IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

No. S 257 of 2014

BETWEEN:

CMB
Appellant

and

THE ATTORNEY GENERAL FOR NEW SOUTH WALES
Respondent

RESPONDENT'S SUBMISSIONS

Part I: Publication

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

Part II: Concise statement of issues

2. **Issue 1:** Is the residual discretion to dismiss a Crown appeal following a finding that the sentence was infected by error a discretion to which an onus applies?

3. **Issue 2:** If there is an onus, does the onus rest with the Crown or with the respondent to the appeal?

4. **Issue 3:** Did the Court of Criminal Appeal ("CCA") in *R v CMB* [2014] NSWCCA 5 ("CCA decision") correctly apply s. 23 of the *Crimes (Sentencing Procedure) Act 1999* ("*CSP Act*") and the decision in *R v Ellis* (1986) 6 NSWLR 603 ("*R v Ellis*")?

Part III: Section 78B of the *Judiciary Act*

5. This appeal does not raise any constitutional issues. The respondent has considered whether notice should be given under s. 78B of the *Judiciary Act 1903* (Cth) and is of the view that no such notices are required.

Part IV: Statement of contested material facts

6. The appellant's statement of facts, whilst accurate, focuses on the procedural history of the criminal proceedings against the appellant and his involvement in the Pre-Trial

NSW Crown Solicitor's Office
60 – 70 Elizabeth Street
SYDNEY NSW 2000

Telephone: (02) 9224 5051
Fax: (02) 9224 5177
Ref: Jillian Caldwell

Diversion of Offenders Program ("the Program"), but has limited regard to the circumstances of the offending.

7. In 2011, the appellant's daughter, who was then aged 17 years, attended upon police and reported that the appellant had committed various sexual assaults on her when she was under the age of 12 (CCA at [4]; Appeal Book ("AB") at 260).

8. On 27 October 2011, the appellant was charged with 22 sexual offences against his daughter, committed between 2004 and 2006 when the victim was between 10 and 12 years old. Those charges were later reduced to five counts of aggravated sexual assault contrary to s. 61J of the *Crimes Act 1900*, two counts of aggravated indecent assault contrary to ss. 61J and 344 of the *Crimes Act* and three counts of aggravated indecent assault contrary to s. 61M of the *Crimes Act* ("the first set of charges"). The offending which was the subject of the first set of charges came to light solely as a result of reports made by the victim to police (CCA at [4]; AB at 260).

9. At the time that the offender first came before the Local Court in respect of the first set of charges, the *Pre-Trial Diversion of Offenders Act 1985* ("the Act") and *Pre-Trial Diversion of Offenders Regulation 2005* ("the Regulation") made provision for a pre-trial diversion of offenders program at Cedar Cottage, namely, the Program. Section 2A of the Act provides that the purpose of the Act "*is to provide for the protection of children who have been victims of sexual assault by a parent or a parent's spouse or de facto partner.*" Section 2A further provides that "[i]*n 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 the child.*" Entry into the Program was conditional on two events: first, an offender was required to be assessed by the Director of Public Prosecutions ("DPP") pursuant to s. 10 of the Act; second, an offender was required to be assessed by the Director of the Program pursuant to s. 14 of the Act. If an offender successfully completed the Program, the offender would be convicted, but would not be sentenced or otherwise dealt with by a court for that charge: s. 24 of the Act.

10. In April 2012, the DPP referred the appellant for consideration for assessment in the Program. There were no places available in the Program at that time and the appellant was committed for sentence (CCA at [6]; AB at 261). Although the Act "*ceased*" to

apply to the appellant at this time (s. 11 of the Act), and although the proceedings could not be adjourned for more than four weeks to enable a determination to be made as to whether a person was to be referred for assessment for suitability for participation in the Program (cl. 11 of the Regulation), the proceedings were remitted to the Local Court and the appellant was again referred to the Program by the DPP when a place in the Program became available some four months later (CCA at [6] and [7]; AB at 261).

11. In the course of being assessed for entry into the Program, the appellant disclosed to Program staff that he had committed additional sexual offences against his daughter. He was subsequently re-interviewed by police. He was cautioned at the commencement of the interview (CCA at [9]; AB at 261). Prior to his assessment for the Program, the appellant had not disclosed these further incidents of sexual offending. In particular, he did not disclose these incidents when he was interviewed by police on 27 October 2011.

12. On 2 November 2012, the appellant was charged with nine further sexual offences against his daughter, committed in 2005 and 2006 when the victim was 11 and 12 years old. Those charges were later reduced to four counts of aggravated sexual assault contrary to s. 61J of the *Crimes Act* and one count of aggravated indecent assault contrary to s. 61M of the *Crimes Act* ("the second set of charges"). The offences involved, *inter alia*, the appellant removing his daughter's underpants, parting her legs, stroking and kissing her vagina and licking her clitoris with his tongue (CCA at [10], [87]; AB at 262, 285-286).

13. On 23 November 2012, the appellant pleaded guilty to the first and second set of charges and was committed to the District Court for sentence. On 31 January 2013, both sets of charges were listed for submissions on sentence.

14. In respect of the first set of charges, the appellant gave an undertaking under s. 23 of the Act to participate in the Program for two years. The respondent should then have been convicted on the first set of charges in accordance with s. 24 of the Act (which provides that where a person gives an undertaking under s. 23, the court "*is to proceed to conviction of the person for the offence concerned but is not to sentence or*

otherwise deal with the person in respect of the offence"). This did not occur (CCA at [5], [12]; AB at 260 – 261, 262).

