



HIGH COURT OF AUSTRALIA

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**IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY**

No. M41 of 2026

BETWEEN:

DEMETRIOS CHARISIOU
Appellant

and

THE KING
Respondent

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APPELLANT'S OUTLINE OF ORAL SUBMISSIONS

Part I - FORM OF SUBMISSIONS

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

Part II – OUTLINE

A. THE SENTENCING ACT AND SENTENCING PRINCIPLES

1. Sentencing is a multidimensional public act: offender focused, but not offender limited.
 - (a) *Sentencing Act 1991* (Vic): s 1(d), (i) (JBA, Pt A, Vol 1, pp 15–16); s 5(1)(a) (“just in all of the circumstances”), (b)–(e) (p 59); s 5(2)(daa), (da), (g).
 - 20 (b) Section 5(2)(g) is a catch-all: no “relevant circumstance” is to be overlooked.
 - (c) The disjunctive “or”: the two limbs of s 5(2)(g) do distinct work: CA [133] (CAB 159).
2. Sentencing principle already looks beyond the offender: victims; parity; general deterrence; denunciation.

B. THE COMMON LAW

3. Mercy is not the correct frame. CA [48] (CAB 138–139) reasons that: family hardship is “not a mitigating factor properly so-called”; therefore it sounds only in mercy; and mercy requires exceptional circumstances.
4. Each step fails:
 - 30 (a) “Aggravating” and “mitigating” are “no more than shorthand expressions” (*Storey* [1998] 1 VR 359, 371; RS [54]): directions of pull, not classes with entry conditions (cf prevalence; plea utility; parity).
 - (b) The Act’s residual category is relevance, not grace: s 5(2)(g); cf CA [58] (the general words pick up the common law, including mercy).

- (c) South Australia has long seen amelioration of third-party hardship as public interest in its own right – disavowing “mercy” as the sole frame; *Buckskin* [109]–[110] (p 820); *Adams* [35], [60]; *Totaan* at [47].
5. The common law does not uniformly prohibit consideration of the effect of a sentence on an offender’s family absent “exceptional circumstances”:
- (a) the rule’s foundations are unsettled: LACW [14]–[30];
- (b) in South Australia the rule has for decades been applied in a way that departs from *Markovic* in all but name: *Adams* [31]–[32], [37]–[38], [50], [77] (Livesey P); [97]–[98], [101] (Doyle JA) (JBA, Pt D, Vol 4, pp 699–701).
- 10 6. If *Markovic* does reflect the common law, then it should change:
- (a) there is one common law of Australia (*Lange* (1997) 189 CLR 520, 563): harmonization is necessary given the differential development between Victoria and at least South Australia.
- (b) “exceptionality” is a description, not a test: *Adams* [97]–[98]; *Totaan* [56], citing *Girard* (JBA, Pt D, Vol 4, pp 1142–1143);
- (c) treated as a test, it is arbitrary — exceptional by reference to what?: *Pratten* (*No 2*), [53];
- (d) the rule has been subject to compelling criticism: *Zerafa* [140] (Beech-Jones J) (JBA, Pt D, Vol 4, p 1056); *Pratten* (*No 2*) (2017) 94 NSWLR 194, [50]–[55] (Basten JA); *Totaan* [77], [83], [93]; *Carter* [61] (McCallum J);
- 20 7. The reasons said to justify the rule do not withstand scrutiny:
- (a) equal justice: the objection is reflexive — the test itself “discriminates between like offenders by reference to the degree (as opposed to the existence) of hardship”: *Totaan* [47] (JBA, Pt D, Vol 4, p 1141); and equal justice requires relevantly different cases to be treated differently: *Green* (2011) 244 CLR 462, [28];
- (b) the “paradox” (a guilty person benefits so the innocent suffer less): a value judgment, not logic; the purpose is to protect the innocent, not reward the guilty: *S v M* [35]; cf plea and assistance discounts;
- 30 (c) the commonality of family hardship/floodgates: goes to weight, not relevance — ordinary hardship, ordinary weight (*Buckskin* [110]); judges are “perfectly able” to make the assessment: *Zerafa* [140];
- (d) the DPP’s “avoidance of just desserts” point (RS [17]–[20], [71]): assumes a uniquely correct sentence; there is none — the sentencer weighs “all relevant considerations (and only relevant considerations)”: *Markarian* (2005) 228 CLR 357, [27].
8. And there are positive reasons in favour of family hardship being considered in all cases – with weight a matter for the sentencing Judge:
- 40 (a) the welfare of an offender’s dependents is itself a public interest, weighed with and against other public interests — not an occasion for grace: *Neill* [24] (JBA, Pt D, Vol 4, p 775); *Buckskin* [109]–[110] (p 820); *Adams* [35], [60];
- (b) The threshold prevents the enquiry precisely where it matters most — at the cusp of custody or at sentence choice (cf *Petherick* [22]);

- (c) exclusion produces injustice: in *Esposito*, the Court held itself bound to ignore the effect of imprisonment on a dying infant and his mother (LACW [43]–[46]); cf *Cross* (LACW [31]–[36]);
- (d) consistency with the general law: courts routinely weigh the effect of coercive orders on third parties in every other context: *Zerafa* [140];
- (e) consistency with the rights protected in the *Charter* and in international law;

C. THE CHARTER

- 10 9. Section 32(1) of the *Charter* does two things in relation to s 5(2)(g). First, it identifies “relevant circumstances”, secondly, it compels a construction of s 5(2)(g) that does not limit the section to the *Markovic* statement of the common law test.
10. The proper approach to s 32:
- a. Section 32(1) is to be considered as part of the process of statutory construction – not as a tie breaker;
 - b. If the question of how s 7 and s 32(2) of the *Charter* interact needs to be resolved, s 7 should not be taken as incorporated into s 32;
 - c. Section 32(1) does not operate only where there is an identifiable limit on an individual’s human right.
- 20 11. The protected right: s 17(1) (JBA, Pt A, Vol 1, p 94): families “are entitled to be protected by society and the State”.
12. Where a sentence will separate or impair a family, the fact of the family’s hardship is a “relevant circumstance”: CA [133], [138] (CAB 159–160).
13. The international frame: s 17(1) is modelled on art 23(1) of the ICCPR, read with art 17 (General Comment 19, [1] (JBA, Pt E, Vol 5, p 1454)); removing one member from a household interferes with “the family” (*Winata* [7.2] (p 1456)); the interference is arbitrary where the family’s interests are not considered (*Nystrom* [7.11]; VEOHRC [49]).
14. Comparable systems respond with proportionality and weight, never a threshold:
- 30 *Petherick* [17]–[23]; *S v M* [35].
15. Nothing in the text, context or purpose of s 5(2)(g) precludes regard to the objective aspect save in exceptional cases. Section 5(1) is no constraint; where Parliament wants thresholds in s 5, it enacts them: ss 5(2H)(e), 70(1)(e).
16. Section 32(1): a compatible construction of s 5(2)(g) is possible consistently with its purpose; it must be adopted.

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