HIGH COURT OF AUSTRALIA

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Details of Filing

File Number:	S126/2022
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Important Information

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IN THE HIGH COURT OF AUSTRALIA S126 of 2022
SYDNEY REGISTRY

BETWEEN: **EMMA-JANE STANLEY**
Appellant

and

DIRECTOR OF PUBLIC PROSECUTIONS (NSW) & ANOR
Respondents

FIRST RESPONDENT'S OUTLINE OF ORAL SUBMISSIONS

Part I: Certification

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

Part II: Outline of propositions

The appeal

Contextual factors

1. In determining whether on its proper construction, a failure to comply with s 66 of the *Crimes (Sentencing Procedure) Act 1999* (NSW) (**CSP Act**) is a jurisdictional error, the critical question is whether parliament intended to invalidate any sentence passed where there was non-compliance with the statutory direction: RS [6]; JB [78] **(CAB 117).**

2. To determine whether Parliament had such an intention one must look at the construction of the statute, taking into account the text, context and purpose of the provision and addressing context and purpose from the outset: RS [7]; *Hossain v Minister for Immigration and Border Protection* (2018) 264 CLR 123 at [27], [71]-[72] (**JBA/C/408, 422**); *The Queen v A2* (2019) 269 CLR 507 at [33] (**JBA/C/688**).

3. The relevant contextual matters pointing away from construing a failure to comply with s 66(2) of the CSP Act as a jurisdictional error are:

4. *First*, that the sentencing task (including the task undertaken by the Court when applying s 66) is inherently evaluative and involves the Court being conferred with authority to identify, formulate and determine the issues relevant to whether an intensive corrections order (**ICO**) should be made. A failure of a sentencing court to take into account a mandatory consideration in the course of that process will not ordinarily amount to jurisdictional error: RS [8]-[10]; JB [48]-[49] (**CAB 107-108**); *Craig v South Australia* (1995) 184 CLR 163 at 180 (**JBA/C/338**); *Kirk v Industrial Court of NSW* (2010) 239 CLR 531 at [67] (**JBA/C/467**).

5. *Second*, that s 66 falls for consideration only *after* the Court has sentenced the offender to imprisonment, making it unlikely that Parliament would have intended that a failure to undertake the assessment in s 66 would invalidate the sentence: RS [21]; CSP Act ss 7(1), 64 (**JBA/A/23, 80**).

6. *Third*, that refusal to make an ICO is the subject of a broad appeal right *(Crimes (Appeal and Review) Act 2001* (NSW) ss 11, 17) (**JBA/B/174-176**) but further appeal is constrained by a privative clause: *District Court Act 1973* (NSW) s 176 (**JBA/B/285**); RS [11]. These provisions apply to all sentence appeals from the Local Court and there is no reason to treat appeals concerning ICOs differently.

7. *Fourth*, that the evident purpose of the ICO provisions is to promote community safety by provision of an alternative means of serving short sentences of imprisonment, in respect of which a sentencing court is to have regard to all of the considerations in s 66, including the sentencing purposes in s 3A of the CSP Act: RS [12]-[13].

Construction of s 66

8. On a proper construction of s 66 and its place in the CSP Act, Parliament cannot be taken to have intended that a failure to address s 66(2) would invalidate a sentence, because:

   a. The sentencing court has a discretion as to whether to make an ICO, s 66 applies where the court is deciding whether to do so and s 66(2) is not determinative of that question: RS [19], [22];

b. The question only falls to be determined when a number of pre-conditions are satisfied (CSP Act ss 4B, 5(1), 17D, 67-69 (**JBA/A/22-23, 28-29, 81-82**)) and the sentencing court is considering the appropriateness of the order, any errors in the application of s 66 are therefore errors within jurisdiction: RS [22]-[27];

c. The mandatory language used in s 66(2) is not such as to make the requirement to undertake the assessment process a condition of jurisdiction, when compared with other provisions of the CSP Act: RS [28]-[29];

d. For these reasons there was no reason for Parliament to have included a 'saving' provision and reasoning on the interpretative principle of *expressio unius* is of no assistance: RS [30]-[40].

9. Properly construed, s 66(2) of the CSP Act is not a condition on the exercise of jurisdiction, and a failure to engage in the s 66(2) assessment does not involve a misconception of the statutory function or any other error as to jurisdiction.

The notice of contention

10. The sentencing judge did not expressly refer to having undertaken the s 66(2) assessment. She was not required to and was not, in terms, addressed on the issue: *Mourtada v R* (2021) 361 FLR 96 at [37] (**JBA/D/ 806**), RS [49].

11. It can be inferred that the sentencing judge did undertake the s 66(2) exercise, because whether an ICO should be made was the basis for the appeal (**ABFM 24**); the sentencing judge was addressed on the appropriateness of the order (**ABFM 30, 134**), took account of the Sentencing Assessment Report in accordance with s 69(1) of the CSP Act (**JBA/A/82-84**), and referred to the paramountcy of community safety (**CAB 74-75**); and in ultimately determining the question concluded that specific and general deterrence outweighed the appellant's subjective case, consistently with s 66(3) (**CAB 75**); RS [50]-[58].

Dated: 15 November 2022

Catherine Gleeson **Anya Poukchanski**