HIGH COURT OF AUSTRALIA

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Details of Filing

File Number:	S61/2021
File Title:	Park v. The Queen
Registry:	Sydney
Document filed:	Form 27D - Respondent's submissions
Filing party:	Respondent
Date filed:	31 Aug 2021

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IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

Between: **JONG HAN PARK**

Appellant

and

THE QUEEN

Respondent

RESPONDENT'S AMENDED SUBMISSIONS

PART I: CERTIFICATION

1. The Respondent certifies that these submissions are in a form suitable for publication on the internet.

PART II: ISSUES RAISED ON APPEAL

2. The issue in this appeal is whether the majority (Bathurst CJ and R A Hulme J) in the New South Wales Court of Criminal Appeal ("CCA") in *Park v R* [2020] NSWCCA 90 ("CCA judgment") was correct in determining that a court, when discounting a sentence of imprisonment for an indictable offence dealt with summarily following a plea of guilty, is to apply any discount to the sentence the court would otherwise have imposed before then ensuring compliance with the Local Court's jurisdictional limit.

PART III: SECTION 78B OF THE JUDICIARY ACT

3. The Respondent considers that no notice is required under s. 78B of the *Judiciary Act* 1903 (Cth).

PART IV: MATERIAL CONTESTED FACTS

4. There are no contested facts in the appeal.

PART V: ARGUMENT

Background

5. The appellant entered pleas of guilty in the Local Court to five offences (including intimidation intending to cause fear of physical harm, common assault, aggravated sexual assault, choking with intent to commit serious indictable offence and sexual intercourse without consent), with a further three offences (one offence of common assault and two offences of indecent assault) taken into account on a Form 1.[1]

6. The appellant also entered pleas to a further two offences, offences 1 and 6,[2] of taking and driving a vehicle without the consent of the owner (a Form 1 offence of stealing property from a dwelling house was attached to offence 6: CCA judgment at [107]). Offences 1 and 6 were "*related offences*", which were the subject of a certificate under s. 166 of the *Criminal Procedure Act* 1986 (NSW) (which enables "back up" or "related" summary offences to be dealt with by the District Court in the determination of indictable charges). The Local Court Magistrate transferred these offences to the District Court pursuant to s. 166(1)(b)(ii) of the *Criminal Procedure Act.*

7. The offences of taking and driving a vehicle without the consent of the owner each carried a maximum penalty of 5 years: s. 154A(1) of the *Crimes Act* 1900 (NSW). However, when dealt with summarily, the maximum term of imprisonment that could be imposed ("the jurisdictional limit") for these offences was 2 years: s. 268(1A) of the *Criminal Procedure Act*. As these offences were before the District Court on a s. 166 certificate, this jurisdictional limit applied to the District Court when sentencing for the offences: s. 168(3) of the *Crimes (Sentencing Procedure) Act* 1999 ("*Sentencing Procedure Act*").

8. The appellant was sentenced by Bennett SC DCJ ("the sentencing judge") in the District Court of New South Wales on 6 November 2018. The sentencing judge imposed an aggregate sentence of imprisonment for 11 years, with a non-parole period of 8 years'

[1] The Form 1 procedure is contained in Division 3 of Part 3 of the *Sentencing Procedure Act*; see also *Attorney General's Application under s 37 of the Crimes (Sentencing Procedure) Act 1999 No 1 of 2002* [2002] NSWCCA 518; 56 NSWLR 146.

[2] These submissions adopt the numbering of the offences described by Fullerton J in the CCA judgment: CCA judgment at [41]. In the sentencing judgment, the offences were described by sequence number. Offence 6, which is the subject of this appeal, is described as sequence 7 in the sentencing judgment.

imprisonment pursuant to s. 53A of the *Sentencing Procedure Act*.[3] The sentencing judge also specified indicative sentences for each of the sequences, in accordance with s. 53A(2)(b) of the *Sentencing Procedure Act*.[4]

9. The sentencing judge stated that he had applied a discount of 25% to each of the indicative sentences.[5] This discount represented the utility to the administration of justice occasioned by the plea: s. 22 of the *Sentencing Procedure Act* and *R v Thomson; R v Houlton* [2000] NSWCCA 309; 49 NSWLR 383 ("*Thomson and Houlton*").

10. The sentence indicated by the sentencing judge for offence 6 was 2 years, which corresponded to the jurisdictional maximum of 2 years prescribed by s. 268(1A) of the *Criminal Procedure Act*. In view of the sentencing judge's statement that a 25% discount had been applied to each of the indicative sentences, it follows that the starting point for offence 6 prior to the discount was a sentence of 2 years and 8 months, which was above the jurisdictional limit.

11. The appellant appealed to the CCA against his sentence on two grounds of appeal: first, that the sentencing judge had failed to give appropriate weight to his finding of special circumstances; and second, that the aggregate sentence imposed by the sentencing judge was manifestly excessive. The CCA unanimously dismissed the first ground of appeal. No challenge is made to that finding.

12. In the course of determining the second ground of appeal, a question arose as to whether it was open to the sentencing judge to discount from a starting point that was above the jurisdictional limit: CCA judgment at [98]. The majority in the CCA (Bathurst CJ and Hulme J, Fullerton J dissenting) rejected the appellant's submission that it was not open to the sentencing judge to discount from a starting point that was above the jurisdictional limit. For the reasons outlined below, it is respectfully submitted that the majority was correct to so hold.[6]

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[3] Sentencing judgment at 28; Core Appeal Book ("CAB") at 49.
[4] Sentencing judgment at 27; CAB at 48.
[5] Sentencing judgment at 5 and 27; CAB at 26 and 48.
[6] The decision of the CCA in *Park* was applied by the CCA (Bell P, Simpson AJA and Hulme J) in *Hanna v R* [2020] NSWCCA 125; 102 NSWLR 244. Justice Simpson, whilst preferring the analysis of Fullerton J in dissent in *Park*, considered that the Court was bound by precedent to follow the majority holding (at [86] – [88]). President Bell held that the views of Bathurst CJ and R A Hulme J were to be preferred (at [5] – [6]). Justice R A Hulme adhered to the opinion that he had expressed in *Park* (at [99]).

