HIGH COURT OF AUSTRALIA

GLEESON CJ,
GUMMOW, KIRBY, HAYNE AND HEYDON JJ

Matter No M273/2003

GAS APPELLANT

AND

THE QUEEN RESPONDENT

Matter No M275/2003

SJK APPELLANT

AND

THE QUEEN RESPONDENT

GAS v The Queen; SJK v The Queen
[2004] HCA 22
19 May 2004
M273/2003 and M275/2003

ORDER

In each matter:

Appeal dismissed.

On appeal from the Supreme Court of Victoria

Representation:

I D Hill QC with L C Carter for the appellant in M273/2003 (instructed by Jones Dowling McGregor)

R Richter QC with T Kassimatis for the appellant in M275/2003 (instructed by Victoria Legal Aid)

P A Coghlan QC with C M Quin for the respondent in both matters (instructed by the Solicitor for Public Prosecutions (Victoria))

CATCHWORDS

GAS v The Queen
SJK v The Queen

Criminal law – Sentencing – Prosecution granted leave to file new presentment charging manslaughter in place of murder against two accused – Counsel for prosecution informed trial judge of "plea agreement" whereby accused would plead guilty and prosecution would submit that sentencing should proceed on basis that each accused was an aider or abettor rather than principal offender – Prosecution appeal against sentence on ground of manifest inadequacy – Appeal succeeded on basis that insufficient weight given to objective gravity of killing and aggravating circumstances, and undue weight given to youth and rehabilitation prospects of offenders – Whether Court of Appeal erred in dealing with the appeal in a manner contrary to the "plea agreement" – Effect of admission involved in pleading guilty to unlawful and dangerous act manslaughter – Culpability of aider and abettor relative to that of principal offender.

Criminal law – Sentencing – "Plea agreement" – Whether prosecution conduct of appeal was contrary to "plea agreement" – Respective responsibilities of prosecution, accused and trial judge with respect to "plea agreements" – Whether trial judge's responsibility to find and apply sentencing principles may be circumscribed by conduct of counsel – Whether appropriate that "plea agreement" should deal with issues of sentencing principle – Desirability of reducing "plea agreement" to writing – Discretion of appeal court in prosecution appeals against sentence to decline to intervene although error is shown in sentencing process.

Words and phrases – "plea agreement", "aider and abettor".

1 GLEESON CJ, GUMMOW, KIRBY, HAYNE AND HEYDON JJ. These appeals are against a decision of the Court of Appeal of Victoria[1] (Phillips CJ, Chernov and Vincent JJA), which allowed prosecution appeals against sentences for manslaughter imposed by the primary judge (Bongiorno J)[2], and fixed higher sentences. The sole ground of appeal to this Court is that the Court of Appeal erred in permitting the Director of Public Prosecutions to conduct his appeal in a manner said to be contrary to a "plea agreement" reached at first instance, and in dealing with the appeal in a manner contrary to such agreement.

The facts

2 The prosecution of the appellants, who were aged 16 and 15 respectively at the time of the event, arose out of the brutal killing of an elderly woman in the course of a robbery at her home. The victim was aged 73. She lived alone with her handicapped son, aged 47. The appellant SJK knew the son, and both appellants knew that the victim kept substantial amounts of cash at home in order to provide her son with money for shopping expeditions, which he enjoyed. They also knew that the doors of the house were often left open at night by the son.

3 The victim was found dead on the morning of 16 October 2000. Her condition was described by the Court of Appeal as follows:

> "The cause of death was asphyxia by manual neck compression. Although he was unable to exclude the possibility that there was some element of smothering in the mechanism of death, the pathologist gave evidence ... that the main cause of death was one of strangulation. The pathologist noted multiple areas of blunt trauma to the head, chest, back and the anal and vaginal areas. He also noted trauma to the front, back and top of the skull. Each was a separate injury. The bruising to the head was more likely to be caused by a fist. The bruising around the laryngeal cartilage was consistent with squeezing. There was also bruising around the vaginal area which was consistent with pressing fingers. There was a symmetrical pattern of bruising over the anterior chest which was consistent with someone having knelt on the chest of the deceased. The

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1 *Director of Public Prosecutions v SJK*; *Director of Public Prosecutions v GAS* [2002] VSCA 131.

2 *R v SJK and GAS* [2002] VSC 94.

deceased also sustained three fractured ribs which would have required at least moderate to severe force to occur."

