HIGH COURT OF AUSTRALIA

NOTICE OF FILING

This document was filed electronically in the High Court of Australia on 03 Jun 2021 and has been accepted for filing under the *High Court Rules 2004*. Details of filing and important additional information are provided below.

Details of Filing

File Number:	S61/2021
File Title:	Park v. The Queen
Registry:	Sydney
Document filed:	Form 27A - Appellant's submissions
Filing party:	Appellant
Date filed:	03 Jun 2021

Important Information

This Notice has been inserted as the cover page of the document which has been accepted for filing electronically. It is now taken to be part of that document for the purposes of the proceeding in the Court and contains important information for all parties to that proceeding. It must be included in the document served on each of those parties and whenever the document is reproduced for use by the Court.

IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

BETWEEN:

JONG HAN PARK
Appellant

and

THE QUEEN
Respondent

10 APPELLANT'S SUBMISSIONS

Part I: Certification

1. These submissions are in a form suitable for publication on the internet.

Part II: Statement of Issues

2. Is a reduction of sentence for the purposes of s 22 of the *Crimes (Sentencing Procedure) Act* 1999 ('the *Sentencing Act*') applied to a sentence that seems 'appropriate' to a judicial officer but that is beyond the jurisdictional limit of the court, or to a sentence the court would actually have imposed if there had not been a guilty plea?

Part III: 78B Notices

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

Part IV: Citation

4. The sentencing judge's Remarks on Sentence are not reported nor on the internet. They may be cited as *R v Jong Han Park*, unreported, District Court of NSW, 6 November 2018.
5. The NSW Court of Criminal Appeal ('CCA') decision is *Park v R* [2020] NSWCCA 90; 282 A Crim R 551 (Core Appeal Book ('CAB') 54).

Part V: Relevant Facts

6. One of a number of offences to which the appellant pleaded guilty was a 'related
30 offence' on a certificate under s 166 of the *Criminal Procedure Act* NSW of taking and driving a conveyance without consent (offence six).[1] It has a five year maximum penalty. When dealt with summarily there is a 'maximum penalty' (jurisdictional limit) of two years imprisonment, this applying also when dealt with in a higher Court as a

[1] In contravention of s154A(1)(a) of the *Crimes Act 1900*, treated for sentence as larceny in contravention of s 117 of the *Crimes Act*. It was described at first instance as sequence 7 and by Fullerton J in the CCA as offence six: *Park v. R* [2020] NSWCCA 90, table at [41] CAB 75.40 further narrative at [52] CAB 78, which phrase is now used.

'related offence' to matters on indictment: *Criminal Procedure Act* ss 166, 168(3), 260, 267, 268(1A). Equally, this was the maximum sentence to be indicated under the aggregate sentencing provisions in s 53A of the *Sentencing Act*.

7. On 6 November 2018 the appellant was sentenced to an aggregate sentence of 11 years imprisonment with a non-parole period of 8 years. The indicative sentence for offence 6 was 2 years, the sentencing judge having stated that because of the utility of the early guilty plea he had provided '.. a 25% discount to the sentence that would have otherwise been imposed to reflect that utility.'[2] This terminology reflects the language of s 22 of the *Sentencing Act* which empowers a court sentencing an offender who has pleaded guilty to impose a lesser penalty than it would otherwise have imposed. The parts of s 22 in force at the relevant time[3] were as follows (emphasis added):

> ***Guilty plea to be taken into account for offences***
>
> *(1) In passing sentence for an offence on an offender who has pleaded guilty to the offence, a court must take into account*
>
> *(a) the fact that the offender has pleaded guilty, and*
>
> *(b) when the offender pleaded guilty or indicated an intention to plead guilty, and*
>
> *(c) the circumstances in which the offender indicated an intention to plead guilty,*
>
> *and may accordingly impose a lesser penalty* ***than it would otherwise have imposed.***
>
> *(1A) A lesser penalty imposed under this section must not be unreasonably disproportionate to the nature and circumstances of the offence.*
>
> *(2) When passing sentence on such an offender, a court that does not impose a lesser penalty under this section must indicate to the offender, and make a record of, its reasons for not doing so.*

8. The appellant sought leave to appeal against the severity of his sentence, including a complaint of manifest excess. A particular was that the indicative sentence for offence 6 showed a starting point before discount of 2 years 8 months - beyond the jurisdictional limit. It was contended that his Honour's discretion had miscarried because this was not a sentence the court 'would otherwise have imposed'.

9. RA Hulme J granted leave to appeal but dismissed the appeal.[4] Bathurst CJ agreed and provided additional reasons regarding s 22 of the *Sentencing Act*.[5] Fullerton J proposed orders granting leave, quashing the sentence and in lieu imposing a sentence of 9 years

---

[2] Remarks on Sentence page 5, CAB 26.30
[3] Given the time of the offences and committal for sentence. Set out in Fullerton J's judgment at [113]
[4] *Park v R* [2020] NSWCCA 90; 282 A Crim R 551 at [216], CAB 124.10
[5] At [36], CAB 74.10

imprisonment with a non-parole period of 6 years 7 months.[6] In relation to offence 6 her Honour would have indicated a sentence of 10 months.[7]

