HIGH COURT OF AUSTRALIA

FRENCH CJ,
CRENNAN, KIEFEL, BELL AND GAGELER JJ

BRIAN WILLIAM ACHURCH APPELLANT

AND

THE QUEEN RESPONDENT

Achurch v The Queen
[2014] HCA 10
2 April 2014
S276/2013

ORDER

Appeal dismissed.

On appeal from the Supreme Court of New South Wales

Representation

T A Game SC with G A Bashir for the appellant (instructed by Catherine Hunter Solicitor)

L A Babb SC with S C Dowling SC for the respondent (instructed by Solicitor for Public Prosecutions (NSW))

Notice: This copy of the Court's Reasons for Judgment is subject to formal revision prior to publication in the Commonwealth Law Reports.

CATCHWORDS

Achurch v The Queen

Criminal law – Sentence – Appellant convicted of drug crimes and sentenced – Crown successfully appealed against sentences – Court of Criminal Appeal applied reasoning held to be erroneous in *Muldrock v The Queen* (2011) 244 CLR 120 in re-sentencing appellant – Appellant applied under s 43 of *Crimes (Sentencing Procedure) Act* 1999 (NSW) for re-sentencing proceedings to be re-opened – Court of Criminal Appeal dismissed application – Where sentences imposed by re-sentencing court open at law – Whether sentences imposed "contrary to law".

Words and phrases – "contrary to law", "principle of finality".

Crimes (Sentencing Procedure) Act 1999 (NSW), ss 43(1), 43(2).

FRENCH CJ, CRENNAN, KIEFEL AND BELL JJ.

Introduction

1 On 24 June 2008 the appellant was convicted after trial by a judge and jury in the District Court of New South Wales of three counts of supplying prohibited drugs contrary to s 25 of the *Drug Misuse and Trafficking Act* 1985 (NSW) ("the Drug Act"). The counts on which he was convicted[1] alleged respectively that he supplied a prohibited drug, 3,4-methylenedioxymethylamphetamine ("MDMA")[2] (count 1), that he supplied an amount not less than the commercial quantity[3] of MDMA (count 2) and that he supplied an amount not less than the large commercial quantity[4] of methylamphetamine (count 4).

2 The appellant was sentenced to a total of 14 years imprisonment, backdated to 16 August 2006, with a non-parole period of six years expiring on 15 August 2012. A Crown appeal to the New South Wales Court of Criminal Appeal against the inadequacy of the sentences, individually and collectively, was allowed on 16 August 2011[5]. The Court of Criminal Appeal re-sentenced the appellant. The offences alleged in counts 2 and 4 were offences for which standard non-parole periods were prescribed in the Table to Div 1A of Pt 4 of the *Crimes (Sentencing Procedure) Act* 1999 (NSW) ("the Sentencing Act"). In re-sentencing the appellant and fixing non-parole periods, the Court applied an approach developed in its earlier decisions which was subsequently held by this Court in *Muldrock v The Queen*[6] to have been incorrect. It is not in dispute that, in the light of *Muldrock*, the Court erred by focusing upon the objective seriousness of the offence and then considering factors justifying a departure from the standard non-parole period.

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1 The appellant was acquitted on count 3 on the indictment.

2 The amount supplied was 108.7 grams.

3 The amount supplied was 270 grams. A commercial quantity is defined under s 3(1) of the Drug Act read with Sched 1 col 4 as 125 grams.

4 The amount supplied was 2.6 kilograms. A large commercial quantity is defined under s 33(4) of the Drug Act read with Sched 1 col 5 as 1 kilogram.

5 *R v Achurch* (2011) 216 A Crim R 152.

6 (2011) 244 CLR 120; [2011] HCA 39.

3 This Court's judgment in *Muldrock* was delivered on 5 October 2011, seven weeks after the decision of the Court of Criminal Appeal. The appellant applied to the Court of Criminal Appeal on 22 March 2012 to re-open the proceedings on the Crown appeal. He invoked ss 43(1)(a) and 43(2) of the Sentencing Act, whereby a court may re-open criminal proceedings, including proceedings on appeal, in which the court has "imposed a penalty that is contrary to law". The Court of Criminal Appeal, sitting a bench of five, dismissed the application on 22 May 2013[7] on the basis that s 43 did not apply to errors of reasoning of the kind relied upon by the appellant when the penalty was one which could have been imposed in the proper exercise of the Court's discretion. The appellant has appealed against that decision to this Court pursuant to a grant of special leave made on 8 November 2013[8].

4 For the reasons that follow, we are of the opinion that s 43 of the Sentencing Act does not authorise the re-opening of proceedings in which a sentence open at law was reached by a process of reasoning involving an error of law.

