IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

No. 257 of 2014

ON APPEAL FROM THE COURT OF CRIMINAL APPEAL (NSW)

BETWEEN:

CMB
Appellant

and

THE ATTORNEY GENERAL FOR NEW SOUTH WALES
Respondent

APPELLANT'S SUBMISSIONS

Part I: Certification

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

Part II: Issues Presented by the Appeal

2 **Issue 1:** Is it correct to say in relation to s5D *Criminal Appeal Act* 1912 that the onus lies upon the respondent to an appeal by the Attorney General "to establish that the discretion ought to be exercised in his or her favour" (cf. *R v CMB* [2014] NSWCCA 5 ("CCA") at [110])?

3 **Issue 2:** Does the limiting purpose of Crown appeals and a correct application of *R v Hernando* (2002) 136 A Crim R 451, *Malvaso v The Queen* (1989) 168 CLR 227 at 240 and *Everett v The Queen* (1994) 181 CLR 295 at 302-303 require the Crown to satisfy an appellate court that the residual discretion should not be exercised before a sentence is increased on a Crown appeal?

4 **Issue 3:** Does s23 *Crimes (Sentencing Procedure) Act* 1999 qualify the principle in *R v Ellis* (1986) 6 NSWLR 603 at 604D? How are the words *"must not be unreasonably disproportionate to the nature and circumstances of the offence"* in s23(3) to be applied?

Part III: Consideration of s78B Judiciary Act 1903 (Cth)

5 The appellant has considered s78B *Judiciary Act* 1903 (Cth) and is of the view that no such notices are required.

Part IV: Citation of the Reasons for Judgment

6 The citation of the reasons for judgment of the court below is *R v CMB* [2014] NSWCCA 5. The reasons for judgment of the primary judge are unreported: *R v CMB* (4 April 2013).

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Part V: Narrative Statement of Facts

7 On 24 May 2011 the appellant's daughter (the complainant) made allegations of sexual and indecent assault against the appellant, as a result of which the appellant was charged with a number of offences on 27 October 2011 ("the initial charges").

8 On 9 August 2012, the prosecutor, on behalf of the DPP, applied to have the initial charges remitted from the District Court to the Local Court for referral to the Pre-Trial Diversion of Offenders Program ("the Program", also called the "Cedar Cottage program"), established under the *Pre-Trial Diversion of Offenders Act* 1985 ("the Act"). There was no issue that the offences with which the appellant was charged fell within the definition of child sexual assault offence under the Act (cf. s3):CCA [22]. The Act is described in its preliminary part as *"An Act to establish a procedure whereby child sexual assault offenders may be diverted from the criminal process into a treatment program"*. The "Purpose of the Act" is set out in s2A, namely: *"The purpose of this Act is to provide for the protection of children who have been victims of sexual assault by a parent...The Act provides for the establishment of a program administered by the Department of Health. In the implementation of the Act, it is intended that the interests of a child victim are to prevail over those of a person pleading guilty to a charge of sexual assault in relation to that child"*: CCA[21]. A person may only be assessed under the Act if referred for assessment by the DPP (s10). A person must be assessed as 'suitable' (s14) by the Director of the Program or his/her delegate. This assessment includes consideration of *"whether the person accepts responsibility for the sexual assault of the child"* (s14(2)(d)) and *"whether participation in the Program by the person...is in the best interests of the child"* (s14(2)(i)).

9 On 23 August 2012 the appellant was referred by the DPP for assessment under the Act for suitability for the Program. There was a place available the next day: CCA [7]. His assessment commenced thereafter. The "Ethos Statement" of the Program included that a participant was *"expected to face up fully to himself and significant others about all aspects of his abusive actions..."* (Affidavit Dale Tolliday affirmed 29.11.13, Annexure A p.4). A further document described as *"Orientation Information"* specifically addressed "further disclosures" and included a statement that *"The Program regards further disclosures by men in the Program as being a sign of positive commitment to change"*. There was a statement that such disclosures would be notified to DOCS and NSW Police. Participants were encouraged to disclose offences prior to entering into "the Undertaking" at the commencement of the program, as "the Undertaking" could not be varied to include

such further offences once entered (Affidavit of Dale Tolliday, affirmed 29.11.13, Annexure B, p.8). A *"Crime Description Appendix 3"*, was part of the assessment. The appellant was asked in a *"Crime Description task"*, *"...to set out in writing, your sexually abusive actions"* (Affidavit of Dale Tolliday, affirmed 29.11.13, Annexure B, p.26).

10 On 5 October 2012, during assessment, the appellant disclosed his additional offending conduct (Affidavit Appellant, affirmed 10.12.13 at [4]). In an interview on 9 October 2012, he resolved to disclose these further offences to the police and called his solicitor the next day for advice. On 31 October 2012 he again contacted his solicitor and arranged to go to the police. On 2 November 2012, the appellant informed police of previously unknown
10 offences he had committed on his daughter. He was arrested and charged with the *"second set"* of charges following participation in an ERISP interview (Facts Sheet p.1). He did so as *"part of his assessment phase he was undertaking in regards to the Cedar Cottage program"* and provided investigators with a *"document he had prepared as a result of the assessment"* (Facts Sheet p.1).

11 On 7 November 2012, the Director of the Program advised that the appellant was suitable for the program. On 14 November 2012, the appellant entered into a Treatment Agreement and commenced the Program. The Program was 2 years long and scheduled to finish on 13 November 2014 (31/01/03 T2).

12 On 23 November 2012, the appellant pleaded guilty at Gosford Local Court to the *"first*
20 *set"* of offences. These were four offences contrary to s61J(1), three offences of attempt s61J(1) and three offences contrary to s61M(1) *Crimes Act* 1900 (EX A1-3 *"Instruction Sheet for Sentence"*, cf.CCA[4]). These offences took place between January 2004 and December 2006.

