IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

No. M 3 of 2013

BETWEEN: PASQUALE BARBARO — Applicant

-and-

THE QUEEN — Respondent

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APPLICANT'S AMENDED SUBMISSIONS

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Date of document: 26 September 2013
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PART I – CERTIFICATION

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

PART II – ISSUES

2.1 Does a judge's refusal to hear a prosecution submission as to sentencing range amount to a breach of procedural fairness or a failure on the judge's part to hear and consider 'a relevant consideration'?

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2.2 Does a judge's refusal to hear a prosecution submission as to sentencing range - in circumstances where the making of the submission formed part of an agreement between the Crown and the offender that predicated the offender's pleas of guilty - amount to a breach of procedural fairness or a failure on the judge's part to hear and consider 'a relevant consideration'?

PART III – SECTION 78B OF THE *JUDICIARY ACT* 1903 (CTH)

3.1 The Applicant certifies that he has considered whether notice should be given under s. 78B of the *Judiciary Act* 1903 (Cth) and determined that notice is not necessary.

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PART IV – CITATION OF REASONS FOR JUDGMENT

4.1 The reasons for judgment of the Court of Appeal, Supreme Court of Victoria, given on 20 November 2012, are available on the internet as *Barbaro v R; Zirilli v R* [2012] VSCA 288.

4.2 The reasons for sentence at first instance, given by King, J in the trial division of the Supreme Court of Victoria on 23 February 2012, are available on the internet as *DPP (Cth) v Barbaro & Zirilli* [2012] VSC 47.

PART V - FACTS

5.1 The Applicant refers to, and adopts (with one qualification), the statement of relevant facts set out by the Court of Appeal at paras [1]-[8] and [11] in its judgment.

5.2 Exhibit 5[1] on the Applicant's plea contained correspondence between the Crown and the Applicant's legal representatives. In that correspondence, the Crown agreed to make a submission as to sentencing range to the judge.

5.3 The Court of Appeal has in its judgment misstated the range that formed part of the agreement between the Crown and the Applicant. The Court stated that the range that would have attached to the proposed head sentence was 33 to 37 years.[2] In fact, it was *32* to 37 years.[3] Had the range been advanced, as agreed, the judge would have been informed that the Crown considered a head sentence of 32 to 37 years, and a non-parole period of 24 to 28 years, an "appropriate sentencing range".[4]

5.4 The sentencing judge made it plain at the outset of the plea hearing, and throughout, that she would not receive a submission as to range. She stated repeatedly that she would not allow the submission to be made by the Crown; nor would she receive from Applicant's counsel the Crown's submission as to range.[5]

5.5 Further, the sentencing judge expressly stated that, if she were to be informed of the Crown's submission on range, she would disregard it.[6]

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1 See *Plea transcript* at p. 51, line 11; correspondence from Ms. Jan McAlpine on behalf of the Commonwealth Director of Public Prosecutions to Nyman Gibson Stewart Solicitors for the Applicant, dated 10 October 2011, at p. 2 para [5].

2 *Barbaro v R; Zirilli v R* [2012] VSCA 288 at [11].

3 Exhibit 5 on the Applicant's plea: correspondence from Ms. Jan McAlpine on behalf of the Commonwealth Director of Public Prosecutions to Nyman Gibson Stewart Solicitors for the Applicant, dated 10 October 2011, at p. 2 para [5]. [Emphasis added.]

4 *Ibid* at p. 3.

5 *Plea transcript* at pp. 5-7; p. 64, lines 11 – 27; and pp. 114-115; see also pp. 154-158.

6 *Ibid* at p. 6, line 25.

5.6 While senior counsel for Zirilli did inform the sentencing judge of the range the Crown had agreed to submit in respect of his client,[7] senior counsel for the Applicant did not. At one point during the plea hearing senior counsel for the Applicant stated, "I understand your Honour's reluctance to talk about the Crown range".[8] Nevertheless, he subsequently did attempt to put before and refer the sentencing judge to "what was agreed between the parties as to the sentencing range".[9] But before he could so, the judge asked him (rhetorically), "do you understand what I've said about sentencing range?" Senior counsel for the Applicant then desisted from any further attempts.[10]

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PART VI – ARGUMENT

SENTENCING RANGES IN VICTORIA

6.1 A submission as to range is a submission that extends beyond the application of principle.[11] It is a submission that descends to the numerical parameters within which the Crown (or another party) contends the sentencing discretion may be lawfully exercised.

