was reduced accordingly. The conciseness of Kearney's J's decision belies the complexity of the process undertaken. It appeared to be a relatively minor mechanical adjustment of 6 months to the 6 year non-parole period and 12 months to the 12 year head sentence[29], but in reality, in order to determine the significance of the error, his Honour was required to review the various factors and assess the relative weight assigned to them in the context of the other factors operating in the case. Having undertaken that assessment, his Honour determined that of the 12 year head sentence, 1 year was attributable to this aggravating factor. His Honour was then required to determine a reduced sentence which, while eliminating any period attributable to the irrelevant consideration, nevertheless remained appropriate in all the circumstances of the case. This was quintessentially a redetermination of the sentence.

6. 47 This distinction between correction and rehearing has been drawn since the procedure was first enacted in s100HA of the Justices Act 1902.: "*This does not mean that these provisions can be used in order to review a sentence or to allow either party to have another bite of the cherry....*" (quoted at CCA [20])...... "*I emphasize again that the power given by this bill cannot be used as a general power of review or as an appeal process.*" (quoted at CCA [128]). When the section, originally applicable only to Local Courts was extended to all courts, it was again emphasised that "*It is important to note that this provision can only be used where there has been a technical error*

[28] ***R v Melville*** (1999) 105 A Crim R 421 at 424 [13].
[29] ***R v Melville*** (1999) 107 A Crim R 70 at 70 [5]

in the sentence imposed. The new section cannot be used to review a penalty by way of appeal... ... ...This is a quite different mechanism to that of appeal." (quoted at CCA [130]).

6. 48 In both ***Meakin*** and ***Erceg***, on which the appellant particularly relies, this basic tenet was adopted and in neither case was there any question of undertaking a rehearing on the merits.

6. 49 ***Meakin***[30] concerned an alleged error as to the automatic disqualification period for a driving offence. Beazley JA held that s 43 was not concerned with the correction of all sentencing errors (***Meakin*** at [28]), a direct contradiction of the construction for which the appellant contends. Her Honour accepted the approach of Grove J from ***Denning*** that s 43 was to be comprehended within the concept of correction (***Meakin*** at [31]) (CCA at [37]).

6. 50 ***Erceg***[31] concerned some "anomalies and discrepancies"[32] in the way a sentence was expressed which required clarification. McColl JA reviewed the previous authorities and, as the appellant has noted, adopted the quoted passage from ***Denning*** as to the scope of s 43 being comprehended within the concept of correction (***Erceg*** at [104]). Again, there was no question of a redetermination of the extent required for ***Muldrock*** error.

Muldrock error

6. 51 The appellant submits that the CCA construed s 43 "much more narrowly" than in previous decisions (AWS at [54]) yet the reality was that it was construed far more widely. No previous decision had applied the correction procedure to effect a complete reconsideration of the sentence.

6. 52 The CCA was correct in its conclusion that the sentence in this particular case was not contrary to law. However, it may have been more correct to hold that the ***Mudlrock*** error was not amenable to s 43 correction at all.

6. 53 The appellant contends that the CCA raised the threshold for correction by requiring not merely that error be identified but that the sentence be shown to be manifestly excessive. This contention appears to be based on the view

[30] ***Meakin v DPP*** (2011) 216 A Crim R 128.
[31] ***Erceg v District Court (NSW)*** (2004) 143 A Crim R 455.
[32] ***Erceg v District Court (NSW)*** (2004) 143 A Crim R 455 at [134].

that the CCA found that the only reason the Crown appeal was allowed was because the sentencing judge had given undue weight to the appellant's medical condition (AWS at [24], [62]). The decision is characterised as saying "nothing about whether the sentences were infected with error and were higher than otherwise appropriate" (AWS at [62]).

6. 54 It is correct that in the original CCA appeal it was held that the sentencing judge had given undue weight to the appellant's medical condition. That finding was reviewed and affirmed in the present appeal 9CCA at [82] – [92]). However, contrary to the appellant's submission, that was not the only error and not the only basis on which the sentence was increased. There had been a more fundamental error, namely, that the sentencing judge had wrongly assessed the objective seriousness of the offence.

6. 55 The sentencing judge regarded the enterprise as "bumbling' (ROS 4.9) although he also found it was "organised and planned" (ROS 4.8). He considered there were no specific individuals who were, or would be, adversely affected by these offences (ROS 5.2) and it stood in the appellant's favour that he had no major drug dealing offences in his history. Presumably on the basis of these findings, his Honour held that the count 2 offence of offering to supply 1000 ecstasy tablets was "significantly less" culpable than a mid range offence (ROS 9.7) and the count 4 offence involving 2.6 kilos of methylamphetamine was "below" mid range (ROS 10.2).

6. 56 The appellant conceded in the original appeal that his criminal history was not relevant to the assessment of the objective gravity of the large commercial supply offence (CCA 27.5.11 at [84]).The CCA also considered that the fact that the drugs were seized before they were supplied was a matter of little weight where the offence was part of an organised commercial activity (CCA 27.5.11 at [97] – [98]). It was clear from the way the drugs were packaged and from the distribution network the applicant had established that it was intended that the drugs would reach end users and it was not open to take this matter into account as affording anything but a modest reduction in the gravity of the offence (CCA 27.5.11 at [100]).