The statutory framework

5 The decisions taken by the sentencing judge and the Court of Criminal Appeal must be understood in the light of the statutory framework governing the penalties for the offences of which the appellant was convicted. Count 1 on the indictment alleged the offence of supply of a prohibited drug contrary to s 25(1) of the Drug Act. The penalty for such an offence is a fine or imprisonment for a term of 15 years, or both[9]. If the supply is of not less than the commercial quantity of a prohibited drug contrary to s 25(2) of the Drug Act, as alleged in count 2, the penalty under the Drug Act is a fine or 20 years imprisonment, or both[10]. The penalty for supply of the large commercial quantity of a prohibited drug contrary to s 25(2) of the Drug Act, alleged in count 4, is a fine or imprisonment for life, or both[11].

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7 *Achurch v The Queen (No 2)* [2013] NSWCCA 117.

8 [2013] HCATrans 278 (French CJ and Hayne J).

9 Drug Act, s 32(1)(c) and (g).

10 Drug Act, s 33(1)(a) and (2)(a).

11 Drug Act, s 33(1)(a) and (3)(a).

6 Part 4 of the Sentencing Act deals with sentencing procedures for imprisonment. A court sentencing an offender to imprisonment for an offence is first required, by s 44(1), to set a non-parole period for the sentence, being the minimum term for which the offender must be kept in detention in relation to the offence. Division 1A of Pt 4 provides for standard non-parole periods for certain offences. It is unnecessary to repeat the analysis of its provisions set out in *Muldrock*[12]. The standard non-parole periods specified for the offences in counts 2 and 4 of supplying a commercial quantity of a prohibited drug and supplying a large commercial quantity of a prohibited drug were 10 years and 15 years respectively[13].

7 In *Muldrock*, this Court identified as the correct approach to sentencing for offences for which standard non-parole periods are specified in Div 1A[14] that enunciated for sentencing generally by McHugh J in *Markarian v The Queen*[15]:

> "[T]he judge identifies all the factors that are relevant to the sentence, discusses their significance and then makes a value judgment as to what is the appropriate sentence given all the factors of the case."

In sentencing for offences specified under Div 1A, the sentencing court is required to have regard to two legislative guideposts — the maximum penalty and the standard non-parole period[16]. This Court eschewed a two-stage approach which had been apparent in decisions of the Court of Criminal Appeal after *R v Way*[17], observing that nothing in Div 1A[18]:

> "requires or permits the court to engage in a two-stage approach to the sentencing of offenders for Div 1A offences, commencing with an assessment of whether the offence falls within the middle range of

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12 (2011) 244 CLR 120 at 126–133 [12]–[32].

13 Sentencing Act, Table to Div 1A of Pt 4, items 18 and 19.

14 (2011) 244 CLR 120 at 131–132 [26].

15 (2005) 228 CLR 357 at 378 [51]; [2005] HCA 25.

16 (2011) 244 CLR 120 at 132 [27].

17 (2004) 60 NSWLR 168.

18 (2011) 244 CLR 120 at 132 [28].

objective seriousness by comparison with an hypothesised offence answering that description and, in the event that it does, by inquiring if there are matters justifying a longer or shorter period."

The reasoning of the Court of Criminal Appeal in re-sentencing the appellant in the present case was inconsistent with *Muldrock*. The reasoning is briefly summarised below. It is necessary first to set out the sentences imposed by the sentencing judge in respect of each of the three counts and by the Court of Criminal Appeal.

Sentencing at first instance

8 The appellant was first sentenced on 6 August 2010. The delay between conviction and sentence resulted from defence applications to allow evidence to be obtained concerning the appellant's medical conditions and their management in custody[19]. The total sentence imposed upon him by the sentencing judge, Woods DCJ, was 14 years imprisonment commencing 16 August 2006, with a non-parole period of six years expiring 15 August 2012. The individual sentences for each count were as follows:

Count 1 A term of imprisonment of two years and three months was imposed to date from 16 August 2006 and to expire on 15 November 2008. A non-parole period was not fixed because the sentence had already been served.

Count 2 A term of imprisonment of four years was imposed to date from 16 August 2006 and to expire on 15 August 2010. A non-parole period of four years was set but no balance term was specified. The sentencing judge held that the "offence [was] significantly less substantial in terms of culpability than a mid-range offence for such an offence."

Count 4 A non-parole period of five years was fixed commencing on 16 August 2007 and expiring on 15 August 2012, with a balance term of eight years to commence upon expiration of the non-parole period and expire on 15 August 2020. The total sentence of imprisonment on count 4 was, therefore, 13 years comprising the non-parole period and the balance of the sentence. The sentencing judge did not treat the offence as in the middle range of objective seriousness "because the offence was 'nipped in the bud' and

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19 (2011) 216 A Crim R 152 at 157 [23].

nothing in effect came of it." The drugs had been found in a police search of a premises previously occupied by the appellant.

Re-sentencing on appeal

9 On 16 August 2011, the Court of Criminal Appeal (Macfarlan JA, Johnson and Garling JJ) allowed the Crown appeal. The sentences imposed on the appellant were quashed. In their place the following sentences were imposed:

Count 1 — Imprisonment for two years and three months, commencing on 16 August 2006 and expiring on 15 November 2008.

Count 2 — A non-parole period of six years, commencing on 16 August 2007 and expiring on 15 August 2013, with a balance term of two years, commencing on 16 August 2013 and expiring on 15 August 2015.