6.2 Putting it differently, it is a submission that a sentence below the bottom end of the range would be manifestly inadequate in all the circumstances of the case, and a sentence greater than the top end of the range would be manifestly excessive. Where the submission refers to a period of imprisonment, it may be made in respect of both a prospective head sentence and a prospective non-parole period.

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7 *Ibid* at pp. 157-158.

8 *Ibid* at p. 64 line 15.

9 *Ibid* at p. 115, lines 5-6.

10 *Ibid* at p. 115, lines 8-11.

11 See, eg, *Hili v R* (2010) 242 CLR 520 at [48]-[50] and [53]-[55] per French, CJ, Gummow, Hayne, Crennan, Kiefel and Bell, JJ.

6.3 It is a submission of mixed law and fact.[12] It contends that, in the particular factual circumstances, the judge would fall into error in the exercise of the sentencing discretion if a sentence outside the range were imposed. It is also a submission that the sentencing judge would not make an error (at least not an error characterised by a sentence which is manifestly excessive or inadequate) if a sentence within the range were imposed. That is, a sentence which falls within the range submitted to the Court is a sentence open to the judge to impose as a matter of law.

6.4 There has developed a considerable body of authority regarding the circumstances in which the Crown should make a submission on range. In *MacNeil-Brown* the Court of Appeal in Victoria held that the submission should be made if requested by the sentencing court or if the prosecutor perceives a significant risk that the court will fall into error unless the submission is made.[13] The obligation is said to arise from the special duty on the prosecution to assist the court by furnishing appropriate and relevant material touching upon the imposition of a sentence.[14] That said, the issue raised by this application is not whether a prosecutor *should* make a submission as to sentencing range but whether a prosecutor *may* make the submission.

THE PLEA HEARING PROCEDURE

6.5 Sentencing proceedings are fundamentally adversarial and accusatorial.[15] Thus, and generally, it is not the role of the sentencing court to seek out evidentiary material thought to be relevant to its function;[16] nor does the court ordinarily determine the scope

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12 Cf *R v MacNeil-Brown* (2008) 20 VR 677 ("*MacNeil-Brown*") at [11]-[12], [42] per Maxwell, P, Vincent and Redlich, JJA; at [127]-[130] per Buchanan, JA (dissenting); and [140]-[147] per Kellam, JA (also dissenting). The majority held that it is a 'submission of law'.

13 *Ibid* at [3].

14 *Ibid* at [2]; *Azzopardi v R* (2011) 219 A Crim R 369 at [70]-[71].

15 *Pantorno v R* (1989) 166 CLR 466 at 473; *Chow v DPP* (1992) 28 NSWLR 593 at pp. 605-06 per Kirby, P.

16 *Re Media Entertainment & Arts Alliance Ex Parte Hoyts Corporation Pty Ltd* (1994) 119 ALR 206 at p. 210.

of the evidence put before it. A court must be circumspect about intruding upon the role of counsel. The fact that informal procedures have been developed and for the most part adopted whereby the parties agree upon the facts against which a court will sentence, particularly where there has been a plea of guilty, does not alter the adversarial complexion of sentencing proceedings.[17]

6.6 In that adversarial context, a sentencing court must accord procedural fairness to the parties (and, in particular, to an offender). Indeed, a "denial of procedural fairness" may "vitiate" an offender's sentence.[18]

10 **PROCEDURAL FAIRNESS AND RELEVANT CONSIDERATIONS**

6.7 One aspect of procedural fairness is the obligation on the court to allow the parties an opportunity to address issues, both legal and factual, that arise in the proceedings. Put another way, a person whose interests are likely to be affected by an exercise of power must be given the opportunity to deal with matters relevant to his or her interests which the repository of power proposes to take into account or, without justification, to disregard in deciding upon its exercise.[19]

6.8 Relatedly, a party who is subject to the possibility of an adverse determination on the basis of information – whether placed before a court or withheld from it or disregarded – must be afforded the opportunity to be heard. The obligation to afford a party *reasonable*
20 *opportunity to present or meet a case*[20] – or to place before the court material relevant to its exercise of power - is fundamental both to the reality and the appearance of justice. Thus, in *Ex parte Kelly; Re Teece*[21] the NSW Court of Appeal held that a magistrate had

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17 See *Weininger v R* (2003) 212 CLR 629 at [7]; *GAS v R* (2004) 217 CLR 198 at [30]; *R v Storey* [1998] 1 VR 359 at p. 371.

18 *Pantorno v R* (1989) 166 CLR 466 at p. 483; *Ristevski v R* (2011) 31 VR 1193 at [9]–[10].