10. All judgments accepted that the sentencing judge applied the discount for offence 6 to a starting point of 2 years 8 months.[8] The question for determination was whether it was open to consider this an appropriate 'starting point' for the application of the s 22(1) discount, when it was not a sentence the judge could have imposed.[9]

11. R A Hulme J, with whom Bathurst CJ agreed subject to that which his Honour additionally wrote,[10] construed s 22 as follows at [174] (CAB 113.31):

> *In my view, the term "would otherwise have imposed" in s 22(1) is a reference to the sentence a court considers appropriate having regard to the maximum penalty and all of the facts and circumstances of the case. That sentence may then be discounted for the offender's plea of guilty. Once that assessment has been made and any discount applied, there remains the question of whether any jurisdictional limit applies. A sentence will need to be reduced to the limit if it would otherwise be exceeded.*

12. Bathurst CJ additionally held at [30](CAB 71.38) that:

> *Section 22 of the Sentencing Procedure Act should be read in the context of the appropriate manner of sentencing for Table offences and the expression "than it otherwise would have imposed" should be construed as referring to the penalty which would have been imposed but for the constraint resulting from the jurisdictional limit.*

13. Fullerton J in dissent articulated the construction thus at [142] (CAB 105.12), (emphasis in original):

> *In my view, the proper construction of s 22(1) obliges a sentencing court to apply the discount allowed for the plea of guilty to a sentence that the court would <u>in fact have</u> imposed <u>but for</u> an offender's plea of guilty and, where there is a jurisdictional limit for a particular offence, the Court is to have regard to that limit when applying the discount.*

---

[6] At [158], CAB 109.45
[7] See table at [153], CAB 108
[8] Bathurst CJ at [3], CAB 62.40, Fullerton J [130], CAB 100.27, RA Hulme J at [169], CAB 112.18
[9] Fullerton J at [120], CAB 97.17; see also [130], CAB 100.27
[10] CCA [36] CAB 74.10

Part VI: Argument

Ground 1: The majority of the CCA erred in interpreting the phrase 'than it would otherwise have imposed' in s 22 of the *Sentencing Act*

14. It is contended that the majority construction is erroneous and Fullerton J's correct. Bathurst CJ described it as 'arguable'.[11] This was the first occasion the construction of the phrase 'than it would otherwise have imposed' in this context has been considered. Simpson AJA subsequently applied the *Park* majority construction as a matter of comity but described the same process in the case before her Honour as '.. a fundamental jurisdictional error in the sentencing process.'[12] It has been applied more recently still in *Huggett v R* [2021] NSWCCA 62 in describing as correct the same approach as undertaken in this case, by the same sentencing judge.

The Relevant Legislation and the Purpose of s 22 of the *Sentencing Act*

15. The predecessor of s 22 was s 439 of the *Crimes Act*, commencing in 1992 and inserted by the *Crimes Legislation (Amendment) Act* 1990.[13] Section 22 replaced s 439 when the *Sentencing Act* commenced on 3 April 2000.[14] This section was amended in 2010 to insert sub-section 22 (1A), after recommendations made by the Sentencing Council.

16. Consistently with the common law, s 33 of the *Interpretation Act* NSW directs preference to a construction that promotes the purpose or object underlying the Act over one that does not.

17. Regard to extrinsic material, namely the Second Reading Speech when the Bill was introduced, confirms that the purpose of the section 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.[15] The reductions for guilty pleas were intended to remain discretionary. An example given of a case where a reduction of sentence would not be appropriate was one which was

---

[11] At [33], CAB 72.37, CAB 66.12
[12] *Hanna v R* [2020] NSWCCA 125 ('*Hanna*') at [85]
[13] See judgment of Bathurst CJ at [17], CAB 66
[14] See judgment of Bathurst CJ at [19], CAB 66
[15] *Crimes (Legislation Amendment) Bill* 1990 Second Reading Speech 4 April 1990, lines 9-10, 18-19

so serious that it is appropriate for the maximum penalty to be imposed despite a plea of guilty.[16] Nonetheless it was made clear that a reduction should usually be given.[17]

18. An important decision confirming the purpose of s 22 of the *Sentencing Act* and guiding courts as to its correct application is *R v Thomson; R v Houlton* [2000] NSWCCA 309; 49 NSWLR 383 ('*Thomson and Houlton*'). The NSW CCA was asked by the Crown to indicate a guideline judgment in respect of s 22, as is permitted by Division 4 of Part 3 of the *Sentencing Act*.

19. It was held that sentencing courts should explicitly state that a plea of guilty has been taken into account.[18] The Court encouraged quantification of the effect of the plea on the sentence, with particular encouragement to quantification of the utilitarian value. This should generally be assessed in the range of 10-25 per cent discount on sentence, the primary consideration being the timing of the plea.

20. The Court considered the legislative history, and aspects of the Second Reading Speech. This referred to the utilitarian purpose of saving court time. The benefit of this across jurisdictions was referred to. The Attorney General's Second Reading Speech demonstrated the importance of the provision of reasons if no discount is to be afforded - it was expected that a reduction will usually be given. Policy created a statutory duty to reduce penalties for guilty pleas.[19]

21. A guideline was necessary because the objective of s 22 was not being attained.[20] There was considerable scepticism as to whether courts were providing any discount, and considerable discount for early guilty pleas.[21] This caused difficulty in advice throughout the system.[22] Clarity was needed for benefits to be realised.[23]

22. Wood CJ at CL added at 420 [163] that 'Adherence to [the guidelines], in the absence of compelling reason to the contrary, can only assist to secure greater certainty and equity in sentencing practice.'

