10 **IN THE HIGH COURT OF AUSTRALIA** **No S276 of 2013**
SYDNEY REGISTRY

BETWEEN: **BRIAN WILLIAM ACHURCH**
Appellant

AND

THE QUEEN
Respondent

20 **APPELLANT'S REPLY**

1. These submissions are in a form suitable for publication on the internet.
2. The appellant does not accept that the consequence of re-opening the Crown appeal pursuant to s43 of the *Crimes (Sentencing Procedure) Act NSW* would entail 'a rehearing on the merits'. RS [2.1] The appellant's submission is that the scope of s43 was sufficiently broad to permit the CCA to re-open the Crown appeal and impose a sentence in accordance with correct sentencing principle. This would not involve a rehearing on the merits, because the extent of any 'correction' will be confined by the extent that the erroneous application of sentencing principle impacted upon the decision to allow the Crown appeal and impose a higher
30 sentence.
3. The s43 application in this case did not relate to proceedings at first instance. The Crown had appealed the inadequacy of the sentences imposed on the appellant on the basis that the judge at first instance had failed to apply correct sentencing principle. The Crown appeal was allowed and the appellant was resentenced to a substantially greater sentence. The subsequent decision of *Muldrock v The Queen* (2011) 244 CLR 120 made it clear that all but one of the Crown's grounds of appeal were without substance. The s43 application was made to correct errors that led to the imposition of an erroneously high sentence. This case thus represents an extremely unusual situation. It was an application for the correction of sentences
40 imposed on a Crown appeal, decided in accordance with principles accepted shortly afterwards to be erroneous.
4. It is incorrect to suggest that the appellant's position is that any error of fact or law in the sentencing process renders a sentence 'contrary to law'. RS [6.1] It is ordinarily necessary to demonstrate the existence of an error of law on the face of the record (including the reasons for sentence). It is the appellant's case that the error had an impact on the sentence imposed.

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5. It is not accepted that the appellant's submission as to the scope of s43 would render 'correction under s43 indistinguishable from rehearing on appeal'. RS [6.2] – [6.3] Latent error, as understood from *House v The King* (1936) 55 CLR 499 at 505, would not be amenable to correction under s43. Similarly, a s43 application that asserted no more than an arguably incorrect application of legal principle in the imposition of a sentence would be doomed to fail, as such arguments are properly to be considered on appeal and not by a court at first instance.

6. The narrow view of the scope of s43, now argued for by the respondent, is that s43 only applies when a sentence is not capable of being imposed at law. On that analysis earlier NSW decisions, including the decision the subject of this appeal, were wrongly decided. The respondent has not previously made this submission in these proceedings.

7. The alternative broader interpretation, adopted in earlier decisions and relied on by the appellant, is that s43 is available where there is an error of law on the face of the record that has affected the outcome. See Beazley JA in *Meakin v DPP* at [91] – [93]; Kirby J in *Ho v DPP* (1995) 37 NSWLR 393; McColl JA in *Erceg v District Court of NSW* (2003) 143 A Crim R 455 at [103] – [109] and the dissenting judgment of McLure JA in *The State of Western Australia v Wallam* (2008) 185 A Crim R 116 at [32]

8. As noted at AS [33], earlier decisions on the scope of s43 have recognised that sentence proceedings can be re-opened where it can be seen that erroneous sentencing principle has resulted in an erroneous sentence. It has been accepted that this circumstance constitutes 'a penalty imposed contrary to law' for the purposes of s43. This case sits conformably with the Northern Territory cases of *Melville* (1999) 105 A Crim R 421 and *Staats* (1998) 101 A Crim R 461. In both cases the applications to re-open were allowed because the interpretation of sentencing principles that had informed the court that imposed the sentence were subsequently overruled by this Court.

9. Previous cases where s43 or its interstate equivalents have been applied to correct application of erroneous legal principle have accommodated the need to correct a penalty where it has been accepted that the process being undertaken fell short of a review on the merits. Those cases involved the erroneous application of sentencing principle in the earlier proceedings. The extent of the error will dictate the extent of the review of the previously imposed sentence. The errors made by the CCA in the Crown appeal are identified at ASA [16] – [17]

10. It is incorrect to suggest (RS [6.12] –[6.13]) that the process of correction must always be a restricted one, limited to 'an adjustment of some specific integer of an existing penalty'. That may often be all that is required, for example when pre-sentence custody has been overlooked or an erroneous maximum penalty applied, however usual usage of the provision should not confine its scope. In any event, the decision of the CCA in this case would not allow even the respondent's narrow interpretation of s43 to operate, because an applicant would be required to establish error (for example the failure to back-date a sentence) and then satisfy the court that the resulting sentence was 'not open'.