Overview of the Respondent's Submissions

13. The issue in this appeal is whether it was open to the sentencing judge to discount from a starting point that was above the jurisdictional limit. Resolution of this issue requires an analysis of the interaction between two statutory provisions: s. 22 of the *Sentencing Procedure Act*, which provides for a guilty plea to be taken into account on sentence, and s. 268(1A) of the *Criminal Procedure Act*,[7] which provides for a jurisdictional limit of imprisonment for 2 years.

14. In essence, the difference between the majority and the dissent in the CCA concerns the correct sequence in which a sentencing court (whether a Magistrate, or a District Court judge exercising summary jurisdiction) is to apply these two provisions. The majority held that a sentencing court should apply the s. 22 discount to the sentence as a part of the sentence assessment, and that, if the result of that assessment is a sentence of two years or more, the jurisdictional limit imposed by s. 268(1A) of the *Criminal Procedure Act* of imprisonment for 2 years would then be the sentence imposed. In contrast, Fullerton J in dissent held that the sentencing court should perform the sentencing assessment, then apply the s. 268(1A) jurisdictional limit, before then applying any discount authorised by s. 22 of the *Sentencing Procedure Act*.

15. Determining the appropriate sequence in which the two legislative provisions should be applied requires consideration of the text, purpose and history of both provisions. For the reasons outlined below, it is submitted that the majority's construction of the interaction between the provisions is correct as it accords with the text, purpose and history of both provisions.

16. Further, as both Bathurst CJ and R A Hulme J observed, the construction of the provisions as applied by their Honours has been followed by courts exercising summary jurisdiction at all levels in New South Wales for well over a decade, dating back at least to the decision of the CCA in *Lapa v The Queen* [2008] NSWCCA 331; 192 A Crim R 305~~4~~: CCA judgment at [33], per Bathurst CJ; at [183] – [197], per Hulme J.

[7] The present offence was a Table 2 offence (such an offence is to be dealt with summarily unless the prosecuting agency or the accused elects to have the matter dealt with on indictment: s. 260 of the *Criminal Procedure Act*). Section 267 of the *Criminal Procedure Act* applies to Table 1 offences (such an offence is to be dealt with summarily unless the prosecuting agency elects to have the matter dealt with on indictment). Section 267(2) is in identical terms to s. 268(1A) and raises the same issues of construction.

17. During that time, a number of law reform reports have been prepared for the assistance of the legislature in considering proposed amendments to both the jurisdictional limits of the Local Court and the provisions relating to early guilty pleas. Each report has demonstrated an extensive understanding of the operation of guilty pleas in the Local Court, and at least one of those reports made express reference to the decision of the CCA in *Lapa*. The reports have not recommended any change to the approach to be adopted to the affording of discounts for guilty pleas in the Local Court. Reflecting the recommendations of those reports, the legislature has undertaken significant amendments in respect of pleas on indictment, but has not intervened in respect of summary prosecutions. It is submitted that this aspect of the legislative history of these provisions provides further support for the construction adopted by the majority of the CCA.

Proper construction of the interaction between s. 22 of the *Sentencing Procedure Act* and s. 268(1A) of the *Criminal Procedure Act*

18. As Bathurst CJ held in the proceedings below, "*the task of statutory construction must begin and end with a consideration of the text… considered in context, including the legislative history and extrinsic material*": CCA judgment at [20].[8]

19. The text of s. 22 of the *Sentencing Procedure Act* provides that a court "*must*" take into account the fact that an offender has pleaded guilty (together with the timing and circumstances of the plea) and "*may accordingly impose a lesser penalty than it would otherwise have imposed*". The appellant contends that in any case where an offence is being determined summarily, the discount for a plea of guilty must be subtracted from the jurisdictional limit, because s. 22 refers to the imposition of a lesser penalty than the court "*would otherwise have imposed*": AWS at [46]ff.

20. However, as outlined above, the issue in this appeal concerns the proper interaction between s. 22 of the *Sentencing Procedure Act* and the jurisdictional limit prescribed by s. 268(1A) of the *Criminal Procedure Act*. Accordingly, the issue in this appeal cannot

[8] Citing *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue (Northern Territory)* [2009] HCA 41; 239 CLR 27 at [47]; *Federal Commissioner of Taxation v Consolidated Media Holdings Ltd* [2012] HCA 55; 250 CLR 503 at [39]; *SZTAL v Minister for Immigration and Border Protection* [2017] HCA 34; 262 CLR 362 at [14] and [39] – [40]; and *R v A2* [2019] HCA 35; 93 ALJR 1106 at [32] – [37]; cf Bell and Gageler JJ, in dissent, at [124] and Edelman J, in dissent, at [163].

be resolved simply by construing s. 22 of the *Sentencing Procedure Act* alone. Rather, it is necessary to construe s. 22 of the *Sentencing Procedure Act* as it operates in the context of the jurisdictional limit prescribed by s. 268(1A) of the *Criminal Procedure Act*.