---

[16] *Crimes (Legislation Amendment) Bill* 1990 Second Reading Speech 8 May 1990 lines 330-335
[17] *Crimes (Legislation Amendment) Bill* 1990 Second Reading Speech 4 April 1990, lines 60-66
[18] Spigelman CJ, with whom Wood CJ at CL, Foster AJA, and Grove and James JJ agreed at 419 [160]
[19] 387 – 388 [7] – [10]
[20] At 389 – 90 [17]
[21] At 389 – 391 [17] – [24], 392 [33], 393 [37]
[22] At 390 [18], 391 [25], 393-4 [38]
[23] At 393 [36]

23. Rare circumstances where reduction is not appropriate were acknowledged, as they later were in *R v Borkowski* [2009] NSWCCA 102; 195 A Crim R 1 ('*Borkowski*').[24] Examples suggested were cases where protection of the community requires a long sentence, or the offence so offends the public that the maximum penalty without discount is required to be imposed.

24. Although the guideline referred to quantification of all aspects of the guilty plea, the practice in NSW has since been to quantify only the discount for utilitarian value, other factors unquantified and taken into account as part of the instinctive synthesis.[25]

10 25. The terms of s 22 of the *Sentencing Act*, particularly as required to be implemented in accordance with *Thomson and Houlton*, represent a significant qualification to the instinctive synthesis approach to sentencing reaffirmed in *Markarian v The Queen* (2005) 228 CLR 357 ('*Markarian*') - although not inconsistent with it, as it is a 'non-sentencing purpose', as explained by McHugh J.[26] The plurality similarly acknowledged the complex effect of pleas of guilty for sentencing purposes, and the disconnection of this with 'discount' for a guilty plea.[27] In Odgers' fifth edition of *Sentence* this advancement of a systemic goal is said to implement a purpose of sentencing but not of punishment, and to mark an exception to the instinctive synthesis principle.[28]

20 26. The NSW legislature has clearly chosen that discounts for the utilitarian value of pleas serve a desired 'non-sentencing purpose' which needs normally to be fully reflected in sentences to attain the desired objective. It needs to be known to be truly provided.[29]

27. As noted above, at [15], s 22 was amended in 2010 to insert sub-section 22 (1A), after recommendations made by the Sentencing Council.

28. In August 2009 the Sentencing Council of NSW reported on 'Reduction in Penalties at Sentence' in response to a reference given to it by the Attorney-General to examine

---

[24] *Thomson and Houlton* 418 [157], [158], [160], *Borkowski* at [32] point 7
[25] *R v MAK; R v MSK* (2006) 167 A Crim R 159 at [41]–[44], *Borkowski* at [32]
[26] *Markarian* at 387 [74]
[27] At 374-375 [37]
[28] Odgers, S.J. *Sentence* Fifth Edition, Longueville Media 2020 pages 9, 83, 95, 119 - 120
[29] See additionally Kirby J in *Cameron v The Queen* [2002] HCA 6; 209 CLR 339 at 360 – 61 [66] – [67]

the practices of the Courts, and the provisions of the *Sentencing Act* in relation to a number of issues including 'The current principles and practices governing reductions in sentence.'[30]

29. The Sentencing Council reviewed the law as articulated in *Thomson and Houlton* and *Borkowski*. The Council received submissions and observed that there was strong support for the awarding of discounts for pleas of guilty, and while some commentators raised philosophical objections to the provision of a discount in return for pleas of guilty (such as by its asserted placing a premium on administrative convenience at the expense of just punishment), the Council was not satisfied that these objections provided cause for any re-appraisal of the system.[31]

30. In describing the importance of an express recognition on sentence of the value of a guilty plea, as a practical means of encouraging prompt and appropriate pleas of guilty, the Council quoted from the judgment of King CJ in *R v Shannon* (1979) 21 SASR 442 at 451, including the statement that 'In most cases, if the offender has nothing to gain by admitting his guilt, he will see no reason for doing so.'[32]

31. After referring to the terms of relevant ACT legislation which specifically required that any lesser sentence must not be 'unreasonably disproportionate to the nature and circumstances of the offence', the Council noted that whereas this phrase was included in the NSW *Sentencing Act* in s 22A (discount for pre-trial disclosure) and s 23 (discount for assistance to authorities), there was no such express direction in s 22. It was stated that 'While existing sentencing practice might import such a limitation, the Council considers that for more abundant caution s 22 should be amended to introduce a requirement to this effect.'[33] The relevant 'existing sentencing practice' that had been considered were those parts of the judgments in *Thomson and Houlton* and *Borkowski*, referred to above, which confirmed that in

[30] NSW Sentencing Council *Reduction in Penalties at Sentence* August 2009, 1.1
[31] NSW Sentencing Council *Reduction in Penalties at Sentence* August 2009, second page of Executive Summary, Chapter 8 at 8.2 and 8.3
[32] NSW Sentencing Council *Reduction in Penalties at Sentence* August 2009, chapter 2 at 2.15
[33] NSW Sentencing Council *Reduction in Penalties at Sentence* August 2009, Chapter 8 at 8.22 – 8.25

some rare or exceptional cases the sheer enormity of the offending suggested no discount should be given.[34]