19 *Kioa & Ors v West & Anor* (1985) 159 CLR 550 at p. 628 per Brennan, J.

20 *Minister of Immigration and Multicultural Affairs v Bhardwaj* (2002) 209 CLR 597 at [40].

21 [1966] 2 NSWR 674 at p. 678.

fallen into error by "failing to give counsel for the defendant an opportunity to be heard upon sentence" so that "thereby there was at that stage a denial of natural justice."

6.9 Further, when an offender's plea of guilty is predicated – as it was in the Applicant's case – upon an agreement with the Crown that the latter would advance a particular range, it is *a fortiori* necessary that the Court at least receive and consider it. That is because the process by which an offender's guilty plea, in those circumstances, was ultimately secured, renders the Crown's range almost inevitably relevant to the sentencing process. Thus, citing McHugh, J in *Markarian v R*:[22]

> "Nor is the instinctive synthesis approach inconsistent with awarding a discount for some factor, provided that discount relates to a purpose distinct from a sentencing purpose. The distinction between permissible and impermissible quantification of "discounts" on a sentence will usually be found in whether the quantification relates to a sentencing purpose rather than some other purpose. So, the quantification of the discount commonly applied for an early plea of guilty or assistance to authorities is offered as an incentive for specific outcomes in the administration of criminal justice and is not related to sentencing purposes."

Such 'specific outcomes in the administration of criminal justice' include saving the community the expense of a trial. Applied *mutatis mutandis* to the Applicant's case, it was an incentive that bore upon his pleas of guilty that a sentencing range which the Crown had agreed to submit to the court at his plea hearing would be received and considered by the court.

6.10 Indeed, that sentiment has been expressed in terms that are on all fours with the Applicant's case. In *Ahmad v R*,[23] McClellan, CJ at CL (with whom Hislop and Johnson, JJ agreed) considered the nature and significance of a submission as to range made by the Crown pursuant to an undertaking given as part of an agreement between the Crown and an offender and held:

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22 (2006) 228 CLR 357 at [70].

23 [2006] NSWCCA 177 at [23].

> "With respect to any aspect of the agreement which relates to the appropriateness of any particular sentence, or a component of it, the Crown's agreement is confined to an undertaking to make a submission to the sentencing judge consistent with the terms of that agreement. The agreement can neither bind the judge nor be given any greater weight than is appropriate to a submission of counsel with knowledge of the facts relevant to the offence and the offender. It *must of course be carefully considered* but carries no greater weight than any other submission which the Crown may make in the sentencing process." [Emphasis added.]

6.11 In the present case, the Applicant was shut out from drawing to the attention of the sentencing judge – as part of his plea - the submission on range which the Crown had undertaken to make. He was denied the opportunity to deal with a matter relevant to his interests which the court, without proper justification, was intent on disregarding in exercising the sentencing discretion. He was denied procedural fairness. Further and alternatively, he was denied the opportunity to put, or to have put, before the court material relevant to his interests and the court's exercise of power. In the result, the sentencing discretion miscarried.

THE COURT OF APPEAL'S ANALYSIS

6.12 The Court of Appeal held[24] that "[n]o question of procedural fairness arises if a judge declines to hear a submission of law which he or she adjudges to be unnecessary or unhelpful". The proposition misapprehends the very nature of the hearing rule: *viz*, to avail a party the opportunity to be heard.[25] Further, to hold that a judge is at liberty to pre-judge what he or she determines to be relevant, and to foreclose a party the opportunity to be heard accordingly, is the very vice (or at least one of the vices) against which the hearing rule is said to guard.

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24 *Barbaro v R; Zirilli v R* [2012] VSCA 288 at [20].

25 *Minister of Immigration and Multicultural Affairs v Bhardwaj* (2002) 209 CLR 597 at [40] per Brennan, J; *Kioa & Ors v. West & Anor* (1985) 159 CLR 550 at pp. 582-86 per Mason, J and 628-29 per Brennan, J; *VEAL v Minister of Immigration* (2005) CLR 88 at [15].

6.13 The Court also held[26] that the "rule focuses attention on adverse matters" and thus "a matter which [a] decision-maker expressly declines to consider — in this case, a submission on sentencing range — does not attract the rule". That analysis too discloses error. It restricts unduly the nature of the hearing rule and begs the question. It also betrays on the part of the Court its reliance upon a distinction that is more apparent than real: counsel shut out by a judge from making a submission thought by a party to be *favourable* (or from relying upon a concession made by opposing counsel) is forced by the Court to adopt a course potentially *adverse* to that party's interests.