21. It is well established that a provision that prescribes a jurisdictional limit (sometimes referred to as a jurisdictional maximum) takes effect at the final stage of the sentencing process. As the CCA (Grove J, with whom Spigelman CJ and Kirby J agreed) held in *R v Doan* [2000] NSWCA 317; 50 NSWLR 115 at [35]:

> "… where the maximum applicable penalty is lower because the charge has been prosecuted within the limited summary jurisdiction of the Local Court, that court should impose a penalty reflecting the objective seriousness of the offence, tempered if appropriate by subjective circumstances, taking care only not to exceed the maximum jurisdictional limit."

22. See similarly, *Canino v Venning* (1993) 113 FLR 326 at 330, cited in *Doan* at [30] ("… *the court should first look to the maximum sentence imposed by the relevant statute and work to that. If a penalty is arrived at by that process beyond the jurisdictional maximum, the jurisdictional maximum will confine the penalty to be imposed*") and *Hansford v His Honour Judge Neesham* [1995] 2 VR 233 at 237, cited in *Doan* at [33] (the jurisdictional maximum "*operates by way of limiting the power of the inferior court, by depriving it of the power which the conferring of jurisdiction to hear and determine it would otherwise give it – the power to inflict anything up to the maximum penalty – in the sense that the power is cut down to a power to pass no more than a two year sentence of imprisonment*".)

23. In other words, where a jurisdictional limit applies, the sentencing court must first assess the appropriate sentence for an offence within the context of the maximum penalty, synthesising all relevant facts and circumstances: CCA judgment at [174], [182] and [197], per R A Hulme J; see also at [24] and at [30], per Bathurst CJ. That sentence is to be imposed unless the sentence exceeds the jurisdictional limit. If the sentence exceeds the jurisdictional limit, the sentence must be reduced so that it accords with the jurisdictional limit.

24. The appellant does not challenge the correctness of the CCA's decision in *Doan*; nor does he contend that the accepted approach to the jurisdictional limit is incorrect: AWS

at [58]. Rather, he contends that this approach does not apply when a discount for a plea of guilty is taken into account under s. 22 of the *Sentencing Procedure Act*.

25. Contrary to the appellant's submissions, the use of the words "*otherwise imposed*" in s. 22 of the *Sentencing Procedure Act* does not signify that this accepted practice should be departed from where a court is applying a discount for a plea of guilty, nor does it require that the discount for a plea of guilty should be applied after the reduction of the sentence to the jurisdictional limit.

26. The word "*imposed*" in s. 22 must be read in the context of the provision as a whole. Importantly, it is to be borne in mind that the text of s. 22 does not require that a discount for the utilitarian value of a plea of guilty be afforded in every case where an offender pleads guilty. Rather, s. 22 provides that whilst a sentencing court "*must*" take into account various aspects of the plea, the court "*may accordingly*" impose a lesser penalty.

27. It is open to a court to decline to afford a discount where the application of the discount would result in a penalty that is not appropriate in all of the circumstances: *Thomson and Houlton* at [160(iv)].[9] The "*statutory duty*" is to "*address the question of reducing a penalty*"; it is not a statutory duty to reduce the penalty: *Thomson and Houlton* at [10]; emphasis added; cf AWS at [20]. In other words, the text of s. 22 does not indicate a legislative intention that the utilitarian purpose of saving court time should prevail over other considerations of justice, such as the need for offenders to receive sentences that are proportionate to the objective gravity of their offending.

28. It is acknowledged that, as with s. 22 of the ~~*Criminal*~~ *Sentencing Procedure Act*, the text of s. 268(1A) of the *Criminal Procedure Act* also does not provide a complete answer to the question of the sequence in which the provisions should be applied. In these circumstances, it is particularly important to consider the history, purpose and context of both provisions to determine their proper scope.[10]

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[9] Whilst a sentencing court is limited by s. 22(1A) of the *Sentencing Procedure Act* in that it may not afford a discount that results in a penalty that is "*unreasonably disproportionate to the nature and circumstances of the offence*", the court's discretion is not limited by s. 22(1A); cf AWS at [61]. Subsection (1A) represents the upper statutory limit of the discretion. It is open to a sentencing court, in the exercise of its discretion, to decline to afford a discount for a plea of guilty where the discount would result in a sentence that is inappropriate in all of the circumstances.

[10] Of course, the context and purpose of the legislation is to be considered in the first instance, and not only when there is ambiguity in a provision: s. 33 of the *Interpretation Act* 1987 (NSW); *CIC Insurance Ltd v Bankstown Football Club Ltd* [1997] HCA 2; 187 CLR 384 at 408: see AWS at [16]; cf AWS at [51]

29. Annexed to these submissions is a chronology of relevant legislative amendments concerning provisions and judicial decisions relating to the jurisdictional limit of the Local Court and the provision of discounts for early pleas of guilty. An analysis of this history demonstrates the following:

First, both provisions have as their object the aim of freeing up court time and resources to deal with other matters, as well as the easing of the burden on witnesses and police: see *Thomson and Houlton* at [7], [115] and [131]; Second Reading Speeches to the 1924, 1974 and 1995 amendments.

Second, whilst efficiency is a concern of both provisions, neither provision is intended to achieve efficiency at the expense of the imposition of sentences that are not proportionate to the objective gravity of the offending.

Third: whilst the concerns in relation to efficiency extend both to the District and the Local Courts, the concerns are particularly acute in respect of District Court trials: see Second Reading Speeches to the 1924, 1974 and 1995 amendments.

30. In relation to the latter consideration, it may be noted that, whilst the purpose of s. 439 (the predecessor of s. 22 of the *Sentencing Procedure Act*) was to "*encourage pleas of guilty as early as possible, to free up court time to deal with the backlog of cases awaiting hearing, and to reduce the burden on victims, police, courts and others*" (AWS at [17]), the concerns about the "*backlog*" of cases primarily relate to the District Court.