32. The relevant recommendation was that consideration be given to amending s 22 of the *Sentencing Act* so as to include a provision that stipulates where a lesser penalty is imposed it must not be unreasonably disproportionate to the nature and circumstances of the offence.[35] It was explained that 'Minor legislative amendments are recommended to promote transparency and consistency in relation to discounts for pleas of guilty' and 'In some relatively minor aspects, recommendations have been made for legislative amendment, either to remove anomalies or to deal with matters that might be overlooked without legislative guidance.'[36]

33. Statutory reforms which commenced on 30 April 2018 but which were not applicable to the appellant because of the date on which he was committed for sentence[37] limit the application of s 22 of the *Sentencing Act* primarily to offences dealt with summarily.[38] This has not resulted in change of terminology. Thus even with predominant operation for offences with a jurisdictional limit, the court is required to apply any discount to the sentence that 'it would otherwise have imposed', as noted by Fullerton J at [118] – [119] (CAB 96.10). Part 3, Division 1A of the *Sentencing Act* now provides for a scheme of fixed sentencing discounts for the utilitarian value of a guilty plea for offences dealt with on indictment, using equivalent terminology (a reduction of specified percentages 'in any sentence that would otherwise have been imposed').

34. Until recently in NSW the decision in *Cameron v The Queen* [2002] HCA 6; 209 CLR 339 was thought to prevent a discount for the utilitarian value of a plea in Commonwealth matters. This was found to be wrong in *Xiao v R (Cth)* [2018] NSWCCA 42; 96 NSWLR 1 ('*Xiao*'). The CCA determined that when sentencing a person who has pleaded to a federal offence, a court is entitled to take into account

---

[34] NSW Sentencing Council *Reduction in Penalties at Sentence* August 2009, Chapter 2 at 2.20, 2.22, 2.25, chapter 5 at 5.21

[35] NSW Sentencing Council *Reduction in Penalties at Sentence* August 2009, 'Recommendations' 1st page (Recommendation 2), Chapter 8 after 8.27

[36] NSW Sentencing Council *Reduction in Penalties at Sentence* August 2009, Executive Summary second page, Chapter 8 at 8.126

[37] Brought about by the *Justice Legislation Amendment (Committals and Guilty Pleas) Act 2017*

[38] Including summary offences referred to higher courts under ss 166-168 of the *Criminal Procedure Act 1986*. Also included are offences dealt with on indictment to which the amendments in Division 1A of the *Sentencing Act* do not apply such as in sentencing juvenile offenders

the utilitarian value of the plea, pursuant to s 16A(2)(g) of the *Crimes Act* 1914 (Cth). This has subsequently been enacted into law.[39]

35. There thus exists in NSW a firm legislative structure for state and Commonwealth sentences, dealt with summarily and on indictment, to be reduced when guilty pleas are entered, to encourage pleas of guilty because of the saving of time and resources.

The role of the jurisdictional limit: the decision in *Doan* and reliance on it in *Lapa* and *Mundine*

36. In *R v Doan* [2000] NSWCCA 317; 50 NSWLR 115 ('*Doan*') a complaint of disparity was considered, in circumstances where the co-offender of the applicant (dealt with on indictment) had been dealt with in the Local Court. Grove J, with whom Spigelman CJ and Kirby J agreed, held at [35], of jurisdictional maxima on summary disposal:

> *.. what has been prescribed is a jurisdictional maximum and not a maximum penalty for any offence triable within that jurisdiction. In other words, 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. The implication of the argument of the appellant that, in lieu of prescribed maximum penalties exceeding two years imprisonment, a maximum of two years imprisonment for all offences triable summarily in the Local Court has been substituted, must be rejected. As must also be rejected, the corollary that a sentence of two years imprisonment should be reserved for a "worst case".*

37. This case was not concerned at all with discounts for the utilitarian value of guilty pleas. It has been widely applied as indicating that magistrates (and judges dealing with appeals or matters on a certificate) must not regard the jurisdictional limit as a form of maximum reserved for a worst case.[40] The applicant takes no issue with this. As stated by Fullerton J,[41] *Doan* is not determinative of the outcome in this case. The paragraph is concerned with the fundamental role of a maximum penalty as a yardstick in assessing the comparative seriousness of an offence, in light also of the circumstances of the offender and relevant sentencing purposes, as described by the

---

[39] *Crimes Legislation Amendment (Sexual Crimes Against Children and Community Protection Measures) Act 2020 (Cth), s 3 and Schedule 8, item 1*

[40] See for example *Re Attorney General's Application Under Section 37 Crimes (Sentencing Procedure) Act 1999 (No. 2 of 2002)* [2002] NSWCCA 515; 137 A Crim R 196 at 203-204 [27]

[41] At [100], CAB 89.38

plurality in *Markarian*.[42] It is not contended that the jurisdictional limits for indictable offences dealt with summarily supplant this role.