Count 4 — A sentence of imprisonment by way of a non-parole period of 11 years, commencing on 16 August 2008 and expiring on 15 August 2019, with a balance term of five years, commencing on 16 August 2019 and expiring on 15 August 2024.

The Court also ordered that the appellant would be eligible for release on parole on 16 August 2019.

The re-sentencing reasons

10 The principal judgment of the Court of Criminal Appeal on the Crown appeal was written by Johnson J, with whom Macfarlan JA and Garling J agreed. Garling J wrote a separate judgment adding some observations in relation to count 4. The Court held that although the sentencing judge had been in error in failing to address the objective gravity of the offence under count 1, the sentence imposed on that count was not manifestly inadequate[20]. With respect to counts 2 and 4, the Court held that the sentencing judge had erred in various ways, including a failure to resolve the question whether the offence under count 4 fell below the mid-range of objective seriousness[21]. The sentences imposed on counts 2 and 4 were held to be manifestly inadequate[22].

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20 (2011) 216 A Crim R 152 at 162–163 [59], 174 [154].

21 (2011) 216 A Crim R 152 at 165 [84].

22 (2011) 216 A Crim R 152 at 174 [155], 175 [157].

11 Johnson J observed that as the appellant had been convicted after trial, the standard non-parole periods of 10 and 15 years with respect to counts 2 and 4 respectively had direct application by force of statute and not merely as a guidepost on sentence following a plea of guilty[23]. His Honour referred to *Way*. He continued[24]:

> "When sentencing for offences for which Parliament has provided a standard non-parole period, it is necessary for Judges to specify where the offences lie on the range of objective seriousness for those crimes." (citations omitted)

The sentencing judge, it was said, had imposed non-parole periods for counts 2 and 4 which were very significantly below the standard non-parole period for each offence[25]. As was acknowledged by the Court of Criminal Appeal on the application to re-open the Crown appeal, the Court in re-sentencing had applied an approach which was disapproved in *Muldrock*[26].

12 The new sentences imposed on the appellant by the Court of Criminal Appeal in allowing the Crown appeal were explained in two succinct paragraphs in the judgment of Johnson J[27]:

> "165. In my view, having regard to the objective seriousness of the second offence and after taking into account the [appellant's] subjective circumstances, a non-parole period of six years ought be imposed for this offence. As the [appellant's] medical condition has been taken into account in the determination of sentence, it is not appropriate to double count that factor in his favour by way of a finding of 'special circumstances' under s 44(2) *Crimes (Sentencing Procedure) Act*: *R v Way* at [185]. Accordingly, for this offence, the appropriate sentence is one of a non-parole period of six years with a balance of term of two years.

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23 (2011) 216 A Crim R 152 at 164 [76].

24 (2011) 216 A Crim R 152 at 165 [77]. His Honour cited *R v Sellars* [2010] NSWCCA 133 at [12] and *R v McEvoy* [2010] NSWCCA 110 at [87].

25 (2011) 216 A Crim R 152 at 165 [78].

26 [2013] NSWCCA 117 at [70].

27 (2011) 216 A Crim R 152 at 176 [165]–[166].

> 166. In my view, the fourth count may be properly characterised as lying in the middle of the range of objective seriousness. The [appellant] is entitled to have his subjective factors, principally his medical condition, taken into account to mitigate penalty. In my view, a non-parole period of 12 years is appropriate for this offence. Once again, the [appellant] is not entitled to have his medical condition double counted in his favour by way of a finding of 'special circumstances'. For this offence, I would impose a non-parole period of 12 years with a balance of term of four years."

His Honour went on to find "special circumstances" on count 4 arising from a process of accumulation and the application of the totality principle[28]. The non-parole period on that count was therefore fixed at 11 years, with a balance term of five years. The total effective non-parole period would be 13 years, with an effective balance term of five years[29].

Statutory framework — re-opening proceedings

13 Section 43 of the Sentencing Act, the construction of which is in issue in this appeal, appears in Div 5 of Pt 3 of the Act. Division 5 is entitled "Correction and adjustment of sentences". Section 43 relevantly provides:

> "(1) This section applies to criminal proceedings (including proceedings on appeal) in which a court has:
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> (a) imposed a penalty that is contrary to law, or
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> (b) failed to impose a penalty that is required to be imposed by law,
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> and so applies whether or not a person has been convicted of an offence in those proceedings.
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> (2) The court may reopen the proceedings (either on its own initiative or on the application of a party to the proceedings) and, after giving the parties an opportunity to be heard:
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> (a) may impose a penalty that is in accordance with the law, and

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28 (2011) 216 A Crim R 152 at 176–177 [170].

29 (2011) 216 A Crim R 152 at 177 [171].

(b) if necessary, may amend any relevant conviction or order.

…

(4) Subject to subsection (5), nothing in this section affects any right of appeal.

(5) For the purposes of an appeal under any Act against a penalty imposed in the exercise of a power conferred by this section, the time within which such an appeal must be made commences on the date on which the penalty is so imposed."