31. Indeed, whilst the guideline judgment in *Thomson and Houlton* was expressed to apply both to the District Court and the Local Court, it may be noted that the need for the guideline was significantly informed by a research study undertaken by the NSW Bureau of Crime Statistics and Research concerning delays in the District Court: *Thomson and Houlton* at [17]-[21], [26], [33]-[37] and [133]-[134]. This is not to say that a recognition of the utility afforded by an early plea of guilty is irrelevant when an offender is sentenced in the Local Court. Considerations of efficiency, and saving witnesses and victims from the need to give evidence remain important in the Local Court. However, the difference assists in understanding of the context of the provisions, and is hence relevant to the determination of how s. 22 of the *Sentencing Procedure Act* and s. 268(1A) of the *Criminal Procedure Act* should interact, and the balance that should be struck between encouraging efficiency, and ensuring that offenders receive

appropriate penalties for serious offending.

32. Viewed in the context of the legislative history of the two provisions, the majority's interpretation of ss. 22 and 268(1A) advances the purpose and addresses the mischief that each provision was introduced to address. In particular, the history of the development of these provisions demonstrates that discounts for pleas of guilty and the use of the summary jurisdiction for indictable offences are complementary measures that each serve the goal of increasing efficiency in the criminal justice system, whilst ensuring that offenders receive sentences that reflect the objective gravity of their offending.

33. The majority's interpretation also has the advantage of ensuring consistency of approach with regard to sentencing between indictable offences in the higher courts and indictable offences disposed of summarily – subject to the requirement not to impose a sentence above the jurisdictional limit, which forms a final discrete adjustment, separate from the exercise of the sentencing discretion. An approach to sentencing that follows an identical approach in different jurisdictions, with the proviso only that on summary disposition, the endpoint cannot exceed the jurisdictional limit, is both clear and logical.

34. In contrast, the appellant's construction would have impacts that are not consistent with the purposes of s. 22 of the *Sentencing Procedure Act* and s. 268(1A) of the *Criminal Procedure Act*. It would mean that an offence sentenced on indictment in the District Court following an early guilty plea could attract a sentence of 2 years' imprisonment, whereas the same indictable offence, dealt with summarily, would receive 18 months' imprisonment, even though a sentence of 2 years' imprisonment is within the jurisdictional limit.

35. Contrary to the appellant's contention, it is not essential to the purpose of s. 22 to ensure the visibility of discounts for pleas of guilty when indictable offences are finalised summarily; cf AWS at [26], [46] and [59]. Section 22 was not introduced to ensure that there is an additional incentive to plead guilty for offenders charged with indictable offences that are being dealt with summarily. Those offenders already have the benefit of the jurisdictional ceiling in the Local Court. As outlined further below, the legislature has expanded the use of the summary jurisdiction to increase the efficiency of the criminal justice system overall and has declined to interfere with the Local Court's

ability to impose a sentence at the jurisdictional limit following a plea of guilty.

36. The only offenders who do not receive a visible discount following a plea to an indictable offence dealt with summarily are those who, had an election been made, would have received a sentence considerably higher than the jurisdictional limit, even after a plea. To suggest that such offenders receive no benefit takes an overly narrow view of the position of such an offender; cf AWS at [60].

37. A person in the appellant's position may be advised that the offence has a maximum penalty of 5 years, that the sentence will be discounted by 25% for an early plea and that because the matter will be dealt with summarily, the offender will not be sentenced to a period of imprisonment of more than 2 years. The advantage to the offender of the twin benefits of the discount for an early guilty plea and summary disposition is that any sentence imposed will be *at least* 25% less than the sentence that would have been considered appropriate in the absence of the plea. The effect of these benefits is clearly visible in the Local Court sentencing examples referred to by R A Hulme J: CCA judgment at [185] – [186].

38. The appellant's interpretation places an unnecessary constraint on the Local Court's sentencing powers by prioritising an asserted need for visible discounts at the expense of the Local Court being able to make full use of its jurisdiction to impose sentences that are appropriate to the objective and subjective characteristics of the offending and the offender, provided only that the sentence does not exceed the jurisdictional limit of 2 years' imprisonment.

39. In summary, the text, purpose and history of the provisions indicates that s. 22 should be approached no differently to other aspects of the process of sentencing an offender for an indictable offence being dealt with summarily. When a court is sentencing such an offender, the court should first assess the appropriate sentence for an offence within the context of the maximum penalty, synthesising all relevant facts and circumstances, and applying any discount under s. 22 of the *Sentencing Procedure Act* together with any other relevant discounts (for example, for assistance to authorities under s. 23 of the *Sentencing Procedure Act*). If a penalty is arrived at by that process which exceeds the jurisdictional limit, then the court must reduce the penalty to the jurisdictional limit.

40. It may be observed that this approach is also applied in respect of similar provisions in

Western Australia and the Northern Territory: *Wiltshire v Mafi* [2010] WASCA 111 at [24] - [33]; *Abeyakoon v Brown* [2011] WASCA 63; 211 A Crim R 338 at [29]; and *Taylor v Malogorski* [2011] NTSC 98 at [24] – [25].

Judicial consideration of the interaction between the jurisdictional limit and discounts for early pleas of guilty and subsequent legislative history

41. The issue of the proper approach to be taken to discounting for a guilty plea was first considered by the CCA in *Lapa v The Queen* [2008] NSWCCA 331; 192 A Crim R 305. Lapa had been sentenced by the Drug Court to imprisonment for 2 years in respect of an indictable offence that was being dealt with summarily. This sentence represented the jurisdictional limit that was available for the offence in those circumstances. Lapa had pleaded guilty at an early stage and it was accepted that the sentencing judge had afforded him a 25% discount. Accordingly, as in the present case, it was accepted that the starting point of the sentence prior to discount had been 2 years and 8 months, which was higher than the jurisdictional limit: *Lapa* at [15].