15. In respect of the second set of charges, the prosecutor, on behalf of the DPP, requested that there be an adjournment of the sentencing proceedings until after the appellant's completion of the Program (CCA at [13]; AB at 262). When asked by Ellis DCJ about the attitude of the victim to her father entering the Program, the prosecutor noted that the victim had never been asked for her views. She also noted that the victim had suffered psychological damage, attempted suicide, changed her name and disassociated herself from her parents (CCA at [14]; AB at 263).

16. On 4 April 2013, Ellis DCJ sentenced the appellant for the second set of charges. In his remarks on sentence ("ROS"), his Honour noted that the Regulation had been repealed in September 2012, six weeks before the second set of charges were laid (ROS at 2; AB at 91). His Honour described the effect of the Regulation, prior to its repeal, as allowing for:

> "*full disclosure to be made and for a person to continue in the* [Program] *without further charges or the matter being relayed back to the Court. That is in fact what has occurred in the past for all those who have been diverted to the* [P]*rogram and who have complied with the* [P]*rogram. That is, further charges would not have been laid and the accused would not have been brought to this Court for sentence*" (ROS at 2; AB at 91).

17. This statement did not accurately reflect the effect of the Regulation prior to its repeal, as the Regulation did not modify the obligation for Program staff to notify police when a Program participant confessed to further offences, nor contain any protection concerning disclosures made in the course of the Program. Whilst it would have been possible, prior to the repeal of the Regulation, for the second set of charges to be referred to the Program, the charges would still have been laid and the respondent would have appeared before the Court during the assessment process (CCA at [32] – [35]; AB at 269 – 270). In view of the fact that the victim had disassociated herself from her parents, there was no guarantee that the appellant would have been referred to the Program in respect of the second set of charges.

18. Ellis DCJ considered that "*the only fair and just outcome would be for me to allow him to have sentence deferred so that he can complete the* [P]*rogram. Effectively, this*

means that his outcome will be identical to that of all other offenders who have been honest and made admissions of other acts as part of their involvement in the [Program]" (ROS at 3; AB at 92). His Honour referred to the victim impact statement, which revealed that the offending had caused "*significant problems*" for the victim and left her facing "*significant hardships and potential problems in the future*" (ROS at 3; AB at 92).

19. His Honour went on to state that, had the appellant not been sent to the 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*" (ROS at 4; AB at 93). His Honour imposed a good behavior bond of two years for the s. 61M offence and a good behavior bond of three years in respect of the four s. 61J offences (ROS at 4 – 5; AB at 93 – 94).

20. The maximum penalty for an offence under s. 61M of the *Crimes Act* is, and was at the relevant time, 7 years imprisonment with a standard non-parole period of 5 years. The maximum penalty for an offender under s. 61J of the *Crimes Act* is, and was at the relevant time, 20 years imprisonment, with a standard non-parole period of 10 years.

21. The day after the DPP announced his decision declining to appeal against the sentences imposed on the appellant for the second set of charges, the respondent informed the appellant that he was considering lodging an appeal. Shortly thereafter, the respondent lodged an appeal against the sentences imposed in respect of the second set of charges.

22. The grounds of the respondent's appeal were:

> First, that the sentencing judge erroneously took into account how certain further disclosures by the appellant would have been dealt with under regulations made pursuant to the Act at a time when the regulations had been repealed (ground 1A);
>
> Second, that the sentencing court erred in failing to have regard to the errors that had been made in referring the appellant to the Program in the first place (ground 1B);

Third, that the sentencing judge gave no weight or insufficient weight to the objective seriousness of the offence (ground 1C); and

Fourth, that the sentencing judge erred in imposing sentences that were in the circumstances manifestly inadequate (ground 2).

23. The CCA upheld three of the respondent's four grounds of appeal (1A, 1C and 2) (CCA at [84], [88]-[89]; AB at 284, 286 – 287).[1] As error within *House v The King* (1936) 55 CLR 499 was established, the CCA was required to resentence the appellant unless it was satisfied that the residual discretion not to intervene should be exercised in the respondent's favour. The CCA considered the residual discretion and concluded that the residual discretion should not be exercised in the respondent's favour. The CCA set aside the sentences imposed by Ellis DCJ and in lieu thereof sentenced the respondent to an aggregate sentence of 5 years and 6 months with a non-parole period of 3 years.

Part V: Applicable legislative provisions

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

Part VI: Statement of argument

Introduction

25. The appellant relies on two grounds of appeal: first, that the CCA erred in holding that the onus lay upon the respondent to establish that the residual discretion ought to be exercised in his or her favour; and second that the CCA erred in the application of s. 23 of the *CSP Act*.

26. For the reasons outlined below, it is submitted that:

(1) The question of whether to exercise the residual discretion is not governed by the concept of an onus;

[1] The CCA rejected ground 1B on the basis that any error concerning the appellant's referral to the Program on the first set of charges could not be the subject of appeal, and hence that the Court "*had no jurisdiction over them*": CCA at [85] and [86]; AB at 284 - 185.

(2) In the alternative, if an onus does apply, the CCA correctly held that the onus is on the respondent to a Crown appeal to satisfy the Court that the residual discretion should be exercised in his or her favour;

(3) To the extent that there is legal error in the CCA's reference to an onus lying on the appellant, it is submitted that such an error was *obiter dictum* and has not affected the orders made by the Court. The CCA examined the material relevant to the exercise of the residual discretion on its merits and determined that in all the circumstances, a sentence of imprisonment was appropriate; and

(4) There was no error in the CCA's application of s. 23 of the *CSP Act*.