13 On 23 November 2012, the appellant also pleaded guilty at Gosford Local Court to the *"second set"* of offences, namely four counts contrary to s61J(1) *Crimes Act* 1900, one count contrary to s61M(1) *Crimes Act* 1900. These offences took place between May-June 2005 and December 2006. The facts of the offences as disclosed by the appellant to police and then charged in terms, are set out at CCA[87].

14 On 31 January 2013 both sets of offences were listed before Ellis SC DCJ for submission
30 on sentence. The appellant's "Undertaking" to participate in the Program was before the Court. The prosecutor, on behalf of the DPP, submitted that the second set of offences should be adjourned for sentence to enable the appellant to complete the Program in

accordance with the Undertaking. The prosecutor submitted in relation to the second set of offences that *"the matters then had to be dealt with at law because the legislation had changed"* (later referred to as *"the lapse of the regulation"*) and that it would be *"unfair"* and *"against the spirit of the program"* to sentence the appellant on that day, instead requesting that the matters be adjourned to allow the program to be completed (31/01/13 T1.27-.28, 1.48-49, T2-4). Having been informed that the offences related to matters that the victim *"had no memory of apparently"*, the sentencing judge suggested *"some type of bond"*[1] (T4-5). The prosecutor interjected *"I'd be happy with a suspended gaol term*[2] *your Honour"*. His Honour continued *"condition it that he complete the Cedar House program"* and the prosecutor replied *"I'd be content with that course"* (T5). His Honour adjourned the matter so that this could be explained to the victim, a victim impact statement prepared and consequences of completion of the Program or breach could be explained to her, with the prosecutor undertaking to do so (T5-6).

16 On 4 April 2013, an update of the appellant's progress in the Program was tendered. The prosecutor again informed the judge that *"the legislation had changed...So they had to be dealt with at law. It was just an unusual situation that arose..."* (T2). The victim impact statement was read (T3) and the evidence, that had been before the primary judge on the previous occasion was formally tendered (T3, T5.25), along with additional reports from the Program (T4). The prosecutor confirmed that *"but for him making those additional disclosures which the complainant had not recalled or disclosed or both...he would have remained in the Cedar Cottage program"* (T6) and that the further matters were disclosed by him *"against his own interests"* (T8.14).

17 The prosecutor went on to say that there was a Regulation which had provided that if there were further disclosures, they would be taken into account under the Program and would not necessarily generate fresh charges (T6-7).[3] The prosecutor confirmed that on 31 January 2013, his Honour had made the finding that the appellant could participate in the Program (T7). The prosecutor agreed with his Honour that it would be *"rather silly to have*

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[1] Section 9 *Crimes (Sentencing Procedure) Act* 1999 ("CSP Act") provides that a good behavior bond must not exceed five years. The potential consequences of breach of such a bond include revocation and re-sentencing for the offence: ss98, 99 CSP Act.

[2] Section 12 CSP Act provides that a court that imposes a sentence of imprisonment for a period not exceeding 2 years may suspend the execution of the sentence for the whole of such period suspended sentence and direct that the offender enter into a good behavior bond. The consequence of a breach is that the good behavior bond may be revoked, and upon this, the order of suspension ceases to have effect, with a non parole period to then be set: ss98, 99 CSP Act. The Court, having already set a term not exceeding two years imprisonment, may not set a longer sentence than two years for the relevant offence.

[3] Prior to the repeal of the Regulation, it would have been possible for the second charges to be referred to the Program, effectively combining both sets of charges: CCA[34]

a rule in the program that you had to make full disclosure if making full disclosure then took you out of the program" (T8.29-8.31). His Honour noted that people do *"not normally put their hand up and say yes I did it all, they often go to trial as my list will show here, 50% of pending trials in this place relate to allegations of sexual assault...so I have always considered that a plea of guilty in a sexual assault involving sexual abuse of a child is more likely to be demonstrative of genuine contrition..."* (T9). The trial judge asked the appellant's legal representative *"All right well today you are asking me to allow him to continue in the Cedar Cottage program by giving him a s9 bond conditioned that he comply with the Cedar Cottage program"*, and he responded "*Yes*". The judge then asked the prosecutor *"What is the Crown's attitude to that?"*. The prosecutor replied *"Well it seems like a sensible course of action..."* citing the program and the lapse of the regulation (T10). The judge made clear to the appellant's lawyer that *"had he not done the right thing he would not be here and that is the only reason that I am considering what you have said because quite frankly if he was here before me with all of these charges he would be looking at a lengthy term of imprisonment"* (T10).

17 Judge Ellis SC imposed concurrent good behaviour bonds pursuant to s9 *Crimes (Sentencing Procedure) Act* 1999 dating from 4 April 2013, conditioned on the appellant: complying with the directions of the Cedar Cottage Program Director and remaining in the Cedar Cottage Program until released from the program by the Program Director; being of good behavior; appearing before the Court if called upon; and providing any change of address as approved by Cedar Cottage. On the s61J offences the length was three years[4] and on the s61M offence the bond was 2 years in length. His Honour found that: *"Without the offender's honest compliance with the diversion program these further acts of sexual abuse would never have come to light. Having identified those offences...he was then charged with a further five counts"* (ROS2). His Honour found that *"it is not possible, given the lapse of the program, for me to send him back to Cedar Cottage as the outcome. However, bearing in mind that the reason he is here before me today is simply that he complied with the program and did the right thing by disclosing things that the complainant had not recalled, and given that the reports that I have received from Cedar Cottage are positive in terms of his approach, and given that pre-trial diversion of offenders' program is a particularly onerous program, at least on a psychological level, the only fair and just outcome would be for me to allow him to have the sentence deferred*

[4] The three year term of a s9 bond does not limit any sentence that may be imposed in the event that the bond is revoked and an offender re-sentenced. It is not possible to suspend a sentence for three years: s12 CSP Act.

so that he can complete the program" (ROS3). His Honour held that *"Had he not been sent to the Cedar Cottage Program...he would in the normal course of events been committed to this Court for sentence and a lengthy sentence of imprisonment would have followed. Of course had he not been in the program he is unlikely to have made admissions and would never have faced being sentenced for the particular offences with which I am now dealing"* (ROS 4).