4 The appellants were interviewed by the police. The appellant SJK admitted to having gone with GAS to the victim's house on the evening of 15 October for the purpose of stealing money. This was the second occasion on which they had done that. He said that, while he and GAS were in the victim's bedroom, she woke up, and GAS then attacked her and appeared to break her neck. The appellant GAS admitted that he had been with SJK on the night of 15 October, but denied that they had been at the victim's house.

The pleas at trial

5 The appellants were both charged with murder, and were committed to the Supreme Court of Victoria for trial. Each pleaded not guilty. On 24 July 2001, before a jury was empanelled, counsel for the prosecution informed the trial judge that there had been "some developments". He then informed the judge of the following matters. First, he said the prosecution would seek leave "to file over a new presentment". Secondly, he told the judge that this had been a "difficult forensic case" because there had been no plan to kill the deceased prior to the entry into the house, SJK had said it was GAS who did the killing, GAS had said that he wasn't there at all, and there were certain "difficult forensic problems". Thirdly, he said that the family of the victim were in court. Fourthly, he said, "it has been indicated to us that each accused will plead guilty to this presentment, and it has also been indicated to us that each accused, through their counsel, will not be urging upon your Honour, in terms of the sentencing process, that either is appropriate for a youth training centre". The judge granted leave to file the new presentment, which charged manslaughter in place of the earlier charges of murder. The appellants were re-arraigned and both pleaded guilty. It appears to have been the common understanding that sentencing would not occur on that day, and that the proceedings would need to be adjourned for evidence and submissions on sentence. Counsel for the prosecution said that he wished to indicate that the prosecution was unable to say, and would never be able to say, who killed the deceased. He went on: "Accordingly, the proper way for your Honour to sentence both the accused, in circumstances such as this, is to place it at the lowest common denominator, that is, they were each aiders and abettors, that is, the Crown cannot point to who was the principal offender". He said that authority for that proposition was to be found in a decision of the Victorian Court of Appeal in *R v Bannon and Calder*[3]. The judge enquired as to "the basis of the

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3 Unreported, 21 September 1993 (Phillips CJ, Crockett and Vincent JJ).

manslaughter", and counsel replied that it was "lack of intent, unlawful and dangerous act". Counsel said "it will be an unlawful and dangerous act manslaughter on the basis of the unusual circumstances of this case, that the Crown cannot prove or demonstrate to your Honour's satisfaction to the relevant standard who was the principal offender. *Bannon's case* is authority where the Crown cannot do that." He gave the judge the reference to *Bannon and Calder* and said that where someone was killed in those circumstances "the sentencing judge was perfectly at liberty to sentence them on the basis at the very least that they were aiders and abettors". There was some discussion about matters irrelevant to the present appeal. The proceedings were then adjourned.

6 When the matter resumed on 11 October 2001, new counsel appeared. Counsel for the prosecution commenced by making a detailed statement, from the bar table, of the alleged facts and circumstances relating to the killing of the deceased, emphasising the nature and extent of her injuries, and the extreme violence inflicted upon her, but not suggesting that either one of the appellants was the person who had attacked and killed her. No objection was raised to this course, and the facts stated were apparently accepted by counsel for the appellants as both true and relevant. Counsel said that the circumstances in which the victim met her death represented "one of the worst nightmares of all elderly women in our community". He elaborated upon the age and vulnerability of the victim, the circumstances of her handicapped son, the taking advantage by the offenders of their knowledge of the household, the fact that on a previous night they had stolen money from the house, the planning of an entry at night to steal more money, and the details of the police interviews of the offenders. Counsel emphasised that both appellants had lied to the police in various ways. He then said:

> "In this case where the Crown is not able to prove to the requisite standard the precise role played by each of these accused, they, therefore, fall to be sentenced in accordance with the judgment of the Court of Criminal Appeal in *R v Bannon and Calder* … Each of the accused falls to be sentenced as an aider and abetter, not a principal in the first degree.
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> Your Honour, as to sentence, the Crown submits as follows: That although this court must give weight to the fact that each accused is a youthful offender and thus rehabilitation must be given full weight, it must also be borne in mind that this death resulted from an extremely serious crime. The victim was an elderly vulnerable person who was attacked in her own home, a place where she had every right to feel safe from intruders.

> The accused, in the Crown's submission, made a cynical and deliberate use of the home [scil known] proclivities of her mentally handicapped son to leave the doors of the house unlocked. They entered her house in the dead of night knowing that she was at home and in her bed. They knew that she was a vulnerable elderly lady who had difficulty with mobility. They returned to the scene of a previously successful foray which resulted in them daringly stealing a handbag from the side of a bed while she slept. When she awoke the accused could have easily made good their escape but chose to stay while [the victim] was attacked in a way that was obviously dangerous in the relevant sense. In my submission, there is no doubt that after her death her bedroom was ransacked while she lay dead on the floor after being beaten and strangled. This conduct, in my submission, displays a callousness which does not augur well for the prospect of rehabilitation.
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> Having regard to the circumstances of this crime, it is the Crown's submission that the aspects of general deterrence and of demonstrating community disapproval of this serious criminal conduct must be given considerable weight."

