HIGH COURT OF AUSTRALIA

12 February 2014

PASQUALE BARBARO v THE QUEEN
SAVERIO ZIRILLI v THE QUEEN

[2014] HCA 2

Today the High Court rejected the argument of Mr Barbaro and Mr Zirilli (the applicants) that they suffered unfairness at their sentencing hearing because the sentencing judge refused to receive any submission from the prosecution about what range of sentences could be imposed on each applicant. The High Court held, by majority, that the practice in Victoria of permitting or requiring counsel for the prosecution, in certain circumstances, to make a submission as to the available range of sentences for an offence is wrong in principle and should cease.

The applicants each pleaded guilty in the Supreme Court of Victoria to three offences: conspiring to traffic a commercial quantity of MDMA, trafficking a commercial quantity of MDMA and attempting to possess a commercial quantity of cocaine. They agreed to enter pleas of guilty in relation to those offences following discussions between their lawyers and the prosecution. During those discussions, the prosecution expressed its view as to the range of sentences that might be imposed on each applicant.

In *R v MacNeil-Brown* (2008) 20 VR 677, the Court of Appeal of the Supreme Court of Victoria held that if a sentencing judge asked, the prosecution was bound to submit what the prosecution considered to be the available range of sentences that could be imposed on an offender. At the applicants' sentencing hearing, the sentencing judge made it plain that she did not intend to ask any party for submissions about sentencing range. Counsel for the prosecution, therefore, made no submission about what range of sentences could be imposed. Mr Barbaro was sentenced to life imprisonment with a non-parole period of 30 years. Mr Zirilli was sentenced to 26 years' imprisonment with a non-parole period of 18 years.

The applicants sought to challenge their sentences in the Court of Appeal on the basis (among others) that it was procedurally unfair for the sentencing judge to have refused to hear a submission from the prosecution on the available range of sentences in light of the discussions between the applicants and the prosecution. The Court of Appeal rejected this challenge to the sentences. By special leave, the applicants appealed to the High Court.

The High Court dismissed the appeals. The Court held, by majority, that it is neither the role nor the duty of the prosecution to proffer some statement of the bounds within which a sentence may be imposed. It is for the sentencing judge alone to decide what sentence will be imposed. The practice which resulted from the decision in *MacNeil-Brown* was therefore wrong in principle and should cease. The Court held that because the prosecution's submission as to an available sentencing range is no more than a statement of opinion, it was not unfair for the sentencing judge to have refused to receive such a submission. The Court also held that this refusal did not amount to a failure to take into account a relevant consideration in sentencing the applicants.

- *This statement is not intended to be a substitute for the reasons of the High Court or to be used in any later consideration of the Court's reasons.*

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