11. An example of the artificiality of the distinction to be drawn by the respondent between 'correction' and 'redetermination' is the class of case where a court has been incorrectly informed that a defendant has no prior criminal history, in circumstances such as in *Traeger v Pires De Albuquerque* (1997) 18 WAR 432. In a case when the absence of a prior conviction mandates a maximum penalty of a fine and one where the existence of a relevant prior conviction exposes the defendant to a sentence of imprisonment, upon re-opening the imposition of an appropriate penalty may involve a substantial reconsideration of all the factors relevant to an appropriate sentence.

12. At RS [6.14] it is suggested: 'some authorities held that s43 did not apply to factual error'. In *Finnie (No 2)* [2004] CCA 150 at [30] Howie J noted that an outstanding issue was whether the scope of s43 included error of law in the imposition of a sentence arising as a result of erroneous facts presented to the court or that it **only** applied to a sentence that was erroneous in law upon the facts presented to the court. It is notable in *Finnie (No 2)* that it was accepted that a sentence imposed that was affected by erroneous application of sentencing principle was within the scope of s43.

13. This 'outstanding issue' regarding factual error may relate to a historical difference in approach taken between Western Australia and Queensland on the issue of whether proceedings can be re-opened when a court has received erroneous factual information relevant to the imposition of an appropriate sentence. This problem was commonly encountered in driving cases where a court would be incorrectly told that a defendant had no relevant prior convictions. The existence of a prior like conviction, if known, would render a defendant liable to a higher penalty. Queensland decisions such as *Boyd v Sandercock* (1989) 46 A Crim R 206 held that proceedings could not be re-opened to allow accurate further factual material to be placed before a court in order that a sentence be reconsidered. Western Australian decisions such as *Traeger* and *Shortland v Heath* (1997) WAR 61 rejected this approach and held that proceedings could be re-opened for this purpose.

14. The respondent has not cited any prior NSW decision where a s43 application has been refused because the prior failure to provide accurate factual information would now require a 'redetermination' and not a 'correction'. RS [6.20] The appellant has also been unable to do so. The appellant submits is that the extent of the error determines the extent of the need for reconsideration of the penalty. This proposition was accepted in *Erceg v District Court of NSW* [103] – [109]

15. At RS [6.15] it is suggested that an application for a review of sentence under s78 of the *Crimes (Appeal and Review) Act 2001 NSW* would be available to the appellant. As a matter of history it is noted that this application was made before the decision of the NSW Court of Appeal in *Sinkovich* [2013] NSWCA 383 that confirmed that an application pursuant to s78 was available in the case of the application of erroneous sentencing principle. The Crown had contested whether the remedy was available, both at first instance (where they were successful) and on appeal (where they were not). There are significant limits on such applications: they are not judicial proceedings and are thus ordinarily not subject to review. The

provision is not available to the Crown. It also does not provide an efficient and inexpensive option, given any successful application must be either referred to the CCA for a further appeal or result in a judicial inquiry. See Divisions 4 and 5 of the Act.

16. The cases referred to at RS [6.17] – [6.24] provide no assistance in determining this appeal. Each case involves the provision of incorrect factual information to the court at first instance. This appeal does not involve any error of fact.

17. The analysis at RS [6.20] is at odds with the reasoning given in *Boyd v Sandercock*. The conclusion in that case that the penalty at first instance was not contrary to law was made because it was considered that the court at first instance was obliged to hear the case on the evidence before it. That the prosecution had failed to produce relevant evidence of the defendant's prior criminal record did not entitle the prosecution to have the proceedings re-opened. The Queensland Court expressly declined to follow *Shortland v Heath* where such a failure was held to warrant the re-opening of the sentence proceedings. In *Boyd v Sandercock* it was expressly held that a penalty is not contrary to law because the prosecution failed to prove a fact that would have led to a higher range of penalty applying or a higher sentence being imposed. (209) As noted, the opposite conclusion was reached in a number of Western Australian cases.