7 It was not suggested to Bongiorno J that those submissions were contrary to any agreement that had previously been made, or that it was not open to the prosecution to press them.

8 Victim impact statements were tendered. As to the nature of the manslaughter, counsel said that "both accused returned to the scene of their successful previous theft ... that this time instead of sleeping through their entry to the bedroom [the victim] woke and then instead of [the accused] running she was attacked and strangled to death". He said: "The Crown is not in a position to prove murderous intent, but the Crown says that the acts of placing the hands around the neck and squeezing was without doubt a dangerous act". Strangulation, he said, was the cause of death. He submitted that "the circumstances of this offence are so serious that the sentencing process involves a very serious disposition and that even giving full weight to the prospects of rehabilitation, this matter must be dealt with as a very serious example of the crime of manslaughter". According to the transcript, he said that detention in a youth training centre was not an appropriate possibility because that could only occur if the sentences were for no more than three years, and such sentences would involve "a terrible error". The transcript is probably inaccurate; counsel, we were told, probably said "appellable error".

9 Counsel for the appellants then addressed. They emphasised the youth of their clients and other circumstances personal to the appellants upon which they called evidence in support of their submissions. They put arguments on the question of general and specific deterrence. Pre-sentence reports were tendered. Counsel for the prosecution then replied, addressing mainly the matter of deterrence. The proceedings were then adjourned.

10 Nothing was said by any counsel on 11 October 2001 about any matter relevant to the ground of appeal in this Court other than what is referred to above.

11 There was a further hearing on 25 February 2002 when the prosecution tendered evidence of certain conduct on the part of the appellants said to demonstrate lack of remorse. There was argument about the admissibility of the material. It is not relevant to the present appeal.

The sentences

12 On 3 April 2002, Bongiorno J sentenced each appellant to imprisonment for six years, and fixed four years as the period before the end of which the appellants were not to be eligible for parole. In his remarks on sentence, Bongiorno J said:

> "Your plea of guilty to manslaughter means that each of you has now admitted that you killed [the victim] by an unlawful act which was dangerous. My inability to discern any distinction in the role played by each of you with the necessary degree of satisfaction *in circumstances where there may or may not have been such a distinction* means that for sentencing purposes you must each be treated as bearing the culpability of no more than that of an aider and abettor, each of the other. It is on this basis that you will be sentenced." (emphasis added)

13 His Honour did not specifically refer to, or discuss the reasoning in, *Bannon and Calder*. However, he said that "current sentencing practices ... require that an aider and abettor should have imposed upon him or her a lesser penalty than that which would be imposed upon a principal offender".

The appeals to the Court of Appeal

14 The Director of Public Prosecutions appealed to the Court of Appeal against the sentence imposed on each accused. The sole ground of appeal in each

case was that the head sentence and non-parole period were manifestly inadequate. In his written submissions, the Director drew attention to the principles governing prosecution appeals stated in *R v Clarke*[4]. Those principles are not in dispute. They were set out in the reasons of the Court of Appeal. In developing the submission that the sentences were manifestly inadequate, the written submissions emphasised the objective gravity of the homicide, describing this (consistently with what had been put to Bongiorno J) as "a very serious example of the crime of manslaughter" and listing as aggravating features the advantage that was taken of knowledge gained from the handicapped son, the knowledge that the victim and her son lived alone, the element of home invasion at night, and the vicious nature of the attack, which involved sexual assault. The need for general deterrence was stressed. It was argued that the trial judge had given undue weight to the youth of the offenders, and to the question of rehabilitation. The need for specific deterrence was also raised, with reference to the lack of remorse of the offenders. The written submissions concluded as follows:

> "17. On 24 July 01 both the respondents were arraigned on one count of manslaughter. At that time the prosecutor indicated to his Honour that the respondents were to be sentenced as aiders and abettors as the Crown was not in a position to point to who was the principal offender. Reliance was placed on *R v Bannon and Calder* ...
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> 18. His Honour acknowledged that each of the respondents was to be sentenced as bearing the culpability of no more than that of an aider and abetter, each of the other ...
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> 19. When called upon to sentence for unlawful and dangerous act manslaughter, where no specific intent is alleged, the distinction between an aider and abetter and a principal is not as significant as it might be for crimes of specific intent. In a manslaughter of this type, little if any disparity between principal and aider and abettor was justified, it is, in effect, a distinction without a difference. In essence, the distinction was drawn as indicating no more that [sic] the Crown was unable to establish who had actually caused the death. His Honour fell into error by allowing too great a reduction in sentence on the basis of aiding and abetting."