6.14 Further, to state as the Court did[27] that "there was, of course, nothing to prevent counsel for the Applicants making their own submissions to the judge on sentencing range" is simply to ignore what occurred in the Court below.[28] The judge refused to hear – and expressed a determined view that she would disregard – any attempt by the prosecutor or defence counsel to advance a submission as to range. It was an unambiguous refusal to permit counsel to be heard. And it is apparent from the exchanges between senior counsel for the Applicant and the judge on the plea[29] that he understood the sentencing judge to have ruled that he not put an "indication of sentencing range". Counsel did no more or less than comply with the ruling.

6.15 Further still, and in response to the submission made in the Court of Appeal that it was a significant consideration that the proposed Crown submission on range was 'part of a plea agreement' between the Applicant and the Crown, the Court observed[30] that the sentencing judge "correctly pointed out.. that such an agreement 'does not bind the Court in any way, shape or form'." But so to say misses the point. The question was not whether it would "bind" the sentencing court; rather it was whether that aspect of the plea agreement was a matter that should be taken into account or considered. The Court of

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26 *Barbaro v R; Zirilli v R* [2012] VSCA 288 at [21].

27 *Ibid* at [23].

28 *Plea Transcript* at pp. 6-7, 115-17, 125, 154-56.

29 *Ibid* at p. 64.

30 *Barbaro v R; Zirilli v R* [2012] VSCA 288 at [26].

Appeal conflated whether a submission is binding on the sentencing court with whether it should be taken into account by the sentencing court.

6.16 Finally, the Court of Appeal[31] endorsed the view of the sentencing judge that her Honour was entitled to refuse to hear any submission from the Crown as to range "unless you think I'm about to fall into appealable error." That analysis too is flawed. A sentencing judge may not give any indication that she is about to fall into appealable error for the simple reason that she does not give any indication of the sentence that she may be contemplating. That is what occurred in the present case, at least in relation to the non-parole period. The sentencing judge gave no indication of the non-parole period that she was contemplating so that all parties were unable to make submissions to her on whether the non-parole period might amount to appealable error.

6.17 In deciding that the sentencing judge had, in the circumstances, not deprived the Applicant procedural fairness on a material question of law or fact, and not denied him the opportunity to advance and have considered a 'relevant consideration', the Court of Appeal erred.[32]

AN ALTERNATIVE ANALYSIS

6.18 The Applicant recognises that there may arise before this Court a real question about the propriety and, perhaps even the utility, of submissions as to range.[33]

6.19 Further, there may arise a question about whether they are, as was held by the majority of the Court in *MacNeil-Brown*[34], submissions of law.

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31 *Barbaro v R; Zirilli v R* [2012] VSCA 288 at [28].

32 *Minister for Aboriginal Affairs v Peko-Wallsend Ltd.* (1986) 162 CLR 24 at pp. 39-42.

33 See *R. v Tait and Bartley* (1979) 24 ALR 473 at 477; *R v Marshall* [1981] VR 725 at p. 735; *Casey and Wells* (1986) 20 A Crim R 191 at p. 196.

34 *MacNeil-Brown* at [11]-[12], [42] per Maxwell, P and Vincent and Redlich, JJA; contra at [125]-[126] and [130] per Buchanan, JA (dissenting); and [139]-[145] and [147] per Kellam, JA (dissenting).

6.20 Nevertheless, at present, *MacNeil-Brown* represents the law in Victoria. More importantly, it represented the state of the law at the time the Applicant entered his pleas of guilty and at the time of his plea hearing and sentence.

6.21 Given then the state of the law at the time of Applicant's plea hearing and sentencing policy and fairness dictated that: (i) the prosecutor ought to have been permitted to submit a range; and (ii) further and alternatively, defence counsel ought to have been permitted to advance and refer to it.

6.22 Instead, the course adopted by the sentencing judge denied the Applicant procedural fairness or, alternatively, the opportunity to advance and have considered a relevant consideration. That course caused the sentencing discretion to miscarry.

MATERIAL OR IMMATERIAL ERROR

6.23 The only question that remains is whether the Crown can establish that the error made by the sentencing judge was immaterial in the sense that it could not have affected the Applicant's sentence.