6\. 57 The CCA held that the appellant's role as principal in an ongoing organised drug supply business for profit involving 2½ times the large commercial quantity did not allow for the characterisation of the offence as below mid range. The Court found that, in the circumstances, the objective criminality was mid range (CCA 27.5.11 at [101] – [102]). There was also an error in the finding of "special circumstances" in relation to count 2 recorded on the back of the indictment, said to be because the offence was "well below mid-range of seriousness" (CCA 27.5.11 at [82]). There was a further error of process in that no balance of term was fixed for this offence (CCA 27.5.11
10 at [82]).

6\. 58 These findings were reviewed in the present appeal (CCA at [74], [93] -[98]) and the CCA agreed that the sentencing judge's findings as to the objective criminality were unsustainable and that the correct assessment of the criminality was mid range (CCA at [97]). The Court noted that the applicant had shown no contrition and that in light of his criminal record and the seriousness of the present offences, the prospects of rehabilitation were doubtful (CCA at [95]) and that no lesser sentence should be imposed (CCA at [98]).

6\. 59 That analysis demonstrated that, contrary to the appellant's submission, the
20 error as to the appellant's medical condition was not the sole basis for upholding the Crown appeal. The errors as to the objective seriousness of the offences were dealt with under the grounds relating to the Standard Non-Parole Period and they obviously affected the assessment made in relation to the applicability of the SNPP but that did not mean that the only relevance of these errors was on the SNPP issue. The objective gravity of the offences was a central element in the assessment of the appropriate sentence and the clear errors in that assessment together with the error in assessing the only mitigatory factor, the medical condition, warranted the increase in the sentence.

30 6. 60 It is correct, as the appellant submits, that there were times when the CCA expressed the conclusion as to whether the penalty was contrary to law in terms of whether the increased sentence "could have been imposed" (CCA at [93] ..."within the reasonable discretion of the Court" (CCA at [98]) but

this did not impose a threshold that the sentence must be shown to be manifestly excessive.

6. 61 This expression referred to the fact that in order for a sentence to be contrary to law it is not sufficient to show that a lesser might have been available. It must be shown that a lesser sentence was warranted in the absence of the error, which is another way of saying that it must be shown that the error led to the imposition of a higher sentence than was warranted. If it cannot be shown that the error led to a higher sentence than was warranted then the penalty was not contrary to law.

10 6. 62 Accordingly, the CCA was correct to consider whether the sentence was warranted but for the error. The finding that the sentence was within the reasonable discretion of the Court (CCA at [98]) was another way of expressing the finding that the error did not result in a higher sentence than was warranted. That is clear from the following paragraph where the Court found that the sentence was appropriate: "*Further, the penalty imposed by the Court of Criminal Appeal was appropriate and thus not contrary to law with the meaning of s 43(1)(a) of the Sentencing Procedure Act.*" (CCA at [99]). Contrary to the appellant's submission that the decision "says nothing about whether the sentences were higher than otherwise appropriate" (AWS

20 at [62]) the reasons for judgment demonstrated that on a proper assessment of the objective gravity of the offences and the medical condition, the increased sentence was appropriate in all the circumstances of the case.

6. 63 Six months after this decision, the decision of ***Sinkovich v Attorney General of NSW*** [2013] NSWCCA 383 was handed down and held that ***Muldrock*** errors could found an application under Pt 7 of the *Crimes (Appeal and Review) Act* 2001 which provides for a judicial inquiry or a referral to the CCA in relation to the sentence. The existence of this procedure under Part 7 was referred to in the present case (CCA at [146] –

30 [147]) but its applicability to ***Muldrock*** error had not been decided at the time.

6. 64 There are thus two possible avenues available for the review of sentences imposed before ***Muldrock***; an application for an inquiry into the sentence

under s 78 of the *Crimes (Appeal and Review) Act* 2001 and the provisions for appeal.

6. 65 The analysis undertaken in the present case demonstrated that in order to apply s 43 to ***Muldrock*** error the Court is required to reconsider "all of the factors that are relevant to sentence" (CCA at [74], [98], [155]). This will generally be the case because ***Muldrock*** error entails a staged approach where the objective seriousness of the offence is assessed by reference to a combination of objective and subjective factors and the non-parole period fixed by giving determinative significance to the SNPP. The reconsideration will almost always require a reassessment of the objective criminality by reference to objective factors alone and a different approach to the applicability of the SNPP[33]. The redetermination must take account of that reassessment in the context of all the other factors in the case. That is plainly not correction but a new sentencing process which should only be undertaken under the provisions already available in the existing statutory framework authorising a rehearing on the merits.

PART VIII: Time Estimate

It is estimated that oral argument will take 1 hour.

Dated: 16 January 2014

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[33] ***Muldrock v R*** (2011) 244 CLR 120 at 132 [22], [27] -[28].