10 **The residual discretion is not a question that is governed by onus**

27. At the outset, it may be observed that in the proceedings below there were no contested issues of fact relevant to any matter related to the exercise of the residual discretion. The appellant relied upon an affidavit which raised matters going to the residual discretion, a portion of which was quoted in the judgment below at CCA [94] (AB 290). He was not required for cross-examination and his evidence was accepted. Accordingly, any question of an applicable onus in the present case does not concern the onus to prove facts relevant to the exercise of the residual discretion, but relates to the Court's judgment as to whether or not to exercise that discretion.

28. This aspect of the exercise of the residual discretion, as with the exercise of the
20 sentencing discretion more generally, is *"not determined by application of the concept of onus"*: *R v Loveridge* [2014] NSWCCA 120 at [249]. Rather,

> *"*[t]*he Court should determine whether the residual discretion to dismiss the appeal ought be exercised, in all the circumstances of the case, and by reference to the material placed before this Court which bears upon the exercise of that discretion"*: *R v Loveridge* [2014] NSWCCA 120 at [249].

29. As the joint judgment (Gleeson CJ, Gaudron, Hayne and Callinan JJ) stated in *The Queen v Olbrich* (1999) 199 CLR 270; [1999] HCA 54, at 281 [25]:

> *"References to onus of proof in the context of sentencing would mislead if they were understood as suggesting that some general issue is joined between prosecution*
30 *and offender in sentencing proceedings; there is no such joinder of issue. Nonetheless, it may be accepted that if the prosecution seeks to have the sentencing*

judge take a matter into account in passing sentence it will be for the prosecution to bring that matter to the attention of the judge and, if necessary, call evidence about it. Similarly, it will be for the offender who seeks to bring a matter to the attention of the judge to do so and, again, if necessary, call evidence about it. (We say 'if necessary' because the calling of evidence would be required only if the asserted fact was controverted or if the judge was not prepared to act on the assertion.)"

See similarly *Leach v The Queen* (2007) 230 CLR 1; [2007] HCA 3, at 20 [47]: "*The concept of a standard of proof, like the related concept of onus of proof, is apposite to the resolution of disputed questions of fact in issue in litigation. Both onus and standard of proof concern the adducing of evidence at trial and the determination of which of the facts in issue are established by that evidence.*"

30. The residual discretion operates in a similar manner to the sentencing discretion outlined in *Olbrich* above. Specifically, where the Crown has demonstrated error in the sentence imposed at first instance, it then falls to the appeal court to determine whether to exercise the "residual discretion" to refuse or decline to interfere with a sentence. This is not a question which is determined by reference to issues of onus. In this "*ultimate discretionary field*", the exercise of the residual discretion "*necessitates an immediate and highly subjective assessment of the circumstances of the case at hand*": *R v Holder and Johnston* [1983] 3 NSWLR 245 at 255 – 256 ("*Holder and Johnston*"), per Street CJ. Like the sentencing process generally, it is a question that should be approached instinctively (*Markarian v The Queen* (2006) 228 CLR 357; [2005] HCA 25 ("*Markarian*")), taking into account all material that is before the Court which bears upon the exercise of the discretion.

31. The decisions of this Court referring to an "*onus*" in the context of Crown appeals against sentence relate to legislation which imposed a requirement for the Attorney General to obtain the Court's leave before filing a Crown appeal: see *Malvaso v The Queen* (1989) 168 CLR 227; [1989] HCA 58 ("*Malvaso*")[2] and *Everett v The Queen* (1994) 181 CLR 295 ("*Everett*"); [1994] HCA 49 ("*Everett*").[3] Consistently with the principle that "*the party who asserts must prove*" (*Phipson on Evidence,* 18th ed.,

[2] *Malvaso* concerned an appeal pursuant to s. 353 of the *Criminal Law Consolidation Act 1935* (SA), which conferred jurisdiction on the Full Court of the Supreme Court of South Australia to grant leave to the Attorney General to appeal against a sentence.

[3] *Everett* concerned an appeal pursuant to s. 401(2)(c) of the *Criminal Code* (Tas) which conferred jurisdiction on the Tasmanian Court of Criminal Appeal to grant leave to the Attorney General to appeal against a sentence.

2013, at [6.04]), there is an onus on the Crown to demonstrate that leave should be granted where a statute imposes a requirement of leave to appeal.

32. In contrast to the legislation considered in *Malvaso* and *Everett,* s. 5D of the *Criminal Appeal Act 1912* contains no leave requirement with respect to a Crown appeal. This Court has held that the decisions in *Malvaso* and *Everett* are apposite in non-leave jurisdictions insofar as those decisions set out relevant principles for the exercise of the residual discretion: *Green v The Queen* (2011) 244 CLR 462; [2011] HCA 49 ("*Green*"), at 465 – 6 [1] and 477 [36], per French CJ, Crennan and Kiefel JJ, and 503 [121], per Bell J. Insofar as *Malvaso* and *Everett* speak of the existence of an onus, however, those decisions are not apposite in non-leave jurisdictions. When referring to the Crown's onus in those decisions, this Court expressly limited the scope of its comments to the "*jurisdiction to grant or refuse such leave*": see *Everett* at 299, per Brennan, Deane Dawson and Gaudron JJ; *Malvaso* at 234 – 235.