6.24 The Court of Appeal determined that neither the total effective sentence imposed for the Applicant's offending, nor the non-parole fixed, was manifestly excessive. It may be accepted that it held also, implicitly, that the upper limits of the sentencing range which the Crown would have advanced if permitted to do so, on both the Applicant's head sentence and non-parole, were not manifestly excessive. *Ex hypothesi*, while the Crown would have submitted that a head sentence greater than 37 years and a non-parole period greater than 28 years would have been manifestly excessive, the Court of Appeal held that the sentences actually imposed (a head sentence of life imprisonment and a non-parole period of 30 years) were not manifestly excessive.

6.25 But the issue before this Court is not whether the Court of Appeal erred in holding that the sentences imposed were within the range of sentences properly open to the sentencing judge. Rather, the question is whether the sentencing judge would *inevitably have*

imposed the sentences that she imposed if the Crown had been permitted to make the submission as to range which it had undertaken to make, or if defence counsel had been permitted to advance and rely upon the Crown range.[35] Put another way, this Court must ask itself whether it *might have made a difference* to the discretion exercised by the sentencing judge if she had accorded the Applicant procedural fairness, or accepted and weighed a relevant consideration in the form of the Crown range.

6.26 The sentencing judge concluded that, notwithstanding the Applicant's pleas of guilty, justice required that he serve a minimum term of 30 years. It cannot be assumed that the judge would have maintained that view if the Crown had been permitted to advance its range and support its legitimacy.

6.27 As regards, in particular, the non-parole period, the prosecutor ought to have been ready to make – and presumably was ready and in a position to make[36] - submissions as to why it would have been unreasonable to impose a non-parole period greater than 28 years.

6.28 That the Court of Appeal held that the sentences imposed were not manifestly excessive entails no more than that they were within the range of sentences reasonably open to the sentencing judge in the sound exercise of her discretionary judgment. In particular, it does not entail that, had the Crown been permitted to submit as appropriate the lower end of the ranges it had undertaken to advance, they would have on appeal been found to be inadequate or betoken error.

6.29 The Crown at first instance would have submitted, if permitted to so, that it was open to the sentencing judge, in all the circumstances of the case, to impose a total effective sentence of 32 years and fix a non-parole period of 24 years. In accordance with its duty to do so, the Crown would have justified its submission. In *Bala v R*[37] Maxwell, P

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35 *Stead v State Government Insurance Office* (1986) 161 CLR 141 at pp. 145-6.

36 See, eg, *Bala v R* [2010] VSCA 78 at [6]-[8] per Maxwell, P and at [19] per Ashley, JA; *Mac-Neil-Brown* at [12].

37 [2010] VSCA 78.

reiterated[38] what, in *MacNeil-Brown*, the majority had identified as the essential features of a submission as to range:

> The range thus nominated must be based on a clearly-articulated view of the gravity of the offence, the relevant sentencing principles and practices, and relevant aggravating or mitigating factors. All of these matters should be referred to in the course of the submission, so that the court understands how the Crown contends that the relevant matters should be brought to bear.

Similarly, Ashley, JA stated:[39]

> "...the prosecutor's 'quote' of a head sentence range of six to eight years and a non-parole period range of four to six years was wholly insupportable by reference to any publication by which 'current sentencing practices' could be divined... the cases involving broadly comparable circumstances which were referred to in argument underlined the anomaly of the Applicant being sentenced as he was. In those circumstances, I concluded that the sentence passed was manifestly excessive."

6.30 Accordingly, a Crown submission as to range is not to be limited to a mere reference to numbers. It is expected that the Crown would have in the Applicant's case supported its range by reference to the facts of the case and the relevant sentencing principles and practices, as well as to comparable cases.

6.31 Just as importantly, senior counsel for the Applicant would have made submissions either in support of the ranges advanced by the Crown or in support of the imposition of sentences below their bottom end.

6.32 In the result, this Court cannot be satisfied that there existed no real possibility that the Applicant's sentence would have been different if the sentencing judge had received and properly considered the Crown's submissions as to range.

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38 *Ibid* at [7].

39 *Ibid* at [19]-[20].

PART VII – ORDERS SOUGHT

7.1 There be an order that the application for special leave to appeal be granted, the appeal allowed and the Applicant's application for leave to appeal against sentence be remitted to the Court of Appeal for determination according to law.

PART VIII – HEARING ESTIMATE

8.1 It is estimated that argument in this proceeding will occupy half a day.

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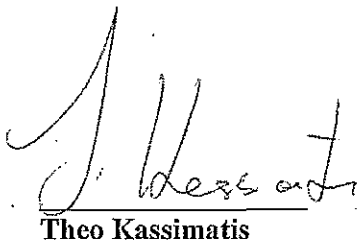

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