

BETWEEN:

JESSE CUMBERLAND

Appellant

and

THE QUEEN

Respondent

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APPELLANT'S OUTLINE OF ORAL ARGUMENT

Part I: Certification that the submission is suitable for publication on the internet

1. I certify that this submission is in a form suitable for publication on the internet.

Part II: Propositions to be advanced in oral argument

A. The respondent's concession on ground 3

2. The respondent has conceded that the appellant was denied procedural fairness by the CCA (**RS [63], [70]**). It follows that the appeal should be allowed (see **RS [71]**).
3. The two main remaining issues, which are somewhat interrelated, are:
 - 3.1. whether this Court should substitute an order dismissing the Crown appeal to the CCA or remit the matter to the CCA; and
 - 3.2. whether any remittal to the CCA can or should be limited to the question of re-sentencing or whether the appellant should be permitted to argue that the appeal should be dismissed in the exercise of the residual discretion.

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B. This Court should set aside both the CCA order allowing the appeal and the order imposing the substituted sentence

4. The appellant had been led by the CCA to believe that there would be a further hearing before any orders were made (**AS [62]-[68]**). By unexpectedly delivering judgment in those circumstances, the CCA denied the appellant procedural fairness.
5. As the respondent rightly accepts (**RS [27]**), the appellant could properly have submitted that the CCA should exercise the residual discretion to dismiss the appeal at any time, right up until the CCA made its orders (ie on 19 June 2019).

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6. The denial of procedural fairness thus not only prevented the appellant advancing material and submissions relevant to re-sentence but also denied him the opportunity to submit and argue that the residual discretion should be exercised in his favour.
7. It follows that *all* of the orders of the CCA made on 19 June 2019 must be set aside.
8. Further and in any event, it would be perverse for the CCA to be required to proceed to re-sentence now, without the appellant being able to raise and rely upon his current circumstances, which now overwhelmingly favour the dismissal of the appeal in the exercise of the residual discretion.

10 ***C. This Court should finally determine the matter by substituting an order that the Crown appeal to the CCA be dismissed***

9. The Court has a discretion either to remit the matter or finally dispose of it by substituting an order dismissing the Crown appeal to the CCA. In the interests of justice and finality, this Court can and should finally determine the matter.¹
10. The Court should consider the *current* circumstances of the appellant. Importantly, those circumstances include the following:
 - 10.1. the fact that the appellant has now served not only the *whole* of the custodial period originally imposed by Blokland J (two years) but (as at 15 April 2020) a *further* 9 months and 20 days in custody (AS [71.2], AR [11]).
 - 10.2. that, because the appeal is to be allowed, the CCA's orders must be set aside (AS [72]-[73], AR [15]) — the immediate effect being that:
 - 10.2.1. once the CCA orders are set aside, the original sentence of Blokland J will provide the only continuing warrant for the appellant's detention;
 - 10.2.2. under Blokland J's sentence, the appellant was entitled to conditional release on 26 June 2019 and so will now become entitled to immediate release from custody upon the CCA orders being set aside;
 - 10.2.3. insofar as the Crown might seek an order remanding the appellant in custody pending the final determination of the Crown appeal, there is no power to do that, and in any event, no such order should be made; and
 - 10.2.4. it follows that any further consideration of the Crown appeal would occur in circumstances where the appellant has more than served the custodial portion of his sentence and has been released; and

¹ Insofar as is necessary, the statement at AS [74] is withdrawn.

10.3. the strong considerations already identified as favouring the dismissal of the Crown appeal in the exercise of the residual discretion (**AS [70]**).

D. Ground 2 — CCA dealing with the Crown appeal in temporally separated stages

11. The “residual discretion” can only properly be exercised having regard to circumstances prevailing at the time when any re-sentencing would occur. Therefore a decision whether a Crown appeal is to be allowed or dismissed should only be made at a time proximate to when final orders are to be made (**AS [56]-[61], AR [10]**).

12. The CCA’s determination of the appeal miscarried by reason of its:

10 12.1. deciding and announcing on 2 August 2018 that it would allow the Crown appeal and re-sentence the appellant, when the CCA could not know the circumstances prevailing at the unknown future time it would make orders;

12.2. ultimately re-sentencing the appellant more than ten months after it had decided and announced it would allow the appeal, when circumstances had changed.

13. In any event, irrespective of whether the CCA erred, given that any final orders would now be made more than *one year and eight months* after 2 August 2018, fresh consideration *must* now be given to the exercise of the residual discretion.

E. Ground 1 — failure to consider residual discretion

14. The CCA failed to consider the residual discretion at all (**AS [44], RS [29], AR [11]**). It was obliged to do so (and/or to invite counsel to address it) in circumstances where:

20 14.1. there had been substantial delay in determining the Crown sentence appeal;

14.2. at the time the CCA made its orders (19 June 2019), the appellant was still serving the sentence imposed by Blokland J and was, under that sentence, due to be released from custody on 26 June 2019;

14.3. the effect of the re-sentencing was to extend the minimum custodial period by some three years and five months (more than doubling the custodial period);

14.4. the CCA had led the appellant’s counsel to believe that he would be heard further before any re-sentencing occurred, including as to rehabilitation, being an issue relevant to the residual discretion.

30 Dated: 14 April 2020

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Marie Shaw QC
Frank Moran Chambers

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Stephen McDonald
Hanson Chambers

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Mark Thomas
John Toohey Chambers