14 Absent specific statutory authority, the power of courts to re-open their proceedings and to vary their orders is constrained by the principle of finality. That principle was stated succinctly in *D'Orta-Ekenaike v Victoria Legal Aid*[30] and re-stated by the plurality in *Burrell v The Queen*[31]:

> "A central and pervading tenet of the judicial system is that controversies, once resolved, are not to be reopened except in a few, narrowly defined, circumstances."

15 As was said in *Burrell*, the principal qualification to the general tenet of finality is the appellate system[32]. Relevant to the position of the Court of Criminal Appeal of New South Wales, their Honours said[33]:

> "But in courts other than the court of final resort, the tenet also finds reflection in the restrictions upon reopening of final orders after they have been formally recorded."

The principle protects parties to litigation from attempts to re-agitate what has been decided and serves as "the sharpest spur to all participants in the judicial process, judges, parties and lawyers alike, to get it right the first time."[34]

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30 (2005) 223 CLR 1 at 17 [34]; [2005] HCA 12.

31 (2008) 238 CLR 218 at 223 [15]; [2008] HCA 34.

32 (2008) 238 CLR 218 at 223 [15].

33 (2008) 238 CLR 218 at 223 [15].

34 (2008) 238 CLR 218 at 223 [16].

16 The principle of finality forms part of the common law background against which any statutory provision conferring power upon a court to re-open concluded proceedings is to be considered. It is a principle which may inform the construction of the provision. In the present case, it is a principle which informs the limit of the purpose for which s 43 and its precursors were enacted, that limit being that the section was not to provide a substitute for the appellate system. Insofar as s 43 applies to courts of first instance exercising original jurisdiction, the limit also maintains the well-established distinction between appellate and original jurisdiction. A statute conferring original jurisdiction is not lightly to be construed as undermining that distinction[35].

17 Consistently with the principle of finality, courts may correct their errors before their orders are formally recorded. As was said in the joint judgment in *Smith v New South Wales Bar Association*[36]:

> "It has long been the common law that a court may review, correct or alter its judgment at any time until its order has been perfected ... The power is discretionary and, although it exists up until the entry of judgment, it is one that is exercised having regard to the public interest in maintaining the finality of litigation." (footnotes omitted)

The power is inherent in superior courts. Similar powers may be implied in statutory courts, including inferior courts, and may be reflected or extended by express statutory provisions or rules of court[37]. Subject to express provision to the contrary, the power subsists up to but not beyond the point at which judgment is entered. As Barwick CJ observed in *Bailey v Marinoff*[38]:

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35 *Lacey v Attorney-General (Qld)* (2011) 242 CLR 573 at 594 [51]; [2011] HCA 10.

36 (1992) 176 CLR 256 at 265 per Brennan, Dawson, Toohey and Gaudron JJ; [1992] HCA 36.

37 Generally as to implied powers see *Grassby v The Queen* (1989) 168 CLR 1 at 15–17 per Dawson J; [1989] HCA 45; *Pelechowski v Registrar, Court of Appeal (NSW)* (1999) 198 CLR 435 at 450–452 [47]–[54] per Gaudron, Gummow and Callinan JJ; [1999] HCA 19; *DJL v Central Authority* (2000) 201 CLR 226 at 240–241 [25] per Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ; [2000] HCA 17.

38 (1971) 125 CLR 529 at 530; [1971] HCA 49.

> "Once an order disposing of a proceeding has been perfected by being drawn up as the record of a court, that proceeding apart from any specific and relevant statutory provision is at an end in that court and is in its substance … beyond recall by that court."

The rationale for the limiting requirement, that the order to be corrected has not been perfected, is that it provides "a readily ascertainable and easily applied criterion."[39] It also "marks the end of the litigation in that court, and provides conclusive certainty about what was the end result in that court."[40]

18 The slip rule as an aspect of the inherent or implied powers[41] allows for limited correction of an order after its final entry, as was explained in *Burrell*[42]:

> "The power to correct the record so that it truly does represent what the court pronounced or intended to pronounce as its order provides no substantial qualification to that rule. The power to correct an error arising from accidental slip or omission, whether under a specific rule of court or otherwise, directs attention to what the court whose record is to be corrected did or intended to do. It does not permit reconsideration, let alone alteration, of the substance of the result that was reached and recorded." (footnote omitted)

The power conferred under the slip rule "is one to be exercised sparingly, lest it encourage carelessness by a party's legal representatives and expose to risk the public interest in finality of litigation."[43]

19 Section 43 and its precursors provided a conditional statutory power to correct penalties beyond the limits of the inherent and implied powers of courts and of the slip rule.

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39 *Burrell v The Queen* (2008) 238 CLR 218 at 224 [20].

40 *Burrell v The Queen* (2008) 238 CLR 218 at 224 [20].

41 Express provision may be made by statute or rule in relation to the correction of errors of the kind covered by the slip rule.

42 (2008) 238 CLR 218 at 224–225 [21].

43 *Gould v Vaggelas* (1985) 157 CLR 215 at 275; [1985] HCA 75.