18. The analysis of cases applying the Queensland legislation on the re-opening of cases to correct error that appears at RS [6.25] – [6.30] does not assist in determining the scope of s43.

19. With regard to the respondent's submissions at RS [6.31] – [6.33], it has never been the appellant's position that s43 permits re-opening 'on any error at any time'. S43 is a provision that recognises there are considerations that go beyond questions of finality. The provision and similar interstate previous provisions have been in effect for decades and have not been seen to be an impediment to the effective working of the criminal justice system. The purpose of the provision is to avoid the need for expensive and time consuming appeals when possible. The use of the provision is discretionary. Repeated applications relying on the same issues, applications relying on purported errors more appropriately dealt with on appeal or very late applications where no adequate explanation for delay is available are unlikely to succeed. See CCA at [66]

20. At RS [6.39] it is said that the decision of the CCA did not adopt a narrower construction than previously adopted, but instead extended the concept of correction 'in a way indistinguishable from a rehearing on the merits'. The test imposed by the CCA was plainly different from the requirements on appeal: "For there to be jurisdiction, error must be identified and it must be shown that the error led to a penalty which was not otherwise open to the court to impose." [63] and: "Generally speaking the only circumstances in which it should be exercised is where the error in question is apparent from the sentence itself, not from an analysis of the legal reasoning which underpins the sentence." [66]

21. At RS [6.42] it is said that in *Tolmie* (1994) 72 A Crim R 416 'it was held' that s24 (the predecessor of s43) did not permit the requested redetermination, as that was a matter for appeal. *Tolmie* was a successful Crown appeal against inadequacy of sentence. The comments made by Hunt CJ at CL were plainly obiter. Smart J

specifically disagreed, preferring the broad view of the scope of s24 in *Denning* (CCA, 15 May 1992, unreported) and Badgery-Parker J declined to comment.

22. At RS [6.40] it is said that in *Tangen* (CCA, 21 June 1996, unreported) Badgery-Parker J (with whom Gleeson CJ and Hidden J agreed) held that the Court should have regard to what has transpired since the original sentencing, but even so, that was to be done within the concept of correction. In fact Badgery-Parker J explained that the concept of correction included the need to consider delay and what had occurred in the interim. His Honour followed *Denning* in holding that the function of s24 (the predecessor of s43) was "to produce that result the sentencing judge originally intended to be achieved by the sentence which he originally but invalidly imposed". This meant that, if necessary, the court was not limited to simply amending the sentence but could re-sentence the offender.

23. At RS [6.54] it is said that the ground of appeal that the judge at first instance gave undue weight to the appellant's medical condition 'was not the only error and not the only basis on which the sentence was increased'. It is said that a second error was that Woods DCJ had wrongly assessed the offences' objective seriousness.

24. The only ground of the Crown appeal to survive *Muldrock* was ground 1, relating to the weight attributed by the sentencing judge to the medical condition of the appellant. CCA [92] All of the other successful grounds of appeal were affected by error. CCA [70] - [72]. The respondent incorrectly suggests that such a conclusion was reached in the 2013 decision of the CCA the subject of this appeal. The statements regarding the objective seriousness of the offences at [94] - [97] were made in the context of considering if the sentences imposed after the Crown appeal had been upheld **could** have been imposed.

25. The process of reasoning on this issue highlights the erroneous process adopted by the CCA when considering the application. Instead of simply deciding if the sentences imposed after the successful Crown appeal were 'contrary to law' and did affect the outcome, the CCA purported to impose a further test requiring an applicant to establish that the sentences were in effect manifestly excessive, in a case where manifest inadequacy was in issue at first instance.

26. The application under s43 was appropriate. The appellant did not seek a complete rehearing or redetermination of the Crown appeal. Instead, after identifying that the legal principles applied by the CCA in upholding the appeal were incorrect, the application sought the re-opening of the Crown appeal so that a sentence could be imposed in accordance with correct legal principle. That this may have involved a substantial reconsideration of the issues raised in the Crown appeal was no more than a consequence of the extent of the errors made at first instance.

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