38. In *Lapa v R* [2008] NSWCCA 331; 192 A Crim R 305 ('*Lapa*') Hidden J (with whom McClellan CJ at CL and RS Hulme J agreed) treated the reasoning in *Doan* as validating the approach of a judge who had utilised a starting point above the jurisdictional limit, arriving at a sentence at it after discount. Although s 22 of the *Sentencing Act* was in force at the time, Hidden J outlined no consideration of it when concluding that there was no error. There was passing reference only to *Thomson and Houlton,* as explaining the sentencing judge's reference to the full benefit of the utilitarian value of the plea. There was no consideration articulated as to the purpose of discounts for guilty pleas, nor the important policy considerations behind the introduction of the legislation as explained in *Thomson and Houlton*. There was no consideration given to the difference between the discount for the utilitarian value of a guilty plea (tangible, quantified, and applied for social policy reasons) and other aspects of the sentencing determination synthesised instinctively.

39. In *Mundine v R* [2017] NSWCCA 97 a similar course was undertaken, in connection with an aggregate sentencing exercise which included summary offences on a certificate. An indicative sentence of 2 years 3 months was given for one, which exceeded the jurisdictional limit. The CCA agreed that this was in error, but reduced it only to 2 years despite a guilty plea. Adamson J at [92] referred to the principle in *Doan* and stated that '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.' As noted by Fullerton J at [137] (CAB 103.17) in the instant appeal, her Honour did not engage with the questions raised in this matter. As in *Lapa*, there was no consideration of the terms of s 22, its purpose, nor the guideline judgment.

---

[42] (2005) 228 CLR 357 at 372 [31] (Gleeson CJ, Gummow, Hayne and Callinan JJ). See also *Elias v The Queen* (2013) 248 CLR 483 at 494 [27] (French CJ, Hayne, Kiefel (as her Honour then was), Bell and Keane JJ), *Muldrock v The Queen* (2011) 244 CLR 120 at 132 [27] (French CJ, Gummow, Hayne, Heydon, Crennan, Kiefel (as her Honour then was) and Bell JJ), and *The Queen v Kilic* [2016] HCA 48; 259 CLR 256 at 266 [19] (Bell, Gageler, Keane, Nettle and Gordon JJ)

Further reasoning of the CCA

40. RA Hulme J, with whom Bathurst CJ agreed, suggested at [173] (CAB 113.15) that Fullerton J's construction gave rise to two procedural options, one of which used the jurisdictional limit as a maximum penalty. His Honour also described the construction advanced on behalf of the applicant as a 'narrow literal' approach: [175] (CAB 113.41), [198] (CAB 120.25).

41. His Honour held at [196] (CAB 119.45) that in seeking to distinguish *Doan*, *Lapa*, and *Mundine* the applicant had in effect assumed that for the past 20 years all courts that have been involved in sentencing for indictable offences in the exercise of summary jurisdiction have been ignorant of the terms of the provision. His Honour cited two first instance Local Court decisions where a Magistrate sentenced in a way consistently with the approach favoured by his Honour and one first instance decision of a District Court Judge at [189] (CAB 117.37). The decisions in neither *Lapa* nor *Mundine* were referred to in these three cases, and nor were the terms or purpose of s 22, or the principle or reasoning in *Thomson and Houlton*.

42. The judgment of Bathurst CJ focused on the difference inherent in the applicant's argument between matters where there was a guilty plea and those where not, this said to be anomalous and incoherent: [29] – [30] (CAB 71.25), [34] (CAB 73.15).

43. Bathurst CJ also referred in support of the preferred construction (above at [12]) to the prospect of too many sentences disproportionate to the gravity of the offending being otherwise passed. Both his Honour and Fullerton J referred to one of the purposes of the section being the passing of sentences which are not unreasonably disproportionate to the offence.[43] His Honour found the preferred construction of s 22 to be consistent with this purpose because in many cases the Table offences, if dealt with on indictment, would attract a significantly greater penalty than the jurisdictional limit.

44. Bathurst CJ at [33] (CAB 72.35) held that he would not overrule *Lapa* and *Mundine* unless plainly wrong, although the conclusion of Fullerton J was arguable, as they had been accepted as correct in a large number of cases and the legislature has not sought to intervene.

[43] Bathurst CJ at [21] CAB 68, Fullerton J at [141] CAB 104

45. In addition to the core aspects of Fullerton J's construction already referred to (above at [13]), her Honour observed that in the decisions of the Court in *Lapa* and *Mundine* there had been no consideration given to the terms of s 22 of the *Sentencing Act*.

Asserted error by the CCA majority

46. The majority judgments fail to give effect to the plain meaning of s 22 of the S*entencing Act*, which is consistent with public policy that any discount attach – and be seen to attach - to the sentence an offender would be required to serve but for that plea. Orthodox principles of statutory construction[44] support the appellant's contention as to the plain meaning of the section.

47. As a matter of ordinary English, to 'impose a penalty' means to establish or apply (a penalty) by authority[45], to lay on or set as something to be borne, endured, obeyed, fulfilled[46], and to lay on, as something to be borne, endured or submitted to, to inflict (something) on or upon.[47] In no sense of its ordinary English usage does it mean the contemplation of laying or setting upon as something to be endured, without power or ability to do so.

