

BETWEEN:

**JESSE CUMBERLAND**  
Appellant

and

**THE QUEEN**  
Respondent

**RESPONDENT'S OUTLINE OF ORAL SUBMISSIONS**

**Part I:**

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

**Part II:**

***The issue of the residual discretion to dismiss the appeal was not properly before the CCA for determination.***

2. The proceedings may be broken up into three periods. The issue of the residual discretion was not raised by counsel for the appellant during any of these periods.

*Period between 11 April 2018 (the date the sentence at first instance was imposed) – 18 July 2018 (the date of the hearing of the appeal before the CCA)*

3. The respondent raised the potential application of the residual discretion in its written submissions but the appellant did not address the potential application of the residual discretion in its written submissions (**ABFM 72, lines 9 and 12**).
4. On 18 July 2018 the CCA considered the application of the residual discretion during oral submissions by the respondent (**ABFM 67, 72**). Counsel for the appellant did not make submissions on the application of the residual discretion in the course of his argument. After counsel for the respondent replied, counsel for the appellant submitted that *Wilson's* case, in which the CCA set out a list of factors to be taken into account in the exercise of the residual discretion, did not apply (**ABMF 104, line 30**).
5. Counsel for the appellant was given the opportunity to make written submissions in relation to any resentencing exercise within 14 days of 18 July 2018 in the event the appeal were to be allowed (**ABMF 105-106**).

*Period between 18 July 2018 (the date the sentence at first instance was imposed) - 2 August 2018 (the date the CCA allowed the appeal)*

6. In this period, the appellant's counsel did not seek to enliven the application of the residual discretion. On 1 August 2018 counsel for the appellant sent an email titled "Re: Section 55 of the Sentencing Act" (**ABFM 109-110**). Counsel for the appellant referred to *Wilson's* case in paragraph 12 of the email. However, the reference to *Wilson* in the email and to the residual discretion must have been directed to the potential exercise of the courts residual discretion to impose a reduced sentence referred to by Riley CJ in *R v Wilson* (2011) 30 NTLR 51 Riley CJ at [27] and not to the residual discretion to dismiss the appeal.
7. On 2 August 2018 Kelly J advised the parties "...the appeal is allowed for reasons which we will publish in due course" (**ABFM 112**) and indicated that as a sentence in excess of 5 years would likely be imposed it was necessary to refer the interpretation of section 55 of the *Sentencing Act 1995* (NT) to the Full Court before proceeding to resentence.
8. Counsel for the appellant had the opportunity to raise any further matters he wished to raise for the consideration of the court and did not even after Kelly J's invitation to raise any other matter (**ABFM 115, line 22**).

*Period between 2 August 2018 (the date the CCA allowed the appeal) – 19 June 2019 (the date of the resentence)*

9. On 12 March 2019 the Full Court heard the reference. Counsel for the appellant did not raise the residual discretion before the hearing on 12 March 2019 and the Full Court determined the reference on the basis the CCA had allowed the appeal and a new sentence would require the fixing of a non-parole period: see *The Queen v Cumberland* [2019] NTCCA 13 at [1], [5]-[6], [32] (**CAB 49, 51, 62**).
10. On 19 June 2019 the CCA resented the respondent. Counsel for the appellant raised matters he said were relevant to the sentencing exercise (**RBFM 17-18**) but did not raise the application of the residual discretion to dismiss the appeal.

**The residual discretion can be a relevant consideration for the CCA once a determination had been made to allow a Crown appeal but before a respondent is resented, if it is raised.**

11. The residual discretion to dismiss a Crown appeal may be raised after the appeal has been allowed but before a respondent is resented: see *DPP (Cth) v Masange* (2017) 325 FLR 363, [8-10, 54-56, 62-63, 70-71]). However, in *Masange* the issue of the residual discretion was placed before the court by both respondents at the initial hearing of the appeal. In this case, the appellant is raising for the first time the potential application of the residual discretion to dismiss the appeal. This Court should not consider that issue where it could have been raised in the CCA but was not. This is not a case where it is "expedient in the interests of justice" for this Court to consider a point raised on appeal for the first time. See *Pantorno v The Queen* (1989) 166 CLR 466 at 472-476.

**If the issue of residual discretion was properly before the CCA, it is accepted that the issue was not considered in the reasons of the CCA. In that case, the matter should be remitted for consideration by the CCA. However, if this court decides to determine**

**whether the residual discretion should have been exercised, that determination should not be exercised in favour of the appellant.**

12. The sentence imposed by the CCA was significantly higher than the sentence imposed at first instance. This factor weighs strongly against exercising the residual discretion. See *Munda v Western Australia* (2013) 249 CLR 600 at 625. The four matters relied upon before this court by the appellant in favour of exercising the residual discretion to dismiss the appeal do not warrant the exercise of the discretion:

12.1 *Imminence of release* – the appellant was made aware of the likely significant increase in both the head sentence and the time required to be served on 2 August 2018 and could not have been anticipating his release according to the initial sentence.

12.2 *Delay* – the decision of the CCA was communicated on 2 August 2018 less than four months after the original sentence was passed. The resentence occurred on 19 June 2019 before the appellant had served the minimum time required to be served under the initial sentence.

12.3 *Demonstration of positive rehabilitation* – there is no material before this court to support a submission that the appellant’s progress toward rehabilitation afforded a basis for exercising the residual discretion.

12.4 *The asserted stance of the Crown prosecutor* – the Crown prosecutor did not concede that a suspended sentence would be appropriate. The submissions on the objective seriousness of the offending and the comparatives provided by the Crown prosecutor offered no support for the imposition of a suspended sentence.

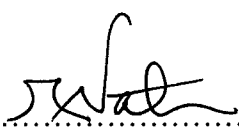
**If the issue of residual discretion to dismiss the appeal was not properly before the CCA, the procedural course followed by the CCA did not involve a denial of procedural fairness to the appellant with respect to the exercise of the residual discretion.**

13. Counsel for the appellant had numerous opportunities to raise the residual discretion to dismiss the appeal throughout the process and did not. Even after the appellant had been resentedenced, counsel for the appellant addressed the court but chose not to raise the residual discretion to dismiss the appeal (**RBFM 17-18**).

**The procedural course followed by the CCA involved a denial of procedural fairness to the appellant with respect to the resentencing exercise.**

14. The sentence may not have been different had the appellant not been denied procedural fairness, however, it is accepted that the appellant should have had the opportunity to seek further material and make submissions on the resentence. The appropriate remedy is to set aside the sentencing orders of the CCA, remit the matter to the CCA for resentence, and remand the appellant in custody to appear before the CCA when called upon. The parties will then have the opportunity to make sentencing submissions.

DATED this 14<sup>th</sup> day of April 2020.



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Name: Matthew Nathan SC