18 During the assessment process and prior to the appellant's admissions, on 1 September 2012, the *Pre-Trial Diversion of Offenders Regulation* 2005 was repealed. The nature of the Regulation was described in the Explanatory Note: *"comprises or relates to matters of a machinery nature"*. It contained guidelines for the prosecutor in determining whether a person should be referred for assessment (Reg 5, cf s10(a)) and a procedure for assessment (Reg 6, cf. s14(1), (3)). The effect of this was that the appellant could not be assessed for the second set of offences in accordance with the mechanical aspects of the guideline as required by s14(1), (3), and as such the charges could not be made part of the "Undertaking".

19 On 17 July 2013, the DPP determined that he would not appeal the sentences imposed by Judge Ellis. On 18 July 2013 the Crown Solicitor wrote to the appellant informing him that the Attorney General was considering whether or not to appeal against his sentences. A notice of application for leave to appeal was filed on 26 July 2013. On 6 August 2013, the Attorney General filed a notice of appeal.

20 On 10 December 2013, the appeal was heard before the CCA constituted by Ward JA, Harrison and R A Hulme JJ. The CCA delivered its judgment on 19 March 2014[5] upholding the Crown appeal and sentenced the appellant to an aggregate sentence of imprisonment of 5 years and 6 months with a non-parole period of 3 years (CCA[111]).

21 In relation to the first ground of appeal the CCA held that the primary judge's approach, (said to be an attempt to ameliorate or eliminate unfairness brought about by the voluntary disclosure of further offences) which *"underpinned and characterized the whole sentencing process"* was patently unavailable and that this should have been drawn to his attention:CCA[82]-[84]. The second ground was without merit:CCA[85]. The third and fourth grounds were determined together, the Court holding that the offences were objectively very serious and immediately holding: *"Subject to consideration of whether or*

[5] The appellant had been participating in the Program for 1 year and 4 mths at the time that the CCA judgment was delivered.

not the residual discretion not to intervene should be exercised in this case, we consider that the sentences imposed by his Honour were erroneously lenient and manifestly inadequate. No sentence other than a period of full-time imprisonment is appropriate. That is so in our opinion even after the subjective and procedural considerations are taken into account. These are considered and evaluated below":CCA[89].

22 The CCA then proceeded to outline *"the proper sentence"*, referring to evidence tendered on the appeal on behalf of the Crown and the offender: CCA[92]-[94]. The CCA held that for the s61M offence, the respondent *"should be sentenced to 12 months, reduced to 9 months for the early guilty plea, with a non parole period of 6 months. For each of the s61J offences, the respondent should be sentenced to 4 years, reduced to 3 years for the early guilty plea, with a non parole period of 2 years"*. The CCA determined that there should be some accumulation of the third, fourth and fifth offences: CCA[101]. The CCA then asked *"Should this Court re-sentence?"*, and answered *"Yes"*: CCA[102]. Following this, the CCA turned to consider the residual discretion determining that the rehabilitative efforts of the offender were not *"sufficient to outweigh the patent seriousness of his offending and the corresponding propriety of imposing a sentence upon him that reflects it"*: CCA[109]. The CCA held that *"the onus lies upon the respondent to establish that the discretion ought be exercised in his or her favour"*, and as the sentencing discretion had miscarried in a way *"that mandates correction in this Court"*, the discretion would not be exercised: CCA[110]. The respondent was re-sentenced to an aggregate term of imprisonment of 5 years and 6 mths with a non parole period of 3 years.

Part VI: Appellant's Argument

23 The CCA erred in its application of s5D, when it held *"We take the law to be that 'the onus lies upon the respondent to establish that the discretion ought to be exercised in his or her favour'"* (CCA[110]). This is an error of principle of significant consequence for the administration of justice. The appellant respectfully submits that *R v Hernando* (2002) 136 A Crim R 451 at 458[12] per Heydon JA (as he then was, Levine J and Carruthers AJ agreeing), represents a correct statement, namely:

> *"...if this Court is to accede to the Crown's desire that the respondent be sentenced more heavily, it must surmount two hurdles. The first is to locate an appellable error in the sentencing judge's discretionary decision. The second is to negate any reason why the residual discretion of the Court of Criminal Appeal not to interfere should be exercised".*

24 The CCA declined to follow this approach and instead applied what it described as *"the opposite approach in relation to onus"* (CCA[81]) relying on Simpson J (Howie and Hislop JJ agreeing) in *R v Smith* [2007] NSWCCA 100 at [60] where her Honour held: "*It is true that the Court retains a residual discretion to dismiss a Crown appeal which otherwise has merit; however, the onus lies upon the respondent to establish that that discretion ought to be exercised in his or her favour*". The CCA erred in imposing an onus on the respondent, contrary to the settled approach to Crown appeals most recently stated in *Green v The Queen* (2011) 244 CLR 462 at 477[35]-[36], and *Bugmy v The Queen* (2013) 249 CLR 571 at 588[24].

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25 First, the onus on an appeal under s5D *Criminal Appeal Act* 1912 to satisfy the Court that it should *"in its discretion vary the sentence and impose such sentence as may to the court seem proper*", is on the Crown and is not on a respondent. The s5D discretion has been the subject of consideration on numerous occasions by this court and it is uncontroversial that principles governing Crown appeals as expressed in *Griffiths v The Queen* (1977) 137 CLR 293, *Malvaso v The Queen* (1989) 168 CLR 227, *Everett v The Queen* (1994) 181 CLR 295 at 299-300 and *Dinsdale v The Queen* (2000) 202 CLR 321 apply to s5D: *Carroll v The Queen* (2009) 83 ALJR 579 at 581[7]. There has been some alteration of the operation of s5D by virtue of s68A *Crimes (Appeal and Review) Act* 2001 ("CAR Act"), as discussed
20 in *Green* and *R v JW* (2010) 77 NSWLR 7, namely, the 'presumed anxiety and distress' occasioned by facing sentence for a second time are not to be taken into account in determining whether to exercise the residual discretion. However, *"s68A, whilst removing the double jeopardy element from the exercise of the discretion to intervene, leaves other aspects untouched. On this basis, there remains a residual discretion to reject a Crown appeal. The Court of Criminal Appeal must continue to recognize in a real and practical way the Crown's responsibility for the proper administration of the criminal justice system"*: *JW* at 25 [95].