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4 [1996] 2 VR 520.

15 It is par 19 that is fastened upon by the appellants for the purposes of their ground of appeal in this Court. It is, therefore, instructive to note how it was dealt with in the Court of Appeal.

16 The written submissions to the Court of Appeal filed on behalf of GAS did not specifically address par 19 of the Director's submissions. The written submissions filed on behalf of SJK responded to that paragraph as follows:

> "34. The Crown ... requested the learned sentencing judge to sentence the respondents '... in accordance with the judgment of the Court of Criminal Appeal in *R v Bannon and Calder*. Each of the accused falls to be sentenced as an aider and abettor, not a principal in the first degree.'
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> 35. In paragraph 19 of the Outline of Appellant's Submissions, it is submitted, in effect, that in a case of this kind the distinction between aider and abettor and principal is not as significant as it might be for crimes of specific intent. The learned sentencing judge is said to have fallen into error by allowing too great a reduction on the basis that the respondents were to be sentenced as aiders and abettors. That submission is not connected to authority.
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> 36. The basis on which the Respondents [sic] was referred to twice by the learned Crown Prosecutor during the proceedings (24 July 2001 at page 19 and 11 October 2001 at page 12). At no stage in the proceedings did the Crown submit to the learned sentencing judge that the distinction between aiders and abettors and a principal was a 'distinction without a difference'. It was implicit in the submissions of Mr Hicks SC (24 July 2001 at page 19) that there is a difference:
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> > '... the Crown is unable to say, and never would be able to say, in this case who killed [the victim]. Accordingly, the proper way for your Honour to sentence both accused, in circumstances such as this, is to place it *at the lowest common denominator*, that is, they were aiders and abettors, that is, the Crown cannot point to who was the principal offender' [added emphasis in appellant's submission].
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> 37. The Crown having relied on the judgment of the Court of Criminal Appeal in *R v Bannon and Calder*, it is to be noted that in the

course of … the part of the judgment dealing with sentence, the Court said[5]:

> 'We think that an aider and abettor in such circumstances should have imposed on him or her a lesser penalty than that imposed on the principal actor. Of course, if the role of each offender cannot be determined then it is proper that each receive the same punishment (assuming - as is this case - that there are no factors personal to the offender that require one to be dealt with differently from the other)'.

38. In his reasons for sentence, the learned sentencing judge … notes that by Statute [*Crimes Act* 1958 (Vic) s 323] the respondent is liable to be punished as a principal offender. He also states the regard he has had to 'current sentencing practices', which can be assumed to include the passage from *Bannon and Calder* (above), requiring that 'an aider and abettor … should have imposed upon him or her a lesser penalty than that which would be imposed upon a principal offender'. His Honour states that he has taken account of that principle in the sentence.

39. In our submission, no error is disclosed."

17 We were not taken to any transcript, affidavit or admission establishing that the matter was taken any further in oral argument. It is to be noted that the Director's argument about the significance of *Bannon and Calder*, and the response of SJK, were treated as going to the merits of the contention that the sentences imposed by Bongiorno J were manifestly inadequate. It was not put to the Court of Appeal that it was not entitled, or obliged, to deal with the argument. Nor was it submitted to the Court of Appeal that, even if it considered the sentences to be manifestly inadequate, or that Bongiorno J had fallen into specific error in relation to his understanding of *Bannon and Calder*, it should nevertheless dismiss the prosecution appeals in the exercise of its discretion. That possibility was not adverted to in the reasons of the Court of Appeal, because no such possibility was raised in argument. In the reasons of the Court of Appeal, as has been mentioned, the general principles relevant to prosecution appeals against sentence were stated, quoting from *R v Clarke*[6]. One of those

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5 *R v Bannon and Calder*, Victorian Court of Criminal Appeal, 21 September 1993 at 37.

6 [1996] 2 VR 520 at 522.

principles was stated as follows: "An appellate court has an over-riding discretion which may lead it to decline to intervene, even if it comes to the conclusion that error has been shown in the original sentencing process. In this connection, the conduct of the Crown at the original sentencing proceedings may be a matter of significance". The Court of Appeal was aware of the existence of the discretion, but it was not invited in argument to consider exercising it, and it made no further reference to the topic.