42. In the context of a ground of appeal alleging that the sentence imposed was manifestly excessive, counsel for Lapa contended that the sentencing judge's approach "*exceeded his Honour's jurisdiction, because* [the] *starting point was greater than the maximum sentence available to him*": *Lapa* at [15].

43. The CCA (Hidden J, with whom McClellan CJ at CL and Hulme J agreed) rejected this contention, finding (at [17]) that:

> "By parity of reasoning [with *Doan*], it was open to Judge Dive in the present case to determine a starting point of sentence above the two-year jurisdictional limit. The only constraint imposed upon him by the relevant provision of the *Criminal Procedure Act* was that the sentence actually passed could not exceed 2 years."

44. A decade later, *Lapa* was affirmed in *Mundine v R* [2017] NSWCCA 97. In *Mundine*, an aggregate sentence had been imposed for offences including an indictable offence dealt with summarily pursuant to s. 167 with a jurisdictional limit of 2 years. The indicative sentence for that offence was 2 years and 3 months after a 25% discount for a plea of guilty.

45. While the CCA found that the sentencing judge erred by indicating a sentence that exceeded the jurisdictional limit, Basten JA confirmed that the jurisdictional limit

applied only to the sentence actually imposed, not to the starting point prior to the discount for the plea: *Mundine* at [19]. Similarly, Adamson J stated (at [92], Campbell J agreeing):

> "I discern no error in the sentencing judge's exercise of the sentencing discretion to arrive at a figure of 2 years and 3 months. The error was in not reducing this figure to 2 years … As this Court has explained in *R v Doan* …, a provision such as s 268 of the *Criminal Procedure Act* is to be treated as a jurisdictional maximum and not a maximum penalty for any offence triable within that jurisdiction. Accordingly, a sentence of two years' imprisonment need not be reserved for a worst case and might be appropriate notwithstanding that a plea of guilty was entered at the earliest opportunity and that, accordingly, a discount of 25% was called for."

46. The decisions in *Lapa* and *Mundine* directly addressed the question of whether a court sentencing an offender for an indictable offence being dealt with summarily may apply a discount for a plea of guilty from a starting point that exceeded the jurisdictional limit.

47. Whilst the precise submissions made by the applicants in support of their contentions concerning "*jurisdiction*" and "*error*" are not recorded in the judgments in *Lapa* and *Mundine*,[11] the CCA was clearly cognisant of the well understood process of applying a discount following a plea of guilty in accordance with s. 22 in compliance with the *Thomson and Houlton* guideline; cf AWS at [38]. Indeed, the judgment in *Lapa* made express reference to the guideline and the "*utilitarian value*" of the "*discount*": *Lapa* at [15]. In each decision, the CCA unequivocally dismissed the applicant's jurisdictional contention, on the basis that the "*discount*" for the plea of guilty should be applied within the sentencing process and prior to the application of the jurisdictional limit. For the reasons outlined above, the CCA was correct to so hold.

48. As both Bathurst CJ and R A Hulme J observed in the CCA judgment, courts in New South Wales exercising summary jurisdiction at all levels have followed the decisions of *Lapa* and *Mundine* and sentenced offenders in the manner prescribed by those decisions on a daily basis over the past two decades: CCA judgment at [33] per Bathurst CJ, and at [167] and [183] – [195], per R A Hulme J. It may also be noted that the decisions made by the prosecuting agencies as to which offences will be dealt with

[11] As the submissions of the parties are not recorded in the judgments, it is not possible to ascertain whether the applicants in either appeal relied on the text or purpose of s. 22 of the *Sentencing Procedure Act* in support of their respective contentions that the sentencing courts had erred in applying a discount to a starting point that exceeded the jurisdictional maximum; cf CCA judgment at [134], per Fullerton J.

summarily and which offences will be dealt with on indictment (AWS at [65]) have been made in the context of the decisions in *Lapa* and *Mundine*.

49. Over these decades, the legislature has given extensive consideration to both the jurisdictional limits that apply in the Local Court where indictable offences are dealt with summarily and the discounts to be afforded for early pleas of guilty. As outlined in Annexure A, numerous Law Reform Commission and Sentencing Council Reports have addressed each of these issues, and the provisions relating to both jurisdictional limits and pleas of guilty have been amended by the legislature on a number of occasions. Throughout this time, the legislature has not intervened to alter the effect of the decisions in *Lapa* and *Mundine*.

50. In particular, in 2009, the Attorney General requested the Sentencing Council to, *inter alia*, provide advice on a proposal to increase the jurisdiction of the Local Court from 2 years to 5 years, and to determine whether the court's jurisdictional limit had produced a significant number of sentences that were not commensurate with the objective seriousness of the offence and the subjective circumstances of the offender: see ~~2009~~ 2010 Report at [1.2] - [1.3].

51. In its report of 2010, the Sentencing Council referred to the operation of the jurisdictional limit in the Local Court, and the decisions in *Doan* and *Lapa*: 2010~~09~~ Report at [1.15] and fn 14. The Report noted that only approximately 5.7% of matters in 2008/09 were disposed of by way of a defended hearing in the Local Court: 2010~~09~~ Report at [3.8]. As part of its consideration of Magistrates' concerns about the effects of the jurisdictional limit on their ability to impose sufficient sentences, the Council also examined 147 transcripts of cases finalised in the Local Court where offenders received sentences for offences of personal violence that coincided with the jurisdictional limit. The summaries of those 147 cases revealed that at least 70 of the offenders received sentences at the jurisdictional limit for indictable offences dealt with summarily having pleaded guilty: Annexure D to the Report.