33. This Court has not held that the decisions in *Malvaso* and *Everett* are authority for the proposition that there is an onus on the Crown to negate the exercise of the residual discretion in jurisdictions that lack a leave requirement (cf AWS at [29] and [30]). Indeed, this Court has never referred to the existence of an onus in the context of discussing the residual discretion outside of the context of an application for leave. In considering the residual discretion in *Munda v Western Australia* (2013) 249 CLR 600; [2013] HCA 38 ("*Munda*") and *Bugmy v The Queen* [2013] (2013) 249 CLR 571; HCA 37 ("*Bugmy*"), this Court made no reference to the existence of an "*onus*" on the Crown to "*negate*" the exercise of the residual discretion. On the contrary, when considering the exercise of the residual discretion, French CJ, Hayne, Crennan, Kiefel, Gageler and Keane JJ held in *Munda* (at 625 [73]) that "*none of the matters urged by the appellant was apt to exert a claim on the residual discretion*".

34. The reference to the "*limiting purpose*" of Crown appeals in this Court's decision in *Green* is not synonymous with there being an onus on the Crown to negate the exercise of the residual discretion. The "*limiting purpose*" of a Crown appeal is the recognition that the "*primary consideration relevant to the exercise of Crown appeals under s. 5D ... is* 'to lay down principles for the governance and guidance of courts having the duty of sentencing convicted persons'": *Green* at 477 [36], per French CJ, Crennan and Kiefel JJ; *Munda* at 623-624 [68]-[69]. This "*limiting purpose*" is a

"*framework within which to assess the significance of factors relevant to the exercise of the discretion*": *Green* at 477 [36], per French CJ, Crennan and Kiefel JJ. It does not import notions of "*onus of proof*" from cases regarding statutory provisions which require the Crown to obtain leave to appeal a sentence.

35. In other contexts, this Court has held that questions of onus are questions of statutory interpretation: *Vines v Djordjevitch* (1955) 91 CLR 512; [1955] HCA 19, at 519 [8]. In this respect, the language of s. 5D of the *Criminal Appeal Act* does not suggest that an onus or burden of proof lies on either party to the appeal. Section 5D provides that "[t]*he Attorney-General or the Director of Public Prosecutions may appeal to the Court of Criminal Appeal against any sentence … and the Court of Criminal Appeal may in <u>its</u> discretion vary the sentence and impose such sentence as to the <u>said court</u> may seem proper*" (emphasis added). In *Griffiths v The Queen* (1977) 137 CLR 293; [1977] HCA 44, at 309 [50], Barwick CJ held that the discretion conferred by s. 5D "*does no more than ensure that where a proper occasion arises for the allowance of an appeal, the court itself may substitute the sentence which it considers appropriate for that imposed by the trial judge.*"

36. Effect must be given to the considered decision of Parliament not to require the Crown to obtain the Court's leave in the filing of an appeal. It is to be observed that "*there is a clear distinction in the legislative scheme between the leave requirement for a sentence appeal under s. 6 of the* Criminal Appeal Act *and the absence of any such requirement in s. 5D of that Act*": *R v JW* (2010) 77 NSWLR 7; [2010] NSWCCA 47 ("*JW*"), at 23 [84].

37. Nor, following the enactment of s. 68A of the *Crimes (Appeal and Review) Act 2001*, could it be said that an onus of proof arises from any common law considerations related to double jeopardy. Section 68A(a) provides that "[a]*n appeal court must not (a) dismiss a prosecution appeal against sentence, or (b) impose a less severe sentence on any such appeal than the court would otherwise consider appropriate, because of any element of double jeopardy involved in the respondent being sentenced again.*"

38. In *Malvaso* and *Everett*, it was said that the Crown had the "*onus*" of persuading the Court that the "*circumstances were such as to bring the particular case within the <u>rare category</u> in which a grant of leave to the Attorney-General to appeal against sentence*

is justified" (emphasis added). However, the enactment of s. 68A (and comparative "double jeopardy" provisions in other States and Territories) has removed from the consideration of the Court the need to approach a Crown appeal as being "*rare and exceptional*": *JW* at 30 [124], per Spigelman CJ; *DPP (Vic) v Karazisis* (2010) 31 VR 634; [2010] VSCA 350, at 33 [69] – [70]; *R v Wilson* (2011) 30 NTLR 51; [2011] NTCCA 9 ("*Wilson*") at 57 [21], 58 [23] – [25], per Riley CJ, with whom Kelly and Blokland JJ agreed).

39. It is contended that, outside of the leave context, there has never been an onus on the Crown to negate the residual discretion, and that *R v Hernando* (2002) 136 A Crim R 451; [2002] NSWCCA 489 was wrongly decided insofar as it determined that there was an onus on the Crown to negate the exercise of the residual discretion. In any event, however, given the abolition of the "rarity principle" by the double jeopardy provisions, it is submitted that any "onus" on the Crown in the context of the residual discretion did not survive the enactment of s. 68A of the *Crimes (Appeal and Review) Act*. In this connection, it is observed that the Court's remarks concerning onus in *Hernando* have not been applied by the CCA since its decision in *JW*. The CCA's remarks about onus in *Hernando* have never been applied outside of New South Wales.

40. Principles similar to the exercise of a residual discretion also operate in other overseas jurisdictions. For example, the Court of Appeal of New Zealand has held that "*at times, certainly, any deficiency in the sentence under appeal may be met by the Court indicating what the appropriate term of imprisonment would have been but nonetheless declining to reverse a non-custodial sentence*": *R v Donaldson* (1997) 1 NZCrimC 640 at 654.