18 The Court of Appeal, for reasons explained in considerable detail, upheld all of the Director's submissions. The Court accepted that the sentences were manifestly inadequate, that insufficient weight had been given to the objective gravity of the killing and to the aggravating circumstances in which it occurred, and that undue weight had been given to the youth of the offenders and to what were regarded as their prospects of rehabilitation. Those were the substantial grounds upon which the Director's appeal was allowed and the re-sentencing proceeded.

Aiding and abetting manslaughter

19 The Court of Appeal was right to accept that this was an extremely serious case of manslaughter, occurring in circumstances of extreme aggravation. It was common ground that the appellants were to be sentenced on the basis that the manslaughter involved killing by an unlawful and dangerous act, and that the relevant act was that of strangulation. The circumstances in which that act occurred involved home invasion, robbery, and a brutal assault on an elderly and vulnerable victim. By their pleas of guilty, expressed to be upon the basis that each admitted only to aiding and abetting, each appellant, although denying that he himself strangled the victim, admitted to being present at the act causing the death of the victim, and to providing intentional assistance or encouragement to the strangler. In *Giorgianni v The Queen*[7], Wilson, Deane and Dawson JJ, in a case concerning the elements of aiding and abetting manslaughter, said:

> "There are ... offences in which it is not possible to speak of recklessness as constituting a sufficient intent. Attempt is one and conspiracy is another. And we think the offences of aiding and abetting and counselling and procuring are others. *Those offences require intentional participation in a crime by lending assistance or encouragement.* ... The necessary intent is absent if the person alleged to be a secondary participant does not

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7 (1985) 156 CLR 473 at 506.

know or believe that what he is assisting or encouraging is something which goes to make up the facts which constitute the commission of the relevant criminal offence. He need not recognize the criminal offence as such, but his participation must be intentionally aimed at the commission of the acts which constitute it." (emphasis added)

20 There was, no doubt, an element of artificiality involved in sentencing each appellant on the basis that he aided and abetted the killer, in circumstances where one or the other must have been the killer. That, however, was the necessary consequence of the prosecution's decision to charge each appellant only with manslaughter in a situation where it could not prove that either of the two offenders strangled the victim, and neither admitted that he did it. But that to which each appellant was willing to admit was a very serious offence. Nowhere in his remarks on sentence did Bongiorno J spell out in detail the effect of the admissions necessarily involved in the pleas of guilty, in the circumstances of this case. When those admissions are examined in the light of what was said in *Giorgianni*, and attention is given to the nature of the unlawful and dangerous act causing death (strangulation), an act which occurred in the context of extremely aggravating circumstances, then it can be seen that the Court of Appeal was right to conclude that the sentences imposed at first instance were manifestly inadequate, and was justified in increasing the sentences as it did.

The decision in *Bannon and Calder*

21 The argument put in pars 17 to 19 of the Director's written submissions, and answered in pars 34 to 39 of the written submission filed on behalf of SJK, was dealt with by the Court of Appeal, but it was not central to its reasons for allowing the appeal. Those reasons were as stated above. Two of the members of the Court of Appeal in the present case had been parties to the judgment in *Bannon and Calder*. The Court of Appeal rejected the contention that *Bannon and Calder* stands for any principle that could justify the leniency of the sentences imposed by Bongiorno J. They were right to do so.

22 What *Bannon and Calder* had in common with the present case was that two people were convicted of unlawful homicide (there, murder), in circumstances where the evidence did not establish which of them killed the victims. Unlike the present appellants, they were both sentenced to the maximum term of imprisonment (life). The Court of Criminal Appeal said[8]:

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8 *R v Bannon and Calder*, Victorian Court of Criminal Appeal, 21 September 1993 at 36-37.

> "Nevertheless [the sentencing judge's] very inability to discern any distinction in the role played by each of the applicants in a case where admittedly there was a distinction must mean that for sentencing purposes each applicant had to be treated as bearing the culpability of no more than that of an aider and abettor. This proposition rests upon the premise, *which we think in the circumstances of this case to be correct*, that such culpability is less than that which would attach to a principal actor. But the judge manifestly did not so sentence the applicants since he imposed on both the maximum possible penalty, namely that of life imprisonment.
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> On a view which the judge in effect said was open to be taken, one of the offenders with little or no cause for so doing gained possession of a knife and launched a homicidal attack ...
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> We think that an aider and abettor *in such circumstances* should have imposed upon him or her a lesser penalty than that imposed upon the principal actor ... One had to get less than life imprisonment. It cannot be said which offender. Therefore both must receive such a lesser sentence." (emphasis added)