20 The earliest precursor of s 43 in New South Wales was s 100HA of the *Justices Act* 1902 (NSW), enacted with effect from 1 January 1987. It conferred on magistrates the power to re-open the hearing of a criminal matter following the imposition of a penalty contrary to law. It was described in the Attorney-General's Second Reading Speech in the Legislative Assembly as similar to provisions then existing in Tasmania, Western Australia and Queensland[44]. The provision could not be used to revise a sentence[45]:

> "It will only allow the magistrate to correct a sentence which is patently in error."

It was necessary "because on occasions magistrates [were] handing down sentences which they [did] not have the power to impose."[46] The Minister representing the Attorney-General in the Legislative Council said of the proposed s 100HA[47]:

> "I emphasize again that the power given by this bill cannot be used as a general power of review or as an appeal process. The power to reopen exists only where there has been a patent error of law in the sentence imposed."

21 The power thereby conferred on magistrates was applied to all courts by the enactment of s 19 of the *Criminal Procedure Act* 1986 (NSW)[48], later renumbered as s 24 of that Act[49]. The power was in substantially the same terms

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44 New South Wales, Legislative Assembly, *Parliamentary Debates* (Hansard), 1 May 1986 at 3591.

45 New South Wales, Legislative Assembly, *Parliamentary Debates* (Hansard), 1 May 1986 at 3591.

46 New South Wales, Legislative Assembly, *Parliamentary Debates* (Hansard), 1 May 1986 at 3591.

47 New South Wales, Legislative Council, *Parliamentary Debates* (Hansard), 18 November 1986 at 6514.

48 *Criminal Procedure (Amendment) Act* 1988 (NSW), s 3.

49 *Statute Law (Miscellaneous Provisions) Act* 1989 (NSW), Sched 2.

as that subsequently conferred by s 43[50]. In the Second Reading Speech introducing s 19, the Attorney-General again distinguished the mechanism thus created from that of appeal, emphasising that it could only be used "where there has been a technical error in the sentence imposed."[51] The need for the power was said to be highlighted by the enactment of the *Probation and Parole Act* 1983 (NSW)[52]:

> "The complexity of this and other legislation that judicial officers have to grapple with in the courts on a daily basis has invariably led to technical errors being made. It is vital that judicial officers have a simple procedure available to them to correct such errors."

22 Section 43 and its precursor provisions were held by the Court of Criminal Appeal in a number of unreported and reported decisions to require a broad construction. Much emphasis was placed in those decisions upon the remedial purpose of the provisions. The remedial purpose of s 24 of the *Criminal Procedure Act* was invoked in *Ho v Director of Public Prosecutions*[53] to justify giving the section "the widest possible operation", extending to the correction of a sentence imposed as a result of "an error of law in the exercise of the sentencing discretion."[54] Section 43 was said in *Erceg v District Court (NSW)*[55], not to limit a court to the formal record of the sentence, but to allow it to "have regard to all the circumstances relevant to the imposition of the penalty."[56] In *R v Finnie (No 2)*[57], Howie J, with whom Spigelman CJ and Dunford J agreed, held

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50 Unlike s 43, s 24(1) provided expressly that the court "whether or not differently constituted" might re-open the proceedings.

51 New South Wales, Legislative Assembly, *Parliamentary Debates* (Hansard), 21 September 1988 at 1673.

52 New South Wales, Legislative Assembly, *Parliamentary Debates* (Hansard), 21 September 1988 at 1674.

53 (1995) 37 NSWLR 393.

54 (1995) 37 NSWLR 393 at 403.

55 (2003) 143 A Crim R 455.

56 (2003) 143 A Crim R 455 at 476 [109].

57 [2004] NSWCCA 150.

that s 43 could be engaged where there had been an error of fact or an omission to find, or to take into account, a relevant fact[58]:

> "Where a relevant error is established, the section is engaged and, at least in so far as the jurisdiction of the court to reopen the sentencing proceedings is concerned, it is unnecessary for the court to determine how the erroneous sentence came about."

That approach was followed more recently in *Meakin v Director of Public Prosecutions (NSW)*[59]. There has been a variety of approaches to similar legislation in other Australian jurisdictions. Those approaches do not indicate a cross-jurisdictional consensus about the way in which re-opening powers in relation to sentencing are to be applied.

23 In *Boyd v Sandercock; Ex parte Sandercock*[60], the Full Court of the Supreme Court of Queensland held that a penalty was not "contrary to law" for the purposes of s 147A(1) of the *Justices Act* 1886 (Q) "merely because the prosecution has failed to prove a fact [the existence of a prior conviction] which would have led to a higher range of penalty becoming applicable, or a higher sentence being imposed."[61] In *R v Thorpy*[62], the Court of Appeal of Queensland applied a restrictive construction to s 188(2)(a) of the *Penalties and Sentences Act* 1992 (Q), which conditioned the power to re-open sentencing proceedings on a sentence having been imposed that was "not in accordance with the law". The Court held that the provision was "limited to the correction of error or possibly also clarification of an order made; but not as allowing the admission of fresh evidence."[63] A restrictive approach to s 188, in its application to factual error,

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58 [2004] NSWCCA 150 at [32].