52. The report recommended a uniform 2 year jurisdictional limit (at [4.16]), but did not support any general increase in the Local Court's jurisdiction (at [4.4] and [4.8]). No legislative change was recommended, or made, following this report, to affect the Local Court's ability to impose a sentence at the jurisdictional limit following a plea of guilty.

53. Following this report, in 2012, the jurisdictional limits, now contained in ss. 267 and 268 of the *Criminal Procedure Act*, were amended by the *Courts and Crimes Legislation Amendment Act* 2012 (NSW) to provide a uniform limit of 2 years. No further amendments were made to the provisions at that time.

54. In 2013, the NSW Law Reform Commission in its "*Report 139: Sentencing*" again considered whether the jurisdictional limit of the Local Court should be increased, in light of ongoing concerns expressed by the Chief Magistrate that, over time, the Local Court had been finalising an increasing number of indictable offences reflecting increasingly serious criminal conduct: 2013 Report at [20.58] - [20.59].

55. The Law Reform Commission referred to the Sentencing Council's 2010 Report (~~2017~~ 2013 Report at [20.60]) and endorsed its recommendation that the jurisdictional limit should not be increased at this time: 2013 Report at [20.71]. The Law Reform Commission also concluded that there was no need to legislate that the jurisdictional limit was not restricted to "*worst cases*", on the basis that the "*Doan principle*" was "*well settled*": 2013 Report at [20.77].

56. In ~~2017~~2014, the New South Wales Law Reform Commission published its report, "*Encouraging appropriate early guilty pleas*", whose terms of reference had included the summary jurisdiction (at [1.18]). In that report, the Law Reform Commission noted that in 2013, 73% of the 88.7% of offenders found guilty in the Local Court had pleaded guilty, and that the median interval from first appearance to determination after a plea of guilty was 32 days: ~~2017~~ 2014 Report at [1.20].

57. The Report found the inference that generally pleas are offered early in summary proceedings to be well supported in consultations, where it was submitted that the "*late entry of guilty pleas in summary proceedings is not an issue that causes delay or consumes resources as it does in the District Court*": ~~2017~~ 2014 Report at [1.20].

58. The Law Reform Commission expressed the view that "*there is currently little need for major reform in criminal procedure in the summary jurisdiction*", and accordingly limited the scope of the review to "*the area where the major problem resides, that is indictable proceedings that are intended to resolve in the District Court*": ~~2017~~ 2014 Report at [1.24]. However, the Law Reform Commission made extensive recommendations for change in the approach to the affording of discounts in the District

Court.

59. In 2017, the *Justice Legislation Amendment (Committals and Guilty Pleas) Act* 2017 (NSW) ("2017 Amending Act") was enacted in response to the ~~2017~~ 2014 Report. This Act introduced a fixed sentencing discount scheme to replace the common law discount for the utilitarian value of a plea of guilty for offences dealt with on indictment. No change was made to the legislation relating to pleas of guilty in respect of indictable offences being dealt with summarily.

60. The Second Reading Speech to the 2017 Amending Act described the amendments to the *Sentencing Procedure Act* as part of "*the most significant criminal justice reform agenda seen for many years*": Second Reading Speech, Legislative Assembly, 11/10/2017. The Second Reading Speech further explained that the amendments were aimed at addressing "*a substantial backlog of trials in the District Court, which is leading to significant delays in finalising indictable criminal cases. … The early appropriate guilty plea reforms will reduce these delays by improving productivity and ensuring that cases are efficiently managed*".

61. The summary of reports above indicates that significant consideration has been given in recent years to sentencing, encouraging guilty pleas and the jurisdiction of the Local Court, without any legislative intervention to sentencing approach approved in *Lapa*.

62. This history supports the majority's construction in two respects: First, it shows that there is no indication that existing sentencing practice, as supported by the majority interpretation, frustrates the purpose of promoting the efficient use of resources or otherwise causes difficulties for the administration of justice. To the contrary, when significant amendments were enacted in 2017 to formalise the rates of discount in order to provide further encouragement for pleas of guilty in the District Court, no change was made to the provisions relating to the summary jurisdiction, on the basis that that goal was already being achieved in the Local Court.

63. Second, this Court may draw an inference from this legislative history that the legislature has approved the interpretation of the interaction of s. 22 of the *Sentencing Procedure Act* and s. 268(1A) of the *Criminal Procedure Act* as determined by the CCA in *Lapa*: *Probuild Constructions (Aust) Pty Ltd v Shade Systems Pty Ltd* [2018] HCA 4; 264 CLR 1 at [52]; *Electrolux Home Products Pty Ltd v Australian Workers' Union*

[2004] HCA 40; 221 CLR 309 at [7]-[8], [81], [161]-[162] and [251]; cf [214]-[215].

64. It is acknowledged that such an inference must be cautiously made, as it cannot always be assumed that the legislature has acted with knowledge or approval of a prior judicial interpretation: see eg *R v Reynhoudt* [1962] HCA 23; 107 CLR 381 at 388; *Electrolux* at [8], per Gleeson CJ. However, criminal law, like industrial relations is a "*politically sensitive field*", and the volume of extrinsic material (including both Law Reform Commission and Sentencing Council Reports) outlined in Annexure A demonstrates the legislature's concern with the particular issues of the jurisdictional limits of the Local Court where indictable prosecutions are dealt with summarily and the encouragement of early pleas of guilty: see *Electrolux* at [81], per McHugh J. In these circumstances, the legislative history reinforces the conclusion of the majority of the CCA as to the correct interpretation of the provisions.

Conclusion

65. For the reasons outlined above, it was open to the sentencing judge to apply a discount for a plea of guilty from a starting point that exceeded the jurisdictional limit that applied to the summary determination of an indictable offence. Accordingly, the applicant has not established that there was any error in the decision of the majority of the CCA. The appeal should be dismissed.