23 Insofar as *Bannon and Calder* held that each of the present appellants was to be sentenced as an aider and abettor, that (subject to relevantly different subjective considerations) each should be given the same sentence, and that such sentence should be less than the maximum (here 20 years), it was not inconsistent with what was done either by Bongiorno J or by the Court of Appeal. However, as the Court of Appeal pointed out in the present case, it is not a universal principle that the culpability of an aider and abettor is less than that of a principal offender, and *Bannon and Calder* did not decide otherwise. A manipulative or dominant aider and abettor may be more culpable than a principal. And even when aiders and abettors are less culpable, the degree of difference will depend upon the circumstances of the particular case. The Court of Appeal said:

> "The combination of the two propositions, first that each of the offenders had to be sentenced as an aider and abettor and second, that accordingly a lesser penalty was attracted, put to the sentencing judge by the prosecutor may well have influenced his view as to the proper sentences to be imposed in the present case. Before this Court [counsel for the Director] did not attempt to support or justify the application of either of the two propositions."

24 What counsel for the Director put to the Court of Appeal is set out in pars 17 to 19 of the Director's written submissions quoted above.

25 The reference to "a lesser penalty" raises an obvious question: less than what, and by what margin? In *Bannon and Calder* the answer to the first part of the question was: less than the maximum. Here, both appellants were sentenced to much less than the maximum term of imprisonment, and speculation as to what either would have received had he been the principal offender is hardly fruitful. Having regard to the objective circumstances of the manslaughter, and the aiding and abetting, in the present case, the margin of difference could properly be regarded as relatively small. But the real question for the Court of Appeal, as the Court recognized, was the adequacy of the sentences that were imposed on the basis that the appellants were aiders and abettors. Speculation as to what one of them would have received as a principal offender was of marginal significance. In that respect, the Court of Appeal said:

> "It is likely, we think, that the learned judge gave too little weight to the gravity of the offences and too much weight to the aspect of rehabilitation of the youthful respondents."

26 The Court of Appeal's reference to two propositions having been put to the sentencing judge, the second being that "a lesser penalty was attracted" by reason of the offenders having to be sentenced as aiders and abettors is not based on any express submission that was made by counsel for the prosecution, either on 24 July 2001 or on 11 October 2001. The transcripts of those occasions record no such submission. And what was claimed in par 36 of the written submissions filed on behalf of SJK in the Court of Appeal was that the proposition was implicit in the submissions made on 24 July 2001. There was no suggestion that the proposition was either expressed or implied in the submissions of counsel for the prosecution on 11 October 2001, when Bongiorno J was urged to treat the case as "a very serious example of the crime of manslaughter". Nor was it claimed, either before Bongiorno J or before the Court of Appeal, that there was some agreement which precluded the prosecution from making the submissions of law advanced in either forum.

Principles affecting plea agreements

27 It is in those circumstances that it is now argued that what was done by the prosecution, in the conduct of the appeal to the Court of Appeal, and by the Court of Appeal, was contrary to "the plea agreement reached with the defendants at trial". The only information about any suggested agreement is that which is set out above. In order to understand what might be involved in the concept of

agreement, in those circumstances, it is necessary to have regard to certain fundamental principles.

28 First, it is the prosecutor, alone, who has the responsibility of deciding the charges to be preferred against an accused person[9]. The judge has no role to play in that decision. There is no suggestion, in the present case, that the judge was in any way a party to the "plea agreement" referred to. The appellants, through their counsel, evidently indicated to the prosecutor that, if a charge of manslaughter were to be substituted for the charge of murder, they would plead guilty, and the prosecutor filed a new presentment on that understanding. However, the charging of the appellants was a matter for the prosecutor.

29 Secondly, it is the accused person, alone, who must decide whether to plead guilty to the charge preferred. That decision must be made freely and, in this case, it was made with the benefit of legal advice. Once again, the judge is not, and in this case was not, involved in the decision. Such a decision is not made with any foreknowledge of the sentence that will be imposed. No doubt it will often be made in the light of professional advice as to what might reasonably be expected to happen, but that advice is the responsibility of the accused's legal representatives.

30 Thirdly, it is for the sentencing judge, alone, to decide the sentence to be imposed[10]. For that purpose, the judge must find the relevant facts[11]. In the case of a plea of guilty, any facts beyond what is necessarily involved as an element of the offence must be proved by evidence, or admitted formally (as in an agreed statement of facts), or informally (as occurred in the present case by a statement of facts from the bar table which was not contradicted). There may be significant limitations as to a judge's capacity to find potentially relevant facts in a given case[12]. The present appeal provides an example. The limitation arose from the absence of evidence as to who killed the victim, and the absence of any admission from either appellant that his involvement was more than that of an aider and abettor.