59 (2011) 216 A Crim R 128 at 135–136 [28]–[30] per Beazley JA, Allsop P agreeing at 131 [2], see also at 149 [109]–[111] per Basten JA.

60 [1990] 2 Qd R 26.

61 [1990] 2 Qd R 26 at 29.

62 [1996] 2 Qd R 77.

63 [1996] 2 Qd R 77 at 79 and authorities there cited.

was maintained in *R v Cassar; Ex parte Attorney-General*[64]. The Court of Appeal said[65]:

> "Sentences are reviewed through the appeal process, not by means of this provision, which is in the nature of a 'slip rule', to be used in the exceptional, limited circumstances to which in precise terms it refers."

24 In contradistinction to the approach in Queensland, the Supreme Court of Western Australia endorsed a broad approach to s 37 of the *Sentencing Act* 1995 (WA), which empowered a court to re-open proceedings when it had sentenced an offender in a manner that was not in accordance with that Act or the written law under which the offence was committed. In *Traegar v Pires de Albuquerque*[66], which was a case similar in its facts to *Boyd v Sandercock*, the power was held to extend to a case in which a magistrate had failed to impose a minimum mandatory sentence because he had not been informed of prior convictions of the defendant which attracted that mandatory minimum[67]. In a more recent decision, *The State of Western Australia v Wallam*[68], the Court of Appeal held that the statutory power to re-open arises in the case in which the sentence imposed was not one which could lawfully be imposed under the *Sentencing Act* 1995 (WA) or the written law under which the offence was committed[69].

25 Different approaches were also reflected in judgments of the Court of Criminal Appeal of the Northern Territory in relation to s 112 of the *Sentencing*

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64 [2002] 1 Qd R 386. The case concerned s 188(1)(c), which empowered re-opening of proceedings if a court had imposed a sentence "decided on a clear factual error of substance".

65 [2002] 1 Qd R 386 at 390 [16].

66 (1997) 18 WAR 432. The Full Court followed *Shortland v Heath* [1977] WAR 61, concerning the re-opening power under s 166B of the *Justices Act* 1902 (WA), a decision which was not followed by the Full Court of the Supreme Court of Queensland in *Boyd v Sandercock*.

67 (1997) 18 WAR 432 at 447.

68 [2008] WASCA 117 (S) — a case in which the sentencing judge had not taken account of the abolition of remissions.

69 [2008] WASCA 117 (S) at [58]–[59].

Act (NT). That section provides for the re-opening of proceedings when a court has "imposed a sentence that is not in accordance with the law". Martin CJ in *Staats v The Queen*[70] saw s 112 as "limited in its application to errors of law in relation to the imposition of the sentence" and not extending to "the correction of reasons or review of the exercise of a discretionary judgment."[71] Angel J expressed the view that the section at least included errors of law and "may well include judicial oversight of a fact obviously material for sentencing purposes"[72]. In *R v Melville*[73], the Court of Criminal Appeal held, in a case with some similarities to the case before this Court, that s 112 enabled[74]:

> "the correction of an error of law in sentencing when, in the course of a binding decision in the appellate hierarchy in another case, it is stated that the sentence in the instant case was not imposed in accordance with the law which governs the proper exercise of the sentencing discretion."

26 A re-opening provision of long standing in New Zealand has attracted a narrow construction. Section 372 of the *Crimes Act* 1961 (NZ) provided that if a sentence was one "that could not by law be passed" or if a judge had not passed a sentence required by law to be passed, he could pass such sentence as ought to have been passed. Like s 43(5), s 372(5) provided that in such a case, the time to appeal against sentence would run from the date of the new sentence. Section 372 was held by the New Zealand Court of Appeal in *R v Shepherd*[75] to confer "a closely limited jurisdiction on the sentencing Judge ... to pass a new sentence."[76] In so holding, that Court relied upon s 372(5) to distinguish correction from appeal[77]:

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70 (1998) 123 NTR 16.

71 (1998) 123 NTR 16 at 24.

72 (1998) 123 NTR 16 at 26.

73 (1999) 9 NTLR 29.

74 (1999) 9 NTLR 29 at 43 [27].

75 [1990] 3 NZLR 39.

76 [1990] 3 NZLR 39 at 40.

77 [1990] 3 NZLR 39 at 41.

> "It necessarily refers to the end product of the sentencing process, not to conclusions reached in the course of arriving at the sentence which is ultimately imposed. Such conclusions whether as to legal principle or factual matters, are reviewable by way of appeal against that sentence."

27 The decision in *Shepherd* was not questioned or elaborated on in later cases[78]. A similarly constrained view of a corrective provision was expressed by the Supreme Court of the United States in *Hill v United States*[79]. Examples from jurisdictions outside Australia must, of course, be treated with caution. The New Zealand and United States examples, however, reinforce the important functional distinction between re-opening proceedings to correct an error which has led to a sentence not authorised by law and correction of error by a sentencing court on appeal. The attribution of a narrower purpose and application to s 43 is consistent with the maintenance of that distinction.