PART VII: ESTIMATE OF TIME

66. The Respondent estimates that it will require one hour for its oral argument.

Dated ~~2 July~~31 August 2021

H Baker SC
Deputy Director of Public Prosecutions
T: 02 9285 8606
hbaker@odpp.nsw.gov.au

B K Baker
Deputy Senior Crown Prosecutor
T: 02 9285 8606
bbaker@odpp.nsw.gov.au

K Jeffreys
Crown Prosecutor
T: 02 9285 8606
kjeffreys@odpp.nsw.gov.au

ANNEXURE "A"

CHRONOLOGY OF SIGNIFICANT AMENDMENTS, REPORTS AND JUDICIAL DECISIONS RELATING TO AFFORDING OF DISCOUNTS FOR PLEAS OF GUILTY AND THE USE OF THE SUMMARY JURISDICTION FOR INDICTABLE OFFENCES

Year	Event
1900	*Crimes Act* 1900 (NSW) passed. As originally enacted ss. 476 – 478 empowered Justices of the Local Court to dispose of certain indictable offences summarily where the Justice or Justices consider that the case may be "*properly be disposed of summarily*" and the accused consents. Section 478 provided that where a person over the age of 16 years pleaded guilty to or was convicted under these provisions, the person was liable to imprisonment for six months or a fine of 20 pounds.
1924	*Crimes (Amendment) Act* 1924 (NSW) passed. The 1924 Amending Act expanded the offences to which s. 476 applied and increased the penalty available to imprisonment for 12 months or a fine of 50 pounds. The Second Reading Speech for the Amending Act indicated that the increasing reliance on the summary jurisdiction was in order to "*make the trial of persons charged with these minor offences of dishonesty as cheap and as expeditious as possible*", in the interests of both the accused and the community: Second Reading Speech, Legislative Assembly, 23/10/1923, at 1709-1711.
1974	Section 476 of the *Crimes Act* amended by s. 11 of the *Crimes and Other Acts (Amendment) Act* 1974 (NSW). The 1974 Amending Act increased the list of offences that could be dealt under s. 476 to include offences of violence. The property value ceiling again increased. As amended, s. 476(7)(a) provided that the maximum penalty of imprisonment to which a person may be sentenced by a Magistrate in respect of any one offence was two years, or the maximum term of imprisonment provided by law in respect of the offence, whichever was the shortest. The Second Reading Speech explained that "*offences which are unlikely to attract serious penalties ought not in general to involve the superior courts merely because they fall into a technical classification as indictable offences. Much of the time of the District Court is now being take up with matters of a level of gravity well within the accepted competence of a magistrate, and this situation would call for remedy quite apart from any difference in work volumes*

	between the two jurisdictions": Second Reading Speech, Legislative Assembly 13/03/1974, at 1362.
1990	Section 439 inserted into the *Crimes Act* by the *Crimes (Legislation) Amendment Act* 1990 (NSW). Section 439 provided that in passing sentence on a person who pleading guilty to the offence, the court "*must take into account*" the fact that the person pleaded guilty and the timing of the indication of the intention to plead, and that the court "*may accordingly reduce the sentence that it would otherwise have imposed."* In the Second Reading Speech, the Hon Mr Dowd (Attorney General) explained that the aim of the bill was to provide "*appropriate encouragements to those who are guilty of an offence to plead guilty to the offence*", so as to "*free up court time to deal with the backlog of cases*" and to avoid inconvenience and distress to victims and other witnesses. The Attorney General emphasised that whilst a reduction will "*usually be given*" and that a court must give reasons for not affording a discount, "*it is not mandatory to reduce the sentence*" and "*reductions will be made in some circumstances and not in others*": Second Reading Speech, Legislative Assembly, 4 April 1990 at 1689 - 1690.
1995	*Criminal Procedure Amendment (Indictable Offences) Act* 1995 (NSW) enacted. The 1995 Amending Act and related provisions moved Part 9A of the *Criminal Procedure Act* 1986 (NSW) and the list of applicable provisions to Tables 1 and 2. The 1995 Amending Act also removed the Magistrate's discretion as to the choice of jurisdiction, instead providing for a presumption of summary disposition, giving the power of election to the parties (particularly the prosecutor) to have an offence dealt with on indictment. The Second Reading Speech for the amendments confirms that these amendments were made to achieve consistency following numerous piecemeal amendments of their scope: Hansard, Legislative Council, 24/05/1995. In particular, the Second Reading Speech explained that "s*ignificant savings in District Court time would be achieved by increased use of summary jurisdiction for those offences which would not attract penalties of more than two years, regardless of the jurisdiction in which they are tried*" and that "*the bill provides for the disposal of a wider range of appropriate offences in the local courts and a consequent benefit in the more efficient allocation of resources in the District Court*".
2000	Enactment of the *Sentencing Procedure Act* (commenced on 3 April 2000) Section 22 of the *Sentencing Procedure Act* was enacted in relevantly identical terms to s. 439 of the *Crimes Act*, save that it provided that the court "*may accordingly impose a lesser sentence than it would otherwise have imposed*" (previously, s. 439 of the *Crimes Act* provided that the Court "*may accordingly reduce the sentence that it would otherwise have passed*": CCA judgment at [18].