41. Similarly, the Chief Justice of the Court of Appeal of England and Wales has remarked of Crown appeals under s. 36(1) of the *Criminal Justice Act 1988* (UK) that "[t]*he second thing to be observed about the section is that, even where it considers that the sentence was unduly lenient, this Court has a discretion whether to exercise its powers*": *Attorney General's Reference No 4 of 1989* [1990] 1 WLR 41 at 45-46.[4] See also *Attorney General's Reference Nos 31, 345, 42, 50 and 51 of 2004* [2004]

[4] It may be noted that, in the United Kingdom, the residual discretion operates in addition to a leave provision: s. 36(1)(b) of the *Criminal Justice Act 1988* (UK).

EWCA 1934 at [2], in which the Court of Appeal of England and Wales stated that "*the sentence actually passed was so unduly lenient that it would not be a proper exercise of our discretion to take the course urged upon us by* [counsel for the offender]." In *Attorney General's Reference No 123 of 2002* [2003] EWCA Crim 949 and *R v Marcus* [2013] NICA 73, the Court of Appeal determined to exercise its discretion against interfering with sentences imposed at first instance on the basis of the offenders' progress in rehabilitation since the conclusion of the proceedings below. In none of these decisions was any reference made to an onus or burden of persuading the Court not to interfere with the sentences.

42. The residual discretion operates in an analogous way to the discretion to dismiss an application for prerogative relief notwithstanding that the Court is satisfied of error in the proceedings below: see for example, *SZBYR v Minister for Immigration and Citizenship and Anor* (2007) 81 ALJR 1190; [2007] HCA 26 ("*SZBYR*"), at 1197 – 1198 [28]; *Re Refugee Tribunal; ex parte Aala* (2000) 204 CLR 82; [2000] HCA 57 ("*Aala*"), at 107 [54], per Gleeson CJ; *The King v Commonwealth Court of Conciliation and Arbitration; Ex parte Ozone Theatres (Aust Ltd)* (1949) 78 CLR 389; [1949] HCA 33 ("*Ozone Theatres*") at 400 [6] – [7] and 408 [22] – [24].

43. In none of those authorities was reference made by the Court to there being any burden or onus of proof in respect of the discretion not to interfere with a decision infected by error. Rather, the language used in the judgments suggests that any burden or onus in the exercise of that discretion is an evidentiary burden, which lies on the resisting party: "[w]*here a party establishes prima facie grounds for the issue of such remedies, the resisting party may point to any considerations that will nevertheless warrant the ultimate refusal of relief in the particular circumstances of the case*": *SZBYR* at 624 [54], per Kirby J; "[t]*he court's discretion is judicial and if the refusal of a definite public duty is established, the writ issues unless circumstances appear making it just that the remedy should be withheld*": *Aala* at 108 [55], per Gleeson CJ, citing *Ozone Theatres*.

44. In the exercise of the residual discretion to dismiss a Crown appeal, there is an "*evidentiary onus*" on the respondent to a Crown appeal in the sense that it is incumbent on a respondent to bring material to the attention of the appeal court which is within his or her knowledge and which the respondent seeks the court to consider as

an aspect of the residual discretion. ("*An evidential burden does no more than oblige a party to show that there is sufficient evidence to raise an issue as to the existence (or non-existence) of a fact*": *Momcilovic v The Queen* (2011) 245 CLR 1; [2011] HCA 34, at 242 [665]). Contrary to the appellant's submissions (AWS at [10]), there are matters that may enliven the exercise of the residual discretion which are peculiarly within the knowledge of the respondent to a Crown appeal. Examples of such matters include an offender's rehabilitation (*DPP (Vic) v Karazisis* (2010) 31 VR 634; [2010] VSCA 350, at 659 [111]–[112]); an offender's poor health (*R v Yang* [2002] NSWCCA 464; (2002) 135 A Crim R 237; *Karazisis* at 659 [108]); and where there is particular evidence of an offender's anxiety and distress (*JW* at 32 [141]; *Cth DPP v De La Rosa* (2010) 79 NSWLR 1; [2010] NSWCCA 194 ("*De La Rosa*"), at 42–43 [174]–[175]; *Director of Public Prosecutions v Chatters* (2011) 21 Tas R 26; [2011] TASCCA 8 ("*Chatters*"), at 42 [51]).

45. This is particularly so following the enactment of s. 68A of the *Crimes (Appeal and Review) Act*. Section 68A removed "*the element of distress and anxiety to which all respondents are presumed to be subject*" from consideration on the part of the CCA when determining whether to exercise the residual discretion, but s. 68A did not remove from consideration any "*actual*" anxiety or distress occasioned by the fact that the respondent may be re-sentenced: *JW* at 32 [141]; *De La Rosa* at 42–43 [174]–[175]; see *Chatters* at 42 [51]. Such evidence, which is peculiarly within the knowledge of the respondent to the Crown appeal, will not be known by the Court or by the Crown. It is incumbent on the respondent to the Crown appeal to bring evidence of these matters before the Court if the respondent seeks that they be relied upon in the exercise of the residual discretion.

46. For the reasons outlined above, it is submitted that the question of whether to exercise the residual discretion is not governed by the concept of an onus. The CCA's reference to an onus of proof (CCA at [110]; AB at 296) was misplaced. To the extent that there is legal error in the CCA referring to an onus of proof, it is submitted that such an error was *obiter dictum* and has not affected the orders made by the Court. As Judge Posner of the Seventh Circuit of the United States Court of Appeal has commented:

> "... [b]*urdens of persuasion affect the outcomes only of cases in which the trier of fact thinks the plaintiff's and defendant's positions equiprobable. Burdens of persuasion are, in other words, tiebreakers. If the trier of fact, having heard all the evidence, comes to a definite conclusion, he has no occasion to invoke a burden of persuasion,*" *Bristow v Drake Street Inc* 41 F 3d 345 at 353 (7th Cir 1994).