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9 *Barton v The Queen* (1980) 147 CLR 75 at 94-95; *Maxwell v The Queen* (1996) 184 CLR 501 at 534; *Cheung v The Queen* (2001) 209 CLR 1 at 22 [47].

10 *R v Olbrich* (1999) 199 CLR 270.

11 *Cheung v The Queen* (2001) 209 CLR 1 at 9-11 [4]-[10].

12 *R v Olbrich* (1999) 199 CLR 270 at 278 [15].

31 Fourthly, as a corollary to the third principle, there may be an understanding, between the prosecution and the defence, as to evidence that will be led, or admissions that will be made, but that does not bind the judge, except in the practical sense that the judge's capacity to find facts will be affected by the evidence and the admissions. In deciding the sentence, the judge must apply to the facts as found the relevant law and sentencing principles. It is for the judge, assisted by the submissions of counsel, to decide and apply the law. There may be an understanding between counsel as to the submissions of law that they will make, but that does not bind the judge in any sense. The judge's responsibility to find and apply the law is not circumscribed by the conduct of counsel.

32 Fifthly, an erroneous submission of law may lead a judge into error and, if that occurs, the usual means of correcting the error is through the appeal process. It is the responsibility of the appeal court to apply the law. If a sentencing judge has been led into error by an erroneous legal submission by counsel, that may be a matter to be taken into account in the application of the statutory provisions and principles which govern the exercise of the appeal court's jurisdiction.

33 The "plea agreement" alleged in the ground of appeal of each appellant in this Court was particularised as follows:

(a) that each appellant would plead guilty to manslaughter by an unlawful and dangerous act;

(b) that as the evidence did not permit the role of each appellant to be determined

(i) each appellant was to be sentenced at "the lowest common denominator" as an aider and abettor; and

(ii) accordingly, each appellant should receive a lesser sentence than a principal (which was said to accord with *Bannon and Calder*);

(c) neither of the appellants would attribute blame to the other; and

(d) neither appellant would submit that a youth training centre sentence was appropriate.

34 Nothing that occurred before Bongiorno J or the Court of Appeal was inconsistent with any aspect of that "agreement" (understood in the light of the

fundamental principles stated above) except for what is said to have occurred in relation to (b)(ii). What actually occurred in that respect is set out above.

35 The subject matter of (b)(ii) is a question of sentencing principle. It was not within the capacity of the parties to agree that each accused would receive a lesser sentence than a principal, whatever exactly that might mean. And what exactly it means is far from clear. At the most, if there were an agreement of the kind asserted, it would be a common understanding as to a submission of law that would be made to the sentencing judge. Moreover, it was a submission about the effect of a decision of the Court of Criminal Appeal which the judge would have to read and interpret for himself.

36 The information available to this Court as to (b)(ii) has already been stated. It discloses no agreement of the kind alleged. As appears from the written submissions filed on behalf of SJK in the Court of Appeal, what was claimed was that it was "implicit in the submissions" of counsel for the prosecution on 24 July 2001 that there was necessarily a difference (of some unspecified degree) between what each accused should receive by way of sentence as an aider and abettor and the sentence he would receive if he had been a principal offender. The implication is said to arise from the reference by counsel on 24 July 2001 to *Bannon and Calder*. The substantive submissions on sentence were made on 11 October 2001. On that day, counsel for the prosecution, as has earlier been noted, submitted that the accused fell to be sentenced in accordance with *Bannon and Calder*, that is to say, as aiders and abettors, not as principals in the first degree. The prosecution has never resiled from the submission. The argument is as to what follows from it in the circumstances of this case.

37 The substance of the complaint is that what was submitted to the Court of Appeal differed in a material respect from what was implicit in what was said on 24 July 2001. The written submissions to the Court of Appeal have already been set out. The complaint to this Court is that what was expressly submitted to the Court of Appeal on behalf of the Director on a matter of law is different from what was impliedly submitted to Bongiorno J on the same matter of law. The relevant matter is the significance which a sentencing judge, in the exercise of his or her discretion, is either entitled or bound to attach to the fact that an offender is an aider and abettor, not a principal in the first degree. The Court of Appeal said two things about that. First, the significance depends on the facts and circumstances of the particular case, and, although as a generalization it may be correct to say that aiders and abettors are less culpable than principal offenders, that is not an absolute rule, and even where there is a difference, it may not be substantial. Secondly, in the facts and circumstances of the present case, the

difference was not sufficiently substantial to explain or justify the sentences that had been imposed at first instance.