48. The term 'impose' or 'imposed' is used five times in s 22 of the *Sentencing Act*, including 'impose' in the same sentence of s 22(1) as the phrase 'than it would otherwise have imposed'. It is there used in its ordinary sense. The terms 'impose', 'imposed' and 'imposition' are used over three hundred times in the *Sentencing Act* in relation to penalties, conditions and orders. The terms are used throughout in accordance with their ordinary meaning. These terms are not defined in the general interpretive provision of the *Sentencing Act,* section 3;[48] but are used within that section to define other terms. For example 'sentence' means, '(a) when used as a noun, the penalty imposed for an offence, and (b) when used as a verb, to impose a penalty for an offence.'

---

[44] Such as beginning and ending with consideration of the text, in context and including (if appropriate) legislative history and extrinsic material: *SZTAL v Minister for Immigration and Border Protection* (2017) 262 CLR 362, *The Queen v A2; The Queen v Magennis; The Queen v Vaziri* (2019) 373 ALR 214 at [32]-[37])

[45] Merriam Webster dictionary accessed electronically, one sense of defining 'impose' as a transitive verb

[46] Macquarie Dictionary accessed electronically, one sense of defining 'impose' as a transitive verb

[47] Oxford English Dictionary, as published online December 2020, one sense of defining 'impose' as a transitive verb

[48] There are instances of related definition for the purposes of particular divisions – for example s43(6) defines the phrase 'impose a penalty' to make clear for purposes such as adjustment of sentences that imposing a penalty includes the imposition of non-custodial options

49. These terms are used in important ways in accordance with their ordinary meaning throughout the *Sentencing Act* – including in describing Parts of the Act, in headings, and in the text of the many provisions pertaining to sentencing law in NSW.

50. A few examples suffice. In s 3A the purposes of sentencing are set out, the section commencing 'The purposes for which a court may impose a sentence on an offender are as follows—'. The heading to Part 2 is 'Penalties that may be imposed', and the first section within that part, s 4, provides in s 4(1) that 'The penalty to be imposed for an offence is to be the penalty provided by or under this or any other Act or law.' Options are explained, such as by s 8(1) which states 'Instead of imposing a sentence of imprisonment on an offender, a court that has convicted a person of an offence may make a community correction order in relation to the offender.' Limitations on power are set out, such as by s 25 which provides that the local court is not to impose certain penalties if the offender is absent. The purpose of an 'assessment report' is described in s 17B(2) thus: 'The purpose of an assessment report is to assist a sentencing court to determine the appropriate sentence options and conditions to impose on the offender during sentencing proceedings.' The terms appear frequently in provisions regarding the commencement of sentences, such as s 47(1) which states ' A sentence of imprisonment commences, subject to section 71 and to any direction under subsection (2), on the day on which the sentence is imposed', and provisions regulating accumulation and concurrency, and the provisions relating to standard non-parole periods for certain offences.

51. The literal meaning of the words of s 22(1) gives effect to the purpose of the legislation, and is thus the applicable 'ordinary meaning': *Saraswati v R* (1991) 172 CLR 1 ('*Saraswati*'). Extrinsic material confirms this: *Interpretation Act* s 34(1). The operation accepted by Fullerton J does not give rise to an 'absurd', 'extraordinary', 'capricious', 'irrational' or 'obscure' operation, nor is it demonstrative of non-conformity with the legislative intent: *Cooper Brookes (Wollongong) Pty Ltd v FCT* (1981) 147 CLR 297 ('*Cooper Brookes*') at 321, *The Queen v A2, Magennis and Vaziri* [2019] HCA 35; 373 ALR 214 ('*A2*') at 223 – 225 [32] – [33], [37] (Kiefel CJ and Keane J), 242 – 3 [124] and 249 [145] (Bell and Gageler JJ, dissenting as to application of those principles in the case), *Interpretation Act* s 34(1)(b). The terms of s 22(1) in no way suggest oversight or drafting error. No doubt arises as to whether

Parliament intended the enactment to have its ordinary meaning: *Saraswati*, *Cooper Brookes*, *Interpretation Act* ss 33, 34.

52. The words of the provision are very important, although their construction does not end with consideration of them: *A2* at 223 – 225 [32], [35] – [37] (Kiefel CJ and Keane J), 242 – 3 [124] (Bell and Gageler JJ, dissenting as to application of that principle in the case), 253 – 254 [163] – [165] (Edelman J), *Grajewski v DPP (NSW)* [2019] HCA 8; 264 CLR 470 at 476 [13] and 478 – 479 [19], [21] (Kiefel CJ, Bell, Keane and Gordon JJ), *Milne v The Queen* [2014] HCA 4; 252 CLR 149 153 [2] (French CJ, Hayne, Bell, Gageler and Keane JJ). The terms of the section are not ambiguous, and do not bear the construction of the majority.

53. The construction preferred by the majority involves an undue strain on the terms of the section. The majority interpretation is equally as narrow as that advanced by the appellant – but contrary to the statute's terms. Phrases like 'appropriate sentence' to which the discount is applied are repeated throughout the judgments.[49] Such terminology is wrongly used instead of the clear terms of the section, which direct attention to the sentence the court would otherwise have imposed. Two years and 8 months imprisonment may be an 'appropriate sentence' for offence 6 if the jurisdictional limit is disregarded – but the court could never impose it. The discount needs to be applied to the sentence that the court would actually have imposed if the applicant had pleaded not guilty.