47. It is apparent from a reading of the decision of the CCA as a whole that the present appeal was not one in which the question of whether to exercise the residual discretion was finely balanced. After considering each of the matters relevant to the exercise of the residual discretion (delay, particular anxiety and distress, conduct of the Crown, rehabilitation: CCA at [104]–[109]; AB at 295–296), the CCA concluded that, having regard to the seriousness of the appellant's conduct, it was "*not satisfied that there is any basis upon which, or reason why, this Court should exercise its residual discretion not to intervene*" (CCA at [110]; AB at 296).

48. Nor is there any error in the CCA structuring its approach to the question of whether to exercise the residual discretion by first asking what the correct sentence should have been (cf AWS at [32], [33] and [37]). Whilst the CCA held in *JW* that the appeal court is not required to state what an appropriate sentence ought to have been when addressing the question of whether to exercise the residual discretion (*JW* at 33 [146]), it remains the case that the CCA may consider the appropriate sentence prior to determining whether to exercise the residual discretion. The extent to which a sentence is inadequate is relevant to the exercise of the residual discretion: *R v Wright* (1997) 93 A Crim R 48 at 52–53, per Hunt CJ at CL, with whom Gleeson CJ and Hidden J agreed. It was open to the CCA to consider the appropriate sentence as part of determining whether to exercise the residual discretion.

49. In these circumstances, if the CCA erred in referring to an onus of proof, that error did not affect the orders that were made and the appeal should accordingly be dismissed.

50. Moreover, in view of the matters set out at para 47 above, it is further submitted that, even if there is an onus and, contrary to the matters set out at 50–53 below, the onus lies on the Crown, such an error was not material to the CCA's decision and the appeal should be dismissed.

In the alternative, if the residual discretion is governed by an onus, the onus is on the respondent

51. As outlined above, the decisions of this Court in *Malvaso* and *Everett* were decided in a legislative context in which the Crown required leave to appeal. Section 5D of the *Criminal Appeal Act* does not require the Crown to obtain leave to appeal against a sentence. In view of this important distinction, those authorities do not support the appellant's contention that there is an onus on the Crown to negate the exercise of the residual discretion.

52. The residual discretion only arises in circumstances where the Crown has first demonstrated that the sentence imposed in the proceedings below was infected by error and that that error was material to the sentence that was imposed. As Spigelman CJ observed in *JW* at 20 [64] "[o]*nce an error of principle has been identified, the result is that an offender has not been sentenced in accordance with law. Prima facie, it is the duty of the Court of Criminal Appeal to resentence.*" If the residual discretion attracts an onus, that onus should lie on the respondent to the appeal, who seeks that the Court, in its discretion, not exercise its duty to resentence.

53. Considerations of fairness to an accused lie at the heart of the residual discretion. The purpose of the residual discretion is to ensure that "[t]*he guidance afforded to sentencing judges by allowing the appeal should not come at too high a cost in terms of justice to the individual*": *Green* at 15 [43]. See similarly *Holder and Johnston* at 255–256, per Street CJ ("[the residual discretion] *enables the Court to keep an ultimate control by protecting a convicted person against unfairness or injustice if that would flow from an adverse appellate decision*").

54. In this sense, the residual discretion operates in a similar manner to the discretion of a court to exclude an unfair admission or evidence which has been illegally or improperly obtained. The onus of demonstrating that it would be unfair for the prosecution to use evidence of an unfairly obtained admission was on the accused person at common law (and remains so under s. 90 of the *Evidence Act*): *Em v The Queen* (2007) 232 CLR 67; [2007] HCA 46, at 91 [63], per Gleeson CJ and Heydon J and the cases cited therein. Similarly, at common law, the onus rested on the accused both to prove the relevant misconduct and justify exclusion. (The position has now

been changed by the express reversal of the onus in s. 138 of the *Evidence Act 1995*: ALRC 26, vol 1, para 964.) If, contrary to the above submissions, the residual discretion is a discretion which attracts an onus, that onus should operate in a similar manner to these common law discretions. That is, the onus should be on the offender to demonstrate that, as a matter of fairness or justice, the residual discretion should be exercised in his or her favour.

There was no error in the CCA's application of s. 23 of the *CSP Act*

55. In the proceedings below, the respondent acknowledged that, in accordance with the decision in *R v Ellis* at 604, the appellant was entitled to a "*significant added element of leniency*" in view of the fact that he had made a "*voluntary disclosure of involvement in serious crime that* [was] *unknown to police*" (CCA at [53], AB at 274).

56. As the appellant acknowledges (AWS at [42]), the application of this principle was not in issue in the proceedings below. It was also common ground between the parties that s. 23 of the *CSP Act* applied to the Court's consideration of the appeal.