26 The limiting purpose of Crown appeals remains unaltered by s68A CAR Act: *Green* at 471-2[24]-[25], 477[36]-[37]. This purpose of Crown appeals distinguishes Crown appeals
30 from offenders appeals against sentence (*Green* at 465-6[1], 477[36]) and constrains the CCA *"in a way that a first instance judge is not constrained" (Green* at 478[38]). Despite the removal of the element of double jeopardy, Crown appeals *"are likely to continue to be relatively infrequent, and subject to particular discretionary obstacles which the Crown*

must overcome": *DPP (Vic) v Karazisis* (2010) 31 VR 634 at 661[119]- 662[122] per Ashley, Redlich and Weinberg JJA. This approach is consistent with *Hernando* at 458[12].

27 Second, casting a burden of 'onus' on a respondent to a Crown appeal is not simply misplaced language. The CCA described it as the 'opposite approach' to *Hernando*: CCA[81]. The CCA's decision has been subsequently applied by the CCA, imposing an onus on the respondent to persuade the CCA that he/she has established that it should decline to intervene and resentence: *R v Gavel* [2014] NSWCCA 56 at [125]. The DPP has relied on *CMB* as authority to this effect: *R v Loveridge* [2014] NSWCCA 120 at [248]. Further, it could not be suggested that the CCA held that the appellant had an 'evidentiary' onus (or that this would, in any case, be correct). While practically speaking, a respondent to a Crown appeal will often seek to rely on evidence in resisting a Crown submission that the discretion should not be applied, the prosecution is often in possession of the same material bearing on delay, submissions made by the Crown below, rehabilitation while in custody and imminence of release, and has an obligation of fairness to assist the Court in this respect. It is not the case, for example, that if the appellant had not put on any evidence, the Crown had automatically satisfied the second 'hurdle' of s5D.

28 *Munda v The Queen* (2013) 249 CLR 600 (in particular 625 [73]) is not authority for the proposition that there is an onus on a respondent to a Crown appeal, evidentiary or otherwise. Reliance on considerations supporting the exercise of the residual discretion to decline to intervene is not to be equated with the imposition or assumption of an onus on a respondent to a Crown appeal. In *Munda,* the plurality noted the limiting purpose of Crown appeals that had been affirmed in *Green* at 477[36], and factors bearing on the exercise of the discretion to decline to interfere as outlined in that decision and *Karazisis* at 658-660[104]-[115]. The statement of the CCA represents a marked departure from the framework of the primary *"limiting purpose"* of a Crown appeal. The appellant bears no burden of having to demonstrate that his rehabilitation must *"outweigh"* the *"seriousness of his offending"*:cf.CCA[109]. Casting an onus on the respondent inverts the process and distracts from the proper purpose of a Crown appeal.

29 Third, it has long been accepted that the discretionary considerations outlined in *Malvaso* and *Everett,* in turn founded on statements from *Whittaker v The King* (1928) 41 CLR 230 and *Griffiths,* apply to s5D appeals (and Crown appeals generally), with leave considerations from those jurisdictions being relevant to exercise of s5D, including the 'residual discretion': *Green* at 465-6[1], 477[35], 503[121]; *JW* at 27-28[107]-[110];

Karazisis at 638-9, 644-647; *Carroll v The Queen* (2009) 83 ALJR 579 at 581[7]; *Lacey v AG* (Qld) (2011) 242 CLR 573 at 583; *Dinsdale v The Queen* (2000) 202 CLR 321 at 340-341; *Bugmy v The Queen* (2013) 249 CLR 571 at 588-9[24]; *Munda* at 624[69], 630[92]. Simpson J in *Smith* (the judgment relied on by the CCA to hold that the respondent bears an onus), observed earlier in her judgment that statements of principle from *Everett* *"are easily and equally applicable to this jurisdiction; Crown appeals should only succeed in the same circumstances as are required, in jurisdictions where leave is necessary, for the grant of leave"*: *Smith* at [44].

30 Thus, when Deane and McHugh JJ in *Malvaso* at 234-5 affirmed that *"the court entrusted with the jurisdiction to grant or refuse such leave should give careful and distinct consideration to the question of whether the Attorney General has discharged the onus of persuading it that the circumstances are such as to bring the particular case within the rare category in which a grant of leave to the Attorney General to appeal against sentence is justified"* (emphasis added), this statement of principle bearing on the limiting purpose, was not limited to leave jurisdictions. The important and distinct consideration in *Malvaso* of whether the Attorney General has satisfied the Court that intervention is warranted, was this Court's application of *Griffiths* (a case concerning s5D in NSW) to the grant of leave in South Australia: *Malvaso* at 235. The passage was specifically affirmed in *Everett* at 299-300 by Brennan, Deane, Dawson and Gaudron JJ (see also McHugh J at 306). *Everett* has continued to be applied even subsequent to the removal of the leave requirement in Tasmania in 1996[6].

31 Fourth, in determining that there was an onus on the respondent to a Crown appeal, there was no discussion by the CCA of this passage from *Malvaso,* nor were reasons given why *Hernando* should not be followed. The CCA in *Smith* had not been referred to *Hernando* at 458[12] on this point. The appellant notes the respondent did not speak against the appellant's submission that *Hernando* at 458[12] was correct before the CCA. *Hernando* at 458[12] has been applied in subsequent decisions of the CCA: *R v Ngyuen* [2004] NSWCCA 155 at [39] and *R v Fadde Assaad* [2009] NSWCCA 182 at [46]. At the time of the Attorney's appeal in the appellant's case, *Smith* had not been further applied.