54. The term 'otherwise appropriate sentence' was used by Howie J in *Borkowski*,[50] and Bathurst CJ more recently in *Barrett v R* [2020] NSWCCA 11 ('*Barrett*')[51], in a way that underscores the appellant's construction of the section. Both cases involved matters dealt with on indictment, such that there was no issue of a jurisdictional limit to take into account. Howie J's judgment was critical of the sentencing judge's use of the term 'discount' to refer to remorse: since *Thomson and Houlton*, a 'sentencing discount' is applied after the otherwise appropriate sentence has been determined. The relevant discounts at that time were discounts for pleading guilty and discounts for assistance to authorities. Other matters that mitigate the sentence (such as remorse) are

---

[49] Bathurst CJ at [27] CAB 70, [30] CAB 71; R A Hulme J at [169] CAB 112, [171] CAB 112, [174] CAB 113, [182] CAB 116, [185] - [186] CAB 115-117, [189] CAB 117, [197] CAB 120, [202] CAB 121

[50] *Borkowski* at 11 [33] – [35]

[51] Bathurst CJ was in the minority in the outcome of the matter in a way that does not impact upon his Honour's articulation of principle on this point

taken into account in the general synthesis to determine the appropriate sentence before the application of a discount. The decision confirms the distinct status of discounts for the utilitarian value of guilty pleas.

55. In approving of this aspect of Howie J's judgment, Bathurst CJ in *Barrett* stated at [151]:

> *That is not a surprising conclusion. One is not able to discern whether the consequences of applying a discount for the plea of guilty will result in a sentence which is unreasonably disproportionate to the nature and circumstances of the offence until one identifies the appropriate sentence and assesses the effect of the imposition of a discount.'*

56. The decisions demonstrate the need to establish the sentence that would actually have been imposed but for the guilty plea, to give operation to the section.

57. The impact of any jurisdictional limit is an essential aspect of postulating the sentence that would have been imposed but for the guilty plea when dealing with Table offences – it was just not required to be attended to in *Borkowski* or *Barrett*. These cases reinforce that the discount is to be applied to the sentence that would have actually been imposed had there not been a guilty plea, rather than a hypothetical sentence under contemplation during the course of the reasoning process towards what that would have been.

58. Contrary to RA Hulme J's references to *Doan*, Bathurst CJ rightly acknowledged that the applicant did not take issue with the correctness of the principle.[52] The proper construction of s 22 does not treat the jurisdictional limit as a maximum penalty. Unless *Doan* is overruled, the correct procedure is to determine the undiscounted sentence the court would otherwise have imposed, in accordance with the statement of principle in *Doan* (no higher than the jurisdictional limit), then apply the discount.

59. Bathurst CJ's finding of incoherence and anomaly in the applicant's approach treats the discount for pleading guilty as another mitigating feature of the case, and fails to pay regard to the fact that discounting sentences for the utilitarian value of guilty pleas is a distinct social policy objective that requires tangible and predictable implementation. As noted above, McHugh J in *Markarian* explained why quantified discounting for a guilty plea is not contrary to the instinctive synthesis method of

[52] At [29] CAB 71, [34] – [35] CAB 73

sentencing – but is also not part of it because it implements a non-sentencing purpose. This aspect of McHugh J's judgment in *Markarian* was referred to in *Xiao* as to the desirability of quantification of this discount in Commonwealth matters.[53]

60. The purposes of the section may be seen as broadly two-fold, as explained by Bathurst CJ and Fullerton J – to encourage offenders to plead guilty, and to ensure that discounted sentences are not unreasonably disproportionate to the nature and circumstances of the offence. The majority construction does not support the former, as there will be no benefit provided for many offenders who plead guilty.

61. The majority construction is capable of addressing the purpose of s 22 that discounts not result in sentences unreasonably disproportionate to the nature and circumstances of the offence; but at the expense of the purpose of encouraging guilty pleas, and in an overly extensive way. It is a stronger response than necessary to address the mischief with which s 22(1A) is concerned, and contrary to the legislative intention and the requirement for individualised justice. Section 22(1A) was not introduced to change any aspect of the law as established in *Thomson and Houlton* and *Borkowski*, but for consistency with s 23 (discounts for assistance), which has been described as having a wide operation, giving rise to evaluative judgment about which reasonable minds may differ, and an attempt to balance conflicting policy objectives. It is very different from a requirement that the sentence not be 'disproportionate': *CMB v Attorney-General for the State of NSW* [2015] HCA 9; 256 CLR 346 at 361 [41] – [42] (French CJ and Gageler J), 373 [77] – [78] (Kiefel J (as her Honour then was), Bell and Keane JJ); see also *C* (1994) 75 A Crim R 309 at 314 – 315 regarding a predecessor of s 23.

62. The terms of s 22(1A) require a deliberation in an individual case. The result of the majority decision is akin to a determination as a matter of law that for all cases where a sentence above the jurisdictional limit would have seemed 'appropriate' on a not guilty plea if not bound by the jurisdictional limit, application of the discount to the sentence that would actually have been imposed results in an unreasonably disproportionate sentence.