2000	*R v Thomson; R v Houlton* [2000] NSWCCA 309; 49 NSWLR 383 CCA issues guideline judgment for the affording of guilty pleas (at [160]): The guideline states that (i) sentencing judges should explicitly state that a plea of guilty has been taken into account, and that failure to do so will generally be taken to indicate that the plea was not given weight; (ii) sentencing judges are encouraged to quantify the effect of the plea of the sentence insofar as it is appropriate to do so; (iii) the utilitarian value of a plea to the criminal justice system should generally be assessed in the range of 10–25 per cent discount on sentence. The timing of the plea is the primary consideration determining where in the range a particular case should fall; (iv) In some cases the plea, in combination with other relevant factors, will change the nature of the sentence imposed. In some cases a plea will not lead to any discount.
2000	*R v Doan* [2000] NSWCCA 317; 50 NSWLR 115 In *Doan*, the CCA determined that the "*true construction*" of ss. 20 and 27 of the *Criminal Procedure Act* (the predecessor of ss. 260 and 267) is a "*jurisdictional maximum and not a maximum penalty… the court should impose a penalty reflecting the objective seriousness of the offence, tempered if appropriate by subjective circumstances, taking care only not to exceed the maximum jurisdictional limit*."
2008	*Lapa v The Queen* [2008] NSWCCA 331; 192 A Crim R 304 In *Lapa*, the CCA held that it is not an error for a sentencing judge or magistrate to commence with a starting point that is higher than the jurisdictional limit when affording a discount for a plea of guilty.
2009	NSW Sentencing Council Report, *Reduction in Penalties at Sentence* The Sentencing Council had been requested by the Attorney General to examine a number of matters relating to discounts on sentence (outlined in the report at [1.1]), none of which specifically addressed the application of discounts following pleas of guilty for indictable offences dealt with summarily. The Council recommended, *inter alia*, that consideration be given to amending s. 22(1) of the *Sentencing Procedure Act* to include the circumstances in which the offender indicated an intention to plead guilty as a further matter to be taken into account, and to include a provision that stipulates that a lesser penalty that is imposed must not be unreasonably disproportionate to the nature and circumstances of the offence: Recommendations 1 and 2. The latter recommendation was made "for abundant caution": 2009 Report at [8.25].
2010	*Crimes (Sentencing Procedure) Amendment Act* 2010 (NSW) enacted. Section 22 of the *Sentencing Procedure Act* amended to include subsection 22(1)(c) and (1A). Subsection 22(1)(c) provides that one of the matters that a court must take into account in passing sentence on an offender is "*the circumstances in which the offender pleaded guilty*". Subsection 22(1A) provides that "*A lesser penalty*

	imposed under this section must not be unreasonably disproportionate to the nature and circumstances of the offence. These latter amendments gave effect to recommendations made by the Sentencing Council's 2009 Report, *Reduction in Penalties at Sentence*.
2010	NSW Sentencing Council Report, *An Examination of the Sentencing Powers of the Local Court in NSW* (2010). This report was provided in response to a request from the NSW Attorney general in 2009 to provide advice, *inter alia*, on a proposal to increase the jurisdiction of the Local Court from 2 years to 5 years. The report recommended a uniform 2 year jurisdictional limit, but did not support any general increase in the Local Court's jurisdiction (at [4.4] and [4.8]).
2012	*Courts and Crimes Legislation Amendment Act* 2012 (NSW) enacted. The 2012 Amending Act amended the jurisdictional limits to provide a uniform jurisdictional maximum of 2 years imprisonment for indictable offences being deal with summarily (see cl [1.1]).
2013	NSW Law Reform Commission, *Report 139: Sentencing* The NSW Law Reform Commission referred to the Sentencing Council's 2010 Report and endorsed its recommendation that the jurisdictional limit of the Local Court should not be increased at that time (at [20.58] – [20.73]).
2017	*Mundine v R* [2017] NSWCCA 97 In *Mundine*, the CCA confirmed that the jurisdictional limit applies to the sentence imposed, and not to the starting point prior to the discount for an early plea of guilty.
2017	*Justice Legislation Amendment (Committals and Guilty Pleas) Act* 2017 (NSW) (commenced on 30 April 2018) Enacted a fixed sentencing discount scheme to replace the common law/ s. 22 discount for the utilitarian value of a plea of guilty for offences dealt with on indictment. The legislation did not alter the legislative scheme applying to the affording of discounts in respect of offences dealt with summarily. The legislation amended s. 22 to provide that this provision now only applies to offences dealt with summarily: s. 22(5). The Second Reading Speech described the amendments as part of "*the most significant criminal justice reform agenda seen for many years*": Second Reading Speech, Legislative Assembly, 11/10/2017. The amendments were said to address "*a substantial backlog of trials in the District Court, which is leading to significant delays in finalising indictable criminal cases.*" It was also said that "*The early appropriate guilty plea reforms will reduce these delays by improving productivity and ensuring that cases are efficiently managed*."

IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

Between: **JONG HAN PARK**
Appellant

and

THE QUEEN
Respondent

ANNEXURE TO THE RESPONDENT'S SUBMISSIONS

LIST OF CONSTITUTIONAL PROVISIONS, STATUTES AND STATUTORY INSTRUMENTS REFERRED TO IN SUBMISSIONS

Pursuant to paragraph 3 of Practice Direction No 1 of 2019

CONSTITUTIONAL PROVISIONS

1. There are no constitutional provisions that are relevant to this appeal.

STATUTES

2. *Crimes Act* 1900 (NSW), as enacted.

3. *Crimes Act* 1900 (NSW), as at 06.01.17 - 01.07.17

4. *Crimes (Sentencing Procedure) Act* 1999 (NSW), as at 24.09.2018- 27.11.2018

5. *Crimes (Sentencing Procedure) Act* 1999 (NSW), current

6. *Criminal Procedure Act* 1986 (NSW) as at 16.08.2018 - 30.08.2018

STATUTORY INSTRUMENTS

7. There are no statutory instruments that are relevant to this appeal