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[6] The requirement for leave in Tasmania was repealed subsequent to the decision in *Everett v The Queen* (1994) 181 CLR 295 at 299, by the *Criminal Code Amendment (Appeals) Act* 1996 (Tas), s4.

32 Fifth, even where an intermediate court of appeal considers a sentence to be inadequate on account of error by the primary judge, two questions involving the exercise of *"the different discretions conferred by s5D"* arise: *Green* at 476-7[35] (see also at 479-480[43]-[45]). Considerations of justice and fairness inform the Court's discretion to dismiss a Crown appeal in the exercise of the residual discretion: cf. *Karazisis* at 658-660[104]-[115]. The limiting purpose of Crown appeals and the whole nature of the exercise of a Crown appeal is lost if the re-sentencing discretion is exercised before consideration is given to the residual discretion, and the respondent to the appeal must then persuade the Court that the sentence ought not be imposed, as occurred in the appellant's case. It was not for the appellant to discharge an onus of negating an assumption that the already determined sentence should be imposed; or to satisfy the Court that issues relevant to the limiting purpose of Crown appeals could not be addressed by being taken into account in re-sentence: cf. CCA[96], [97].

33 In *JW*, Spigelman CJ (Allsop P, McClellan CJ at CL, Howie and Johnson JJ) at 32-33 [142]-[146], rejected a Crown submission that on a Crown appeal, once the CCA has identified error it was obliged to re-sentence. He held that it was not correct to say that in such circumstances a court must then determine what sentence ought to have been imposed, then assess by computing and articulating a *"proper sentence"* whether there was a *"marked difference"* between that and the sentence actually imposed and where there was such a *"difference"* proceed to re-sentence. The Court held that there was *"a long line of authority which distinguishes, on a Crown appeal, between the discretion to intervene and the sentence to be imposed. That distinction remains after the enactment of s68A"*: *JW* at 33[146]. It was specifically affirmed that the residual discretion may be exercised without determination of what an appropriate sentence should be: *JW* at 33[146]. The plurality in *Green* affirmed that the first question is whether the Court should decline to allow the Crown appeal in the exercise of the residual discretion: *Green* at 477[35], 479[43] and 480[45]. The CCA in the appellant's case erred in first determining *"the proper sentence"* and then imposing an onus on the appellant to satisfy the Court of reasons *"sufficient to outweigh the patent seriousness of his offending"* (cf.CCA[109]) or the *"corresponding propriety of imposing a sentence upon him that reflects it"* (cf.CCA[109]). It was also an error to hold that the respondent had failed to *"satisfy"* the CCA that the sentencing discretion had not miscarried in a way that *"mandates correction by the Court"* (cf.CCA[110]). It was for the Attorney General to satisfy the CCA that the sentencing discretion had miscarried in a way that demonstrated *House* error and to satisfy

the CCA that the appeal should not nevertheless be dismissed in the exercise of the residual discretion.

34 Sixth, a further difficulty with imposing the onus on the respondent is demonstrated by the consequent failure of the CCA to apply the statement of King CJ in *R v Wilton* (1981) 28 SASR 362 at 367-8 that an appellate court should: *"allow the prosecution to put to it, on an appeal against sentence, contentions that were not put to the sentencing judge, only in exceptional circumstances which appear to justify that course...Generally speaking, if the submission is not made to the sentencing judge the prosecution should not be able to advance that contention successfully on an appeal by the Attorney General"* (emphasis added). The application of *'Wilton'* is not limited to leave jurisdictions (see eg. *R v Tait* (1979) 24 ALR 473 at 477; *Karazisis* at 660[115]). It was considered to in *JW* (at 21-22[71]-[76]) and approved in the context of the *'restraint principle'* and the residual discretion being informed by considerations of *'protecting a convicted person against unfairness or injustice'*: *JW* at 20-22[65]-[80], 23[85], 24-25[91]-[93], 27[105]. It has been applied in many cases in NSW including *R v Allpass* (1993) 72 A Crim R 561 at 566 (decided before *Everett*), *R v Miles* [2001] NSWCCA 274 at [27], *R v Grover* [2013] NSWCCA 149 at [49]-[50] and *TDP v R;R v TDP* [2013] NSWCCA 303 at [161]-[163]. See also *Malvaso* at 240, *Everett* at 302-303, *Bugmy* at 596[48], *Karazisis* at 660[115].

35 It was for the Attorney to satisfy the CCA that such circumstances existed. In the appellant's case this was a real issue warranting consideration on the exercise of the discretion. One arm of the executive was concurring with the outcome (the DPP in declining to intervene), while the other was challenging it. Without denying the Attorney General's right to appeal, there was no recognition that the case related to the appellant's model participation in the government's own program, at the approval of and as encouraged and supported by the Director of the Program, nor of the unfairness in the Attorney General's complete change in the position of the Crown, including as to the acceptance of good behaviour bonds as a permissible outcome:CCA[93], [99], [106]-[109]. The residual discretion may be exercised even where erroneous submissions have been made by a prosecutor below, particularly as *"circumstances may combine to produce the result that if the appeal is allowed the guidance provided to sentencing judges will be limited and the decision will occasion injustice"*: *Green* at 465-6[1]-[2], 477-8[36]-[38]; *R v Borkowski* (2009) 195 A Crim R 1 at 18 [70]. In focusing on whether the respondent had satisfied the CCA that what the CCA determined in its judgment to be a *"proper sentence"*

should not be imposed, the unfairness occasioned by the Attorney General was not addressed by the Court in its consideration of the residual discretion (cf.CCA[97], [107]).