63. Section 22, as explained in *Thomson and Houlton*, imposes a statutory duty to ordinarily reduce sentences for guilty pleas although a discretion is retained. A

---

[53] *Xiao* at 51 [279] and 36 [212] in reciting submissions

determination that the result of such discount would be unreasonably disproportionate to the nature and circumstances of the offence must be made as a result of specific consideration in an individual case, mindful of the fact that Parliament has determined the offence can be disposed of (even without a guilty plea) with a two year maximum penalty, the prosecuting authorities have determined that it is an instance of such offending which may be so dealt with, and bearing in mind the statutory duty to encourage guilty pleas, as an exercise of individualised justice. Reasons for not imposing a 'lesser penalty' are required. The appellant's construction serves this purpose and the majority construction does not.

64. There are other problematic consequences on the majority construction when the section is looked at as a whole, whereas Fullerton J's construction allows it to work harmoniously. The majority construction inhibits proper consideration of the concept of a 'lesser penalty imposed under' s 22. This term or an equivalent concept is used a number of times in the section. It is a 'lesser penalty imposed under' the section that must not be unreasonably disproportionate, and failure to 'impose a lesser penalty under this section' that triggers the obligation to give reasons. Consideration of the sentencing determination of a judicial officer who would regard a three year sentence of imprisonment 'appropriate', in the absence of a guilty plea and jurisdictional limit, shows clearly that the majority construction renders much of the section inoperable.

65. Contrary to Bathurst CJ's emphasis on unreasonably disproportionate sentences, it is for Parliament to determine which offences may be dealt with summarily, and prosecuting authorities to determine which instances of those will be so dealt with. The Court's obligation is to apply the terms of s 22 within this framework, instructed by *Thomson and Houlton*. The requirement of s 22(2) of the *Sentencing Act* to give reasons where no discount at all is afforded to offenders for their plea of guilty is an indication that such cases should be rare. The construction of s22(1) of the majority avoids this requirement by permitting discounts with no practical effect.

66. The central question requiring determination was the construction of s 22(1). *Lapa* and *Mundine* were consistent with the construction of the majority, but without having considered the section or *Thomson and Houlton*. There was no principle carefully

worked out in a significant succession of cases.[54] If the applicant's construction is correct, there was good reason for not applying *Lapa* and *Mundine*. Reference in the majority judgments to longstanding practise was misplaced. The cases nominated by RA Hulme J of 'continued adherence' to the suggested 'sentencing practice' did not support this and were not of assistance to the task of statutory construction.

Part VII: Orders sought

67. The appellant seeks the following orders: (1) The appeal is allowed. (2) The orders made by the CCA on 6 May 2020 are set aside and the matter is remitted to the CCA to consider re-sentence in accordance with this Court's reasons.

10 **Part VIII: Estimate**

68. The appellant estimates that 1 hour will be required for the presentation of his oral argument, including submissions in reply.

Dated: 3 June 2021

20

Belinda Rigg
Public Defenders Chambers
T: 02 9268 3111
E: Belinda.Rigg@justice.nsw.gov.au

Jane Paingakulam
Denman Chambers
T: 02 9264 6899
E: j.paingakulam@denmanchambers.com.au

THE APPLICANT'S SOLICITOR IS:
Legal Aid NSW Indictable Appeals, 323 Castlereagh Street, Sydney NSW 2000
30 Telephone: 9219 5000; Facsimile: 9219 5935; Frances.Low@legalaid.nsw.gov.au
Reference: Ms Frances Low

[54] Cf. *John v Federal Commissioner of Taxation* (1989) 166 CLR 417 at 438 (Mason CJ, Wilson, Dawson, Toohey and Gaudron JJ, relying on *The Commonwealth v. Hospital Contribution Fund* (1982) 150 CLR 49 at 5 (Gibbs CJ, with whom Stephen and Aickin JJ agreed)), *Green v The Queen; Quinn v The Queen* [2011] HCA 49; 244 CLR 462 ('*Green*') at 491 [85] (Heydon J)

IN THE HIGH COURT OF AUSTRALIA

SYDNEY REGISTRY

ON APPEAL FROM THE COURT OF CRIMINAL APPEAL OF NEW SOUTH WALES

BETWEEN: **JONG HAN PARK**

Appellant

and

THE QUEEN

Respondent

ANNEXURE TO THE APPELLANT'S SUBMISSIONS
LIST OF CONSTITUTIONAL PROVISIONS, STATUTES AND STATUTORY INSTRUMENTS LISTED REFERRED TO IN SUBMISSIONS

Pursuant to paragraph 3 of Practice Direction No 1 of 2019

CONSTITUTIONAL PROVISIONS

Nil

STATUTES

1. *Crimes Act 1900*, as at 01.02.1992-01.03.1992
2. *Crimes Act 1900*, as at 06.01.17 -01.07.17
3. *Crimes Act 1914,* current
4. *Crimes (Sentencing Procedure) Act 1999*, as at 24.09.2018- 27.11.2018
5. *Crimes (Sentencing Procedure) Act 1999*, current
6. *Criminal Procedure Act 1986* as at 16.08.2018 – 30.08.2018
7. *Interpretation Act 1987*, current

STATUTORY INSTRUMENTS

Nil