57. Section 23(1) of the *CSP Act* provides that 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 ... law enforcement authorities in the prevention, detection or investigation of, or proceedings relating to the offence concerned ....*" Section 23(3) of the *CSP Act* provides that the lesser penalty imposed "*must not be unreasonably disproportionate to the nature and circumstances of the offence.*"

58. The appellant submits that the meaning of the words "*unreasonably disproportionate to the nature and circumstances of the offence*" are in issue in the appeal (AWS at [44]). The appellant cites the CCA decisions in *R v C* (1994) 75 A Crim R 309; *Raad v R* [2011] NSWCCA 138; *R v Gallagher* (1991) 23 NSWLR 220; and *R v Huang* (1995) 78 A Crim R 11 in respect of the application of this provision (AWS at [45]). These cases each reflect the clear text of s. 23 of the *CSP Act*, namely, that while a "*lesser penalty*" may be imposed on an offender who has assisted law enforcement authorities, the extent of that leniency must not be such as to render the penalty "*unreasonably disproportionate to the nature and circumstances of the offence*".

59. The interpretation of s. 23 of the *CSP* was not in dispute in the proceedings below, nor is it in dispute in this Court. Rather the issue in dispute in this Court is whether the CCA properly applied s. 23 of the *CSP Act*.

60. Contrary to the appellant's submissions (AWS at [52]), the CCA did not fail to apply s. 23 of the *CSP Act*. At [52] of the CCA judgment (AB 274), the CCA stated that the "*single most important issue that demands consideration in this case is the effect and relevance of the fact that the circumstances underpinning the second set of charges only came to light as a result of the* [appellant's] *admissions made during the assessment phase of the Program.*" The CCA then correctly posed the question: "*Does that fact support a conclusion that the imposition of good behavior bonds was within a range of permissible outcomes*?" Immediately after posing this question, the CCA acknowledged the respondent's concession that the appellant was entitled to a "*significant added element of leniency*" as a result of his voluntary disclosures and that such a lesser penalty "*must not be unreasonably disproportionate to the nature and circumstances of the offences*": CCA at [53] (AB at 274). It is clear, therefore, that the CCA took s. 23 of the *CSP Act* into account.

61. Nor did the CCA err in its application of s. 23 of the *CSP Act* (cf AWS at [49] and [50]). At [93] of its judgment (AB at 289–290), the CCA said:

> "*It is uncontroversial that the facts underpinning the second set of charges only came to light as the result of the respondent's admissions during the assessment phase of the Program. However, the significant added element of leniency to which the respondent is therefore entitled must not lead to a sentence which is unreasonably disproportionate to the nature and circumstances of the offences.*"

62. This paragraph reflects the clear words of s. 23(3) of the *CSP Act* and the principles espoused in cases such as *R v Ellis*. After setting out the correct test, the CCA then considered matters relevant to the application of s. 23 at [93] – [94] (AB 289–290), including extracting the parts of the appellant's affidavit in which he described the circumstances in which he had made his admissions.

63. The error imputed to the CCA by the appellant is not apparent in the CCA's judgment (cf AWS at [49]). The CCA judgment does not suggest that the Court "assumed, or thought" that s. 23(3) required the imposition of a sentence proportionate to the

objective seriousness of the offence. The CCA judgment at [99] (AB at 292-293) does not speak of s. 23 of the *CSP Act*, nor is it addressed towards s. 23 of the *CSP Act*.

64. The CCA appropriately considered the application of s. 23 of the *CSP Act* at [93] – [94] (AB at 289-290) of its judgment. The CCA then turned to the respondent's rehabilitation (CCA at [95] and [96]; AB at 291), the impact of delay (CCA at [97]; AB at 292), the conduct of the Crown (CCA at [97]; AB at 292) and the appellant's pleas of guilty (CCA at [98]; AB at 292). After appropriately considering each of these matters, the CCA concluded that "*in the circumstances of this case, paying due regard to the objective seriousness of the offending, and the particular subjective factors attending the respondent, no penalty other than the imposition of a term of full time imprisonment is appropriate*" (CCA at [99]; AB at 292). Read in context, [99] of the CCA judgment is addressed towards the "instinctive synthesis" process of determining the appropriate sentence, that process having already taken into account the appellant's assistance to authorities.

65. It was open to the CCA to take the view that the sentences imposed were manifestly inadequate, notwithstanding the significant assistance provided by the appellant. The appellant committed numerous offences of aggravated sexual and indecent assault on his daughter, who was then aged between 10 and 12 years. The offences were not isolated. The courts have long acknowledged that, given the acute vulnerability of children, it is important to protect them from sexual abuse by adults, particularly when the perpetrator is the victim's parent: *NT v Regina* [2007] NSWCCA 143 ("*NT v R*"), at [38]-[39], per Harrison J. This was not a case such as *Muldrock v The Queen* (2011) 244 CLR 120; [2011] HCA 39 ("*Muldrock*"), where the offender's limited moral culpability meant that general deterrence, denunciation and retribution assumed lesser importance (see *Muldrock* at 140 [58]). There was no suggestion that the respondent lacked the capacity to appreciate the wrongfulness of his actions (cf *Muldrock* at 139 [54]). The offences required a substantial prison sentence (see *BT v R* [2010] NSWCCA 267 at [39]; *R v ABS* [2005] NSWCCA 255 at [26]; *NT v R* at [38]-[39]). It must also be borne in mind that the appellant's admissions "*ultimately arose from complaints by the victim which were unrelated to the respondent's admission or self-reporting of the criminal conduct involved* (CCA at [93]; AB at 289). In all of these

circumstances, the imposition of good behavior bonds was "*unreasonably disproportionate to the nature and circumstances of the offence.*"

66. The CCA did not quantify the significant added element of leniency that the appellant received as a result of the admissions that he had made (cf s. 23(4) of the *CSP Act* and *R v Ehlrich* [2012] (2012) 219 A Crim R 415; NSWCCA 38, at 419 [7]–[8], per Basten JA). However, this cannot give rise to a ground of review, given that s. 23(6) of the *CSP Act* provides that a failure of a court to comply with the requirements of s. 23(4) does not invalidate the sentence imposed.