The approach by the Court of Criminal Appeal to s 43

28 Bathurst CJ and Garling J, in a joint judgment with which Johnson and Bellew JJ agreed, correctly focused upon the text of s 43. Their Honours observed that on one view the term "contrary to law" referred to a sentence "which could not be lawfully imposed as distinct from one arrived at by an erroneous process of reasoning."[80] Their Honours acknowledged that the section had consistently been given a broad construction in New South Wales. The decisions which had enunciated that broad construction had not been challenged[81].

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78 Section 372 of the *Crimes Act* 1961 (NZ), and the similar provision, s 77 of the *Summary Proceedings Act* 1957 (NZ), were repealed, and were replaced by ss 180–182 of the *Criminal Procedure Act* 2011 (NZ).

79 368 US 424 at 430 (1962).

80 [2013] NSWCCA 117 at [22].

81 [2013] NSWCCA 117 at [23].

29 After reviewing a number of those decisions and the two decisions of the Court of Criminal Appeal of the Northern Territory mentioned above[82], their Honours held in relation to s 43:

- In an appeal against sentence under s 5(1) or s 5D of the *Criminal Appeal Act* 1912 (NSW), the jurisdiction to impose a different sentence is enlivened upon error being demonstrated. Section 43(1) focuses on outcome. Error must be identified and it must be shown that the error led to a penalty which it was not otherwise open to the court to impose[83].

- Section 43 is a discretionary provision designed principally to correct manifest error. Generally speaking, the only circumstance in which the power to re-open should be exercised is where error is apparent from the sentence itself, not from an analysis of the legal reasoning which underpins the sentence[84].

- Section 43 should not be used as a vehicle to review what might colloquially be described as *Muldrock* appeals, save possibly for the case in which it is alleged that the Court of Criminal Appeal erroneously sentenced on the basis of *Way*[85].

- The reasoning of the Court of Criminal Appeal on the Crown appeal demonstrated error[86]. However, the sentence imposed by the Court of Criminal Appeal would only be "contrary to law" if the application of correct principle had led to the conclusion that the Crown appeal should have been dismissed[87].

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82 [2013] NSWCCA 117 at [24]–[42]. Their Honours also quoted a passage from the judgment of Kearney J in *R v Melville* (1999) 9 NTLR 29 at 43 [27], referring to decisions in Queensland and Western Australia.

83 [2013] NSWCCA 117 at [63].

84 [2013] NSWCCA 117 at [66].

85 [2013] NSWCCA 117 at [67].

86 [2013] NSWCCA 117 at [70]–[71].

87 [2013] NSWCCA 117 at [73].

- The sentences which were imposed by the Court of Criminal Appeal were within its reasonable discretion and could, in accordance with correct principle, have been lawfully imposed[88].

- The penalty imposed by the Court of Criminal Appeal was appropriate and thus not contrary to law within the meaning of s 43(1)(a)[89].

As appears from the preceding, Bathurst CJ and Garling J disposed of the application on the basis that the condition for the exercise of the power conferred by s 43 had not been satisfied. The penalty imposed was not "contrary to law". Therefore the section did not apply. McClellan JA on the other hand held that, on the strength of previous decisions of the Court of Criminal Appeal, the correctness of which were not under challenge, the Court was bound to interpret s 43 as applicable to errors in reasoning of the kind identified in *Muldrock*[90]. His Honour, however, concluded that the Court should decline, in its discretion, to exercise the power conferred by s 43[91].

30 McClellan JA was correct to discern a construction of s 43 in the reasoning of Bathurst CJ and Garling J which was narrower than that adopted in decisions of the Court of Criminal Appeal of New South Wales discussed earlier in these reasons. The appellant's submission was to like effect. Indeed, a strong thread in the appellant's argument was that the Court of Criminal Appeal had departed from its own previous decisions, which were not in question before it. The task of this Court, however, is to construe s 43, at least to the extent necessary to decide the appeal. Invocation of the previous approach taken by the Court of Criminal Appeal and of the approaches taken by other intermediate appeal courts to similar but not identical provisions is of limited assistance. In relation to the decisions of intermediate appeal courts outside New South Wales, it is also necessary to bear in mind what was said in *DJL v Central Authority*[92] and quoted in *Burrell*[93]:

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88 [2013] NSWCCA 117 at [98].

89 [2013] NSWCCA 117 at [99].

90 [2013] NSWCCA 117 at [106]–[107].

91 [2013] NSWCCA 117 at [109]–[110].

92 (2000) 201 CLR 226 at 247 [43].

93 (2008) 238 CLR 218 at 223 [14].

> "In the case of each such court, State or federal, attention must be given to the text of the governing statutes and any express or implied powers to be seen therein."

There are significant textual differences between the relevant statutory provisions of the States and Territories.