36 Instead it was said that the conduct of the DPP below was not *"inappropriate or unfair"* as the respondent *"sought to embrace"* the result at first instance; there was no suggestion of error of the DPP below by the appellant's solicitor; and the appellant's *"latter day dissatisfaction with what occurred is as much the result of his representative's arguably opportunistic...failure to correct the error as it is the result of the error itself"* (CCA[107]). The Attorney General's conduct was thus not addressed, and responsibility of the prosecutorial authorities for the proper administration of justice was not *'recognised in a real and practical way'*: *JW* at 25[95] The DPP had: (a) referred and advocated for diversion in relation to the first set of charges; (b) advocated for bonds to be imposed in relation to the second set of charges, one reason being so as not to derail the ongoing rehabilitation or the disposition of the first set of charges; (c) did so in the knowledge that the appellant was still subject to the government's Act and compliant with the Program; (d) effectively conceded that the appellant would have been a suitable candidate for the Program if the Regulation (which was mechanical in nature) had not lapsed and that the Program Director had assessed him as suitable for diversion into the Program in the knowledge of the further offences (cf.CCA[83]-[84], [97]); and (e) made submissions before the sentencing judge knowing that the imposition of jail sentences would effectively operate as a breach of the Program requiring the original matters to also be dealt with at law (s28 the Act) and was of the view that this would be "unfair". The reversal of onus demonstrably resulted in a failure to apply *Wilton*, *Malvaso* and *Green* (at 479-480[43]).

37 Seventh, the failure to apply *Hernando,* is also apparent through the obscuring of the first 'hurdle' on the ground of manifest inadequacy, namely the necessary preliminary finding of the this asserted *House* error by the CCA. Having recited the facts of the offences, and the aggravating circumstances of the offences, the CCA immediately held that *"Subject to consideration of whether or not the residual discretion not to intervene should be exercised in this case, we consider that the sentences imposed by his Honour were erroneously lenient and manifestly inadequate"*: CCA[89] (emphasis added). This represented an erroneous exercise of jurisdiction with the finding of manifest inadequacy said to being 'subject' to consideration of the discretion. The finding of manifest inadequacy was then said be based on a conclusion that full time imprisonment was the only appropriate sentence and that this was so *"even after the subjective and procedural considerations are taken into account"*, suggesting a two stage approach. The *"subjective and procedural*

considerations" were not considered and evaluated in the determination of manifest inadequacy but were instead said to be *"considered and evaluated below"*, that is, within the framework of re-sentencing (at CCA[93]-[98]). There was no consideration of the s23/*Ellis* issues in the discrete determination of whether the sentence was manifestly inadequate (cf.CCA[87]-[89]). The consideration of subjective and procedural matters was only following reference to further evidence including material tendered by the Crown in the event of re-sentencing (at CCA[92], [94]-[95]). The significant entitlement to leniency was then first considered by the CCA in the context of *"the proper sentence"*. It was not subsequently referred to in the consideration of the residual discretion. This is further addressed below. The CCA erred in failing to apply *Hernando* and failing to observe that *"Strict compliance with procedures which authorise an increase in sentence by an appellate court should be insisted on...before a prisoner is deprived of the liberty left to him after sentencing at first instance"*: *Malvaso* per Mason CJ, Brennan and Gaudron JJ at 233; *Lacey* at 583 [19].

Statutory construction of s23 *Crimes (Sentencing Procedure)* Act 1999

38 Section 23(1) *Crimes (Sentencing Procedure) Act* 1999 ("CSP Act") provides:

> *"A court may impose a lesser penalty than it would otherwise impose on an offender, having regard to the degree to which the offender has assisted, or undertaken to assist, law enforcement authorities in the prevention, detection or investigation of, or proceedings relating to the offence concerned or any other offence."*

Section 23(3) CSP Act provides:

> *"A lesser penalty that is imposed under this section in relation to an offence must not be unreasonably disproportionate to the nature and circumstances of the offence."*[7]

39 The offences the subject of the appeal became known because of the appellant's disclosures while he was participating in assessment for the Program. He volunteered his further offences while candidly participating in the assessment requirements of the government's program and thereafter voluntarily attended the police station and disclosed his guilt of the unknown offences to the authorities. The facts of this "second set" of offences consisted entirely of the appellant's own admissions, the victim having no memory of them.

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[7] Section 36 *Crimes (Sentencing) Act* 2005 (ACT) is similarly worded. Section 6 *Sentencing Act* 1995 (WA), s5 *Sentencing Act* 1991 (Vic), s5 *Sentencing Act (NT);* ss10, 10A *Criminal Law Sentencing Act* 1988 (SA), ss16A, 21E *Crimes Act* (Cth), ss9, 13A-B *Penalties and Sentences Act* 1992 (Qnld) all have provisions which encompass mitigating circumstances, including assistance to be taken into account on sentence, with some specifically referring to assistance. Under the Queensland provision, however, in relation to offences of the kind in relation to which the appellant was sentenced, an actual term of imprisonment must be served *"unless there are exceptional circumstances"*.

40 The requirements of s23(2) CSP Act, which must be considered in determining the *"nature and extent of the penalty it imposes"*, insofar as relevant to an offender's voluntary disclosures of his own guilt (as opposed to assistance related to another), were all in the appellant's favour. His assistance was determinative of the charges laid against him and formed the entirety of the facts. The truthfulness, completeness and reliability of the assistance were not in issue and his honesty was accepted by primary judge, and the authorities who relied on them as the complete prosecution case: ROS 2, cf.CCA[93]. The nature and extent of his assistance was comprehensive.

41 However, section 23 CSP Act was not mentioned in the CCA's consideration of manifest inadequacy at the distinct stage of finding latent error (cf.CCA[87]-[89]). As set out above, the CCA first considered the *"significant added element of leniency"* at the stage of determining *"the proper sentence"*, that is on re-sentencing (CCA[93]). The CCA erred in adopting this approach, whereby it substituted its own adverse (and erroneous) findings in consideration of re-sentencing, rather than first determining manifest inadequacy on the facts as found by the sentencing judge: cf. *Carroll* at 584 [24]. The CCA, for example, considered that the revelations by the respondent were *"prompted by the looming prospect of imprisonment in relation to the first charges"*, whereas it was uncontroversial and accepted by the sentencing judge, that the respondent had made the disclosures whilst honestly engaged in the rehabilitation process at Cedar Cottage during assessment for a program that diverted him from the criminal justice system (ROS 2-3).