67. The CCA took into account the appellant's assistance to authorities both in determining whether the sentence was manifestly inadequate and in determining whether to exercise the residual discretion. The CCA dealt with the ground of appeal relating to manifest inadequacy at paragraphs [87]–[89] (AB 285–287) of the judgment. In these paragraphs, the CCA does not address the appellant's assistance to authorities. However, at [89] (AB 287), the CCA stated that:

> "*Subject to consideration of whether or not to exercise 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 full-time imprisonment is appropriate. That is so in our opinion even after the subjective and procedural considerations are taken into account. <u>These are considered and evaluated below</u>.*" (emphasis added)

68. In the discussion of the "*proper sentence*" which follows at [90]–[101] (AB at 287–293) of the judgment, the CCA expressly dealt with the appellant's assistance and, at [93] (set out above at para 61), correctly stated the applicable principles.

69. The appellant's complaint that the *R v Ellis* considerations were not taken into account in the exercise of the residual discretion should not be accepted. For the reasons outlined above, the CCA properly considered the appellant's assistance when considering the "*proper sentence*". The "*proper sentence*" was an integral part – indeed the starting point – of the Court's assessment as to whether to exercise the residual discretion (CCA at [102]; AB at 293). The appellant's assistance to authorities is relevant to the residual discretion only insofar as it affected the Court's consideration of the appropriate sentence which should have been imposed.

70. In substance, the appellant's complaint is that the CCA did not give s. 23 sufficient weight. This is not a proper basis on which to challenge the decision of the CCA.

The appropriate remedy

71. The appellant seeks orders that the appeal be allowed, that the orders made by the CCA be set aside and that the Crown appeal against the sentence be dismissed. If either or both of the errors pleaded by the appellant are made out and this Court is satisfied that those errors were material to the decision below, it would be inappropriate for the Crown appeal to be dismissed. Rather, the appropriate order would be for the appeal to be remitted to the CCA.

72. "*This Court is not a sentencing court*": *Bugmy* at 596 [49]; *Markarian* at 376 [44], per Gleeson CJ, Gummow, Hayne and Callinan JJ; *Johnson v R* (2004) 78 ALJR 616 [2004] HCA 15 at 626 [35], per Gummow, Callinan and Heydon JJ, with whom Gleeson CJ agreed. As was the case in *Bugmy*, if the alleged errors are made out, the effect of those errors would be that the respondent's appeal "*has not been determined*": *Bugmy* at 596–597 [49].

73. "[T]*he Crown is entitled to proper consideration of an appeal duly made*": *Markarian* at 377 [46] per Gleeson CJ, Gummow, Hayne and Callinan JJ. In these circumstances, if, contrary to the respondent's submissions, error in the CCA's judgment is established, the alternative relief sought by the appellant should be granted, namely, that the appeal be remitted to the CCA for redetermination according to law.

Part VIII: Time Estimate

74. It is estimated that oral argument for the respondent will take one hour.

Dated 7 November 2014

John Agius SC
16 Wardell Chambers
Telephone: (02) 9231-3133
Facsimile: (02) 9233-4164
Email: john.agius@16wardell.com.au

Belinda Baker
Solicitor Advocate for Crown Solicitor
Telephone: (02) 9224 5022
Facsimile: (02) 9224 5177
Email: belinda_baker@cso.nsw.gov.au

IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

No. S 257 of 2014

BETWEEN

CMB
Appellant

AND

ATTORNEY GENERAL FOR NEW SOUTH WALES
Respondent

RESPONDENT'S AUTHORITIES

No.	Description of Document	Page/Section
1.	*Criminal Appeal Act* 1912 (NSW) No 16	s. 5D As at 19.3.14 Still in force
2.	*Pre-Trial Diversion of Offenders Act* 1985 (NSW) No 153	Current from May 2010 to date Still in force
3.	*Pre-Trial Diversion of Offenders Regulation* 2005 (NSW)	Repealed version for 26.8.05 to 31.8.12, repealed with effect from 1.9.12
4.	*Crimes (Appeal and Review) Act 2001* (NSW)	s. 68A As at 19.3.14 Still in force
5.	*Crimes (Sentencing Procedure) Act* 1999 (NSW) No 92	s. 23 As at 19.3.14 Still in force
	Cases	
6.	*Malvaso v The Queen* (1989) 168 CLR 227	234 – 235
7.	*Everett v The Queen* (1994) 181 CLR 295	299
8.	*The Queen v Olbrich* (1999) 199 CLR 270	281 [25]

	9.	*Markarian v The Queen* (2006) 228 CLR 357	376 [44] [46]
	10.	*Green v The Queen* (2011) 244 CLR 462	465 – 6 [1], 477 [36], 503 [121]
	11.	*Bugmy v The Queen* (2013) 249 CLR 571	596 – 597 [49]
10	12.	*Munda v Western Australia* (2013) 249 CLR 600	623 – 624 [68] – [69], 625 [73]
	13.	*R v Loveridge* [2014] NSWCCA 120	[249]
	14.	*R v JW* (2010) 77 NSWLR 7	20 [64], 23 [84], 30 [124], 32 [141], 33 [146]
	15.	*DPP v Karazisis* (2010) 31 VR 634	33 [69] – [70], 659 [108] [111] – [112]
20	16.	*R v Ellis* (1986) 6 NSWLR 603	604