31 The broad approach of the earlier decisions of the Court of Criminal Appeal was underpinned by emphasis upon a remedial purpose, the breadth of which was not supported by the text of s 43 nor by the purpose of the re-opening jurisdiction as stated to the Parliament of New South Wales when s 19 of the *Criminal Procedure Act* was enacted. The task of construction begins with the text of the provision. The purpose of the provision is an aid to its construction, as mandated by s 33 of the *Interpretation Act* 1987 (NSW).

The construction and application of s 43

32 Section 43 confers upon courts exercising jurisdiction in criminal proceedings a power to re-open those proceedings and to impose a penalty that is in accordance with law[94]. The section only applies to criminal proceedings in which one of two conditions is fulfilled. The condition directly relevant to this appeal is that "a court has … imposed a penalty that is contrary to law". On the ordinary meaning of that collocation, what must be contrary to law is the "penalty". That condition is not satisfied merely by demonstrating that the court has erred in law or fact. Notwithstanding such error, the penalty imposed may not be contrary to law. It may fall within the range of penalties permitted or required by the relevant statutory provisions and may also be consistent with the reasonable exercise of a discretion applicable to the particular offence and offender. Examples of circumstances in which a penalty may be said to be contrary to law include:

- A penalty which exceeds the maximum penalty prescribed for the offence.
- A penalty which it is beyond the power of the court to impose because some precondition for its imposition is not satisfied — eg the existence of an aggravating factor or the existence of prior convictions for the same kind of offence.

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94 It is not necessary for present purposes to consider whether the section extends the jurisdiction of the courts.

A penalty which lies outside the range of penalties that could have been imposed in a reasonable exercise of discretion is not, thereby, contrary to law in the sense required by s 43, not least because reconsideration of such would involve an evaluative exercise which must be dealt with by way of appeal.

33 The appellant relied upon the approach to s 43 reflected in the line of decisions of the Court of Criminal Appeal mentioned earlier in these reasons. Much of the appellant's argument was by way of complaint about the Court of Criminal Appeal's departure from those decisions, the limited classes of cases to which it held s 43 to apply, and the consequential reduction in the utility of the provision in a way that was said to be inconsistent with its remedial purpose.

34 The respondent submitted that the finding by the Court of Criminal Appeal that the sentence imposed on the Crown appeal was within its reasonable discretion[95] was another way of expressing a finding that the error did not result in a higher sentence than was warranted.

35 Correction of legal and factual errors in sentencing may be effected in more than one way. There are no doubt classes of sentencing error which would not fall within the scope of s 43 as construed by the Court of Criminal Appeal, but would fall within the scope of inherent power or the slip rule or statutory extensions thereof[96]. Such corrective powers do not require, as a condition of their application, that the penalty imposed be "contrary to law". Correction of legal and factual errors is principally available by way of appeal. If an error is obvious and conceded, the appeal may be disposed of by consent order. The respondent also referred in written submissions to the availability of a judicial inquiry or a referral to the Court of Criminal Appeal in relation to a sentence pursuant to Pt 7 of the *Crimes (Appeal and Review) Act* 2001 (NSW). Part 7 was considered in *Sinkovich v Attorney General of New South Wales*[97], which held that *Muldrock* errors could found an application under it for a judicial inquiry or referral[98]. Of course, the availability of more than one means of redressing sentencing error, which may be contracted or expanded or added to from time to

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95 [2013] NSWCCA 117 at [98].

96 Eg, r 50C(3) of the Criminal Appeal Rules (NSW), whereby the Court of Criminal Appeal may, of its own motion, within 14 days after an order is entered "set aside or vary the order as if the order had not been entered."

97 [2013] NSWCA 383.

98 [2013] NSWCA 383 at [79].

time, is not determinative of the constructional question in relation to s 43. Their existence demonstrates that corrective powers may be conferred on courts to deal with a variety of cases and subject to a variety of conditions. Such powers, however, do not subsume the appeal process, which remains the principal qualification on the tenet of finality of ligitation.

36 The text of s 43 is clear enough. The relevant power is conditioned upon the penalty being "contrary to law". A construction encompassing error in the imposition of a lawful penalty would allow the power to be applied to any penalty, however appropriate, that is imposed under the influence of an error of law or fact. That construction does not fit with the text. Nor does it accord with the limited purpose of the section. The principle of finality should not be taken to have been qualified except by clear statutory language and only to the extent that the language clearly permits. The construction for which the appellant contended, and which is reflected in some earlier decisions of the Court of Criminal Appeal, can only be supported by attributing to the provision a purpose which, whatever its practical benefits, leaves the boundaries between correction and appeal porous and protected only by the exercise of the sentencing court's discretion. The importance of the distinction between original and appellate jurisdiction in the application of s 43 to courts of first instance militates against such a result. The appellant's construction should not be accepted. A penalty is not "contrary to law" only because it is reached by a process of erroneous reasoning or factual error.

Conclusion

37 For the preceding reasons the Court of Criminal Appeal did not err in its approach to the application of s 43 of the Sentencing Act. The sentences imposed were not "contrary to law". The appeal should be dismissed.

38 GAGELER J. The *Crimes (Sentencing Procedure) Act* 1999 (NSW) ("the Act") confers