38 The matter was argued and decided in the Court of Appeal by addressing the merits of the proposition that, as aiders and abettors, the culpability of the appellants was of a relatively low order; low enough to explain the sentences that were imposed. That argument was considered and rejected by the Court of Appeal. No error in the reasoning of the Court of Appeal in that respect has been shown. The Court of Appeal concluded that the basic error made by Bongiorno J was that he gave too little weight to the objective circumstances of the killing, and too much weight to the subjective circumstances of the offenders.

The agreement relied upon by the appellants

39 The particular aspect of the alleged "plea agreement" upon which the appellants now found their argument related to a matter of law and sentencing principle, and was inherently vague and uncertain. It was an inappropriate subject for any kind of agreement between counsel. It related, in substance, to the significance for a sentencing judge's discretion of a circumstance that varies in importance from case to case. The significance was said to follow from some rather circumscribed judicial remarks in a decision of the Court of Criminal Appeal which the sentencing judge was obliged to consider and interpret for himself.

40 If the appellants had any legitimate complaint about what occurred, and we do not consider that they did, the appropriate way to ventilate that complaint was to submit to the Court of Appeal that, in accordance with one of the principles stated in *R v Clarke* (and recognized in this Court by McHugh J in *Everett v The Queen*[13]), the Court should exercise a discretion to dismiss the appeal on the ground that the prosecution led the sentencing judge into a material and decisive error. It is not necessary for present purposes to examine the precise ambit of such a discretion, for two reasons. First, no such submission was made. If such a submission had been made, it may have been necessary to take evidence about the terms of the agreement from which counsel for the prosecution were said to have departed. The matter could hardly have been left in the vague condition reflected in what appears above. Secondly, consistently with the way the Court of Appeal decided the case, such an argument would not have succeeded. The Court of Appeal held that the manifest inadequacy of the

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13 (1994) 181 CLR 295 at 307.

sentences resulted from a failure to give sufficient weight to the objective circumstances, and an over-emphasis of the subjective circumstances. It was not some implied submission by counsel, on 24 July 2001, about the effect of *Bannon and Calder*, that accounted for the sentencing judge's error. It was his failure to appreciate, and give sufficient weight to, exactly what the appellants were admitting, in the circumstances of the case, by their pleas of guilty.

41 If, as the appellants submitted, there was an agreement that the prosecutor would submit to Bongiorno J that *Bannon and Calder* required a particular kind of outcome, it was not suggested that the prosecutor's submissions to Bongiorno J departed from what had been agreed. Further, if there was an agreement of the kind alleged and, contrary to what is said above, it was an agreement to which some definite operation could be given as between the parties to it, neither its making nor its substance precluded the Director from appealing against the sentences imposed on the appellants on the ground that those sentences were manifestly inadequate. If, as the appellants submitted, the Director's submissions on the appeal to the Court of Appeal departed in some respect from what was agreed (and for the reasons given earlier that premise was not established) that departure did not affect the outcome of the Director's appeal to the Court of Appeal.

General observations

42 It is as well to add some general observations about the way in which the dealings between counsel for the prosecution and counsel for an accused person, on subjects which may later be said to have been relevant to the decision of the accused to plead guilty, should be recorded. In most cases it will be desirable to reduce to writing any agreement that is reached in such discussions. Sometimes, if there is a transcript of argument, it will be sufficient if an agreed statement is made in court and recorded in the transcript as an agreed statement of the position reached. In most cases, however, it will be better to record the agreement in writing and ensure that both prosecution and defence have a copy of that writing before it is acted upon. There may be cases where neither of these courses will be desirable, or, perhaps, possible, but it is to be expected that they would be rare.

43 Although the recording of the agreement is most obviously necessary in cases where some agreement is reached about matters of fact that will be put to the court as agreed facts or circumstances bearing upon questions of sentence, the desirability of recording what is agreed is not confined to those cases. It extends to every substantial matter that is agreed between the parties on subjects which

may later be said to have been relevant to the decision of an accused person to plead guilty.

44 Recording what is agreed, in an agreed form of words, should reduce the scope for misunderstanding what is to be, or has been, agreed. It should serve to focus the minds of counsel, and the parties, upon the application of the three fundamental principles which are set out earlier in these reasons and describe the respective responsibilities of the prosecutor, the accused person and the sentencing judge. Most importantly, it enables counsel for both sides to be clear about the instructions to be obtained from their respective clients and the matters about which, and basis on which, counsel should tender advice to their respective clients. There should then be far less room for subsequent debate about the basis on which an accused person chose to enter a plea of guilty.

Orders

45 The appeals should be dismissed.