42 The application of the principle stated in *R v Ellis* (1986) 6 NSWLR 603 by Street CJ at 604D was not in issue on the appeal. That principle is:

> *"When the conviction follows upon a plea of guilty, that itself is the result of a voluntary disclosure of guilt by the person concerned, a further element of leniency enters into the sentencing decision. Where it was unlikely that guilt would be discovered and established were it not for the disclosure by the person coming forward for sentence, then a considerable element of leniency should be properly be extended by the sentencing judge. It is part of the policy of the criminal law to encourage a guilty person to come forward and disclose both the fact of an offence having been committed and confession of guilt of that offence."*

43 Following the introduction of s23(3) in NSW, Bell J held in *S v R* [2008] NSWCCA 186 at [10], *"Ellis remains a useful shorthand way of describing the significant element of leniency that may be extended in a case in which an offender voluntarily discloses his or her guilt of an offence which he or she was not suspected of committing. In an appropriate*

case this may be a powerful factor justifying leniency". In *Ryan v The Queen* (2001) 206 CLR 267 all members of the High Court accepted the principle identified in *Ellis.* McHugh J held (at 273[15]) that *"the disclosure of what was an unknown offence is a significant and not an insubstantial matter to be considered on the credit side of the sentencing process. How significant depends on the facts and circumstances of the case".* The variation is according to *"(1) the likelihood that the offences would have been discovered by the authorities; and (2) the likelihood the offences could have been proven beyond reasonable doubt in a court without the disclosure"*: *Ryan* per McHugh J at 272 [12]. Applying these considerations, the appellant was, as the CCA stated on re-sentence, "*entitled*" to a *"significant added element of leniency"* (CCA[93]). It is submitted that the CCA failed to give effect to this finding in either its consideration of last category of *House* error or the consideration of the residual discretion and that it was not properly applied in re-sentencing.

44 The CCA stated, echoing the terms of s23(3) that the significant added element of leniency *"must not lead to a sentence that is unreasonably disproportionate to the nature and circumstances of the offences"* (CCA[93]). The meaning of the words *"unreasonably disproportionate to the nature and circumstances of the offence"* are in issue on this appeal. The appellant contends that the meaning given to these words by Mahoney JA (Newman and James JJ agreeing) in *R v C* (1994) 75 A Crim R 309 at 315, in relation to the predecessor to s23(3), s442B(2) *Crimes Act* 1900 (NSW)[8] are, with respect, correct and applicable:

> *"The provision does not proscribe sentences which were disproportionate; it proscribed only those which were 'unreasonably disproportionate'. It was clearly intended that, in determining what was 'unreasonable' for this purpose, the Court should be able to take into account the assistance given to law enforcement authorities and, taking that into account, to reduce a sentence below what otherwise would be required by the nature and circumstances of the offence...for this purpose the Court may take into account the nature and extent of the assistance given".*

45 This reflects the common law and the statutory position in NSW. In *Raad v R* [2011] NSWCCA 138, per Adams J at [23] (Buddin J and McClellan CJ at CL agreeing), the CCA held that s23(3) is based on an assumption: *"The assumption made by Parliament is, therefore, that the resulting sentence will be 'disproportionate' but requires that it not be unreasonably so"* (*Raad* at [23]). In *R v Gallagher* (1991) 23 NSWLR 220 at 232G,

[8] Section 442B(2) provided: "The court must not reduce a sentence so that the sentence becomes unreasonably disproportionate to the nature and circumstances of the offence"

Gleeson CJ (Meagher JA and Hunt J agreeing) held that whether or not a sentence was an affront to community standards was to be judged against *"the circumstances of the particular offence and the particular offender"* in light of the public policy considerations informing leniency. See also *R v Huang* (1995) 78 A Crim R 11 at 114 (per Cole JA, Gleeson CJ and Sperling J agreeing).

46 The interpretation given to the words not *"unreasonably disproportionate to the nature and circumstances of the offence"* in *C* permits proper recognition of the public policy considerations referred to in *Ellis.* Gummow and Callinan JJ in *AB v The Queen* (1999) 198 CLR 111 at 131[52] outlined the considerations underlying voluntary admissions to offences of a similar nature to the appellant's, namely *"that child complainants would be spared the ordeal of a trial and cross examination; the importance to children that the truth of their allegations has been vindicated; the State has been spared the expense and trouble and expense of a long trial or trials...;and the desirability and public interest in the encouraging of the full revelation of all criminality..."* .

47 Hayne J explained the significance of voluntary confessions of one's own guilt in *AB* at 155[113]. His Honour stated that *"...the offender who confesses to what was an unknown crime may properly be said to merit special leniency. That confession may well be seen as not motivated by fear of discovery or acceptance of the likelihood of proof of guilt; such a confession will often be seen as exhibiting remorse and contrition".* His Honour also referred to the policy considerations that operate to encourage and reward such conduct, including those set out above particularly where *"it may be thought probable that no conviction would have been recorded had the offender not taken the step...".* His Honour, approving *Ellis,* described the "powerful" policy considerations that operate in the case of confession to previously unknown crime while emphasising that there should not be a mathematical approach to sentencing, such as may appear to be invited by the use of the word 'discount' when applying such principle in sentencing to achieve a 'just' result (*AB* at 155-157[113]-[120]).

48 Section 23 is to be applied in the context of recognised public policy considerations, particularly in the area of reporting of sexual abuse. In the context of the applicant's crimes, as Basten JA recognised in *RJT v R* [2012] NSWCCA 280 at [9] (Adams J agreeing, R A Hulme J dissenting): *"Reporting of sexual abuse is notoriously rare: even victims require encouragement, for a range of reasons which need not be explored here. There is a public interest in increasing the level of reporting of sexual abuse."* Added to

this may be the public policy of encouraging and rewarding a process whereby harm done to a victim is reported by the offender, the trauma of the victim having to recount or be tested on his/her recollection is avoided and the treatment of the sex offender is undertaken in order to protect the victim, the family and the community. In *York v The Queen* (2005) 225 CLR 466 at 473[21], McHugh J said of the purposes of punishment that *"Sentences are imposed to further 'the public interest'- which may include the rehabilitation of the prisoner- and to enhance the liberty of society by ensuring 'the protection of society' from the risk of a convicted criminal re-offending or others engaging in similar criminal activity"*. These considerations, which were recognised by the sentencing judge, were not recognised by the CCA, which instead held that as the Program had been dismantled, the issues raised in its judgment would be *"unlikely ever to arise again"* (CCA[108]). The issues raised by the appellant's case had much broader application than acknowledged by the CCA. Additionally, the Act had not been repealed and the Cedar Cottage program continued (as it still does) to treat those offenders referred before the lapse of the regulation.

49 Section 23(3) did not constrain the CCA in the manner it was applied by them, namely by requiring the imposition of a sentence proportionate to the objective seriousness of the offence. The CCA assumed or thought, based on s23(3), that the *"nature of the offences"* were such as to *"command"* that *"the requirements"* of retributive, deterrent purposes of sentencing be served (CCA[99]). It is submitted that this is erroneous. The nature of the assistance was, for example, such as to suggest a closer examination of considerations such as specific deterrence. Nor are these purposes *"requirements"*, particularly when s23 is to be applied. The erroneous approach of the CCA is also apparent from the later statement that *"We are not satisfied that the respondent's apparent progress within the Program so far, and his accepted rehabilitative achievements, are sufficient to outweigh the patent seriousness of his offending and the corresponding propriety of imposing a sentence upon him that reflects it"* (emphasis added, CCA[109]). Section 23(3) permitted a sentence to be imposed that was disproportionate to the patent seriousness of the offences, so long as the extent of the disproportion was not unreasonable, having regard to the nature and extent of his assistance in his own prosecution and conviction.

50 The error in this case is similar to that considered by this Court in *Green.* There the majority of the CCA had thought that an inadequate sentence mandated intervention, even where equal justice considerations (parity) may have permitted what would otherwise have been seen to be an inadequate sentence to stand. The proper application of s23 might lead

to a sentence that would be manifestly inadequate if the section were read to mean that a sentence proportionate only to the objective seriousness of the offence must be imposed. Sentences such as non-custodial sentences and suspended sentences may be disproportionate to the objective seriousness of the offences here under consideration, but are not "unreasonably" so when the nature and extent of the assistance, including the s23(2) considerations, are taken into account in determining whether the resulting disproportion is "unreasonable". The task of a sentencing court or an intermediate court of appeal is not to determine the objective seriousness of the offence and then consider whether it is "offset" or "outweighed" by rehabilitation or an "uncertain status" (or s23 considerations): cf CCA[99].

51 The error of principle in relation to the application of s23, *Ellis* and *C*, underpinned the reasoning of the CCA on each of Grounds 1A, 1C and 2. The CCA's statements that the sentencing judge was in error in ameliorating perceived unfairness (Ground 1A, CCA[83]); that his approach was patently unavailable (Ground 1A, CCA[84]); that his error "*underpinned and characterised the whole sentencing process*" (Ground 1A, CCA[84]); and the conclusion of manifest inadequacy, if this encompassed consideration of s23 at all, (Grounds 1C and 2, CCA[89]) were attended by the error of principle in relation to the meaning and proper application of s23. As stated above, the *Ellis* considerations were not referred to at all on the residual discretion.

52 The failure to apply s23 is also seen where the appellant was re-sentenced taking into account a 25% discount for the utilitarian value of his guilty plea (CCA[93], [101]), with no indication in accordance with s23(4) of any reduction on account of his assistance to the authorities in his own detection for and conviction of the crimes. To the contrary the CCA indicated accumulation of three of the sentences (CCA[101]), imposing an aggregate sentence (CCA[111]). Rehabilitation being found to be a special circumstances was not an application of s23 or *Ellis*: cf. CCA [96]. This is indicative of error in failing to give effect to a stated entitlement to a significant element of leniency.

53 Taking into account the positive reports from Cedar Cottage, the applicant's voluntary disclosures, that his disclosures formed the entirety of the case against him on the counts for sentence, *Ellis* policy considerations and the onerous nature of the program, the facts and the victim impact statement, the sentencing judge imposed sentences that were not unreasonably disproportionate to the nature and circumstances of the offences. The offences before the Court for sentence were all committed during the time period of the

first set of offences, which were the subject of the Undertaking and the Program. The DPP and Program Director supported the purposes of rehabilitation and protection of the community continuing in the circumstances of the appellant's case. The conditional nature of the bonds imposed on the second set of offences ensured that the applicant continued to participate in the Program. If he breached the bonds by failing to comply with the Program or failing to maintain his good behavior for a further period of a year, his bonds could be revoked and sentences of imprisonment imposed. In the circumstances of the appellant's case, the sentences imposed were within the proper exercise of the sentencing discretion of the judge. Alternatively, the residual discretion should have been exercised to dismiss the Attorney General's appeal.

Part VII: Applicable Legislation

54 The applicable legislation is set out in the List of Authorities, attached at Annexure A.

Part VIII: Orders Sought

55 (A) The appeal is upheld;

(B) The orders made by the Court of Criminal Appeal on 19 March 2014 is set aside;

(C) The Crown appeal to the Court of Criminal Appeal against sentence is dismissed; or in the alternative,

(D) The Crown appeal against sentence is remitted to the Court of Criminal Appeal to be dealt with in accordance with law.

Part IX: Time Estimate.

56 It is estimated that oral argument will take three hours

Dated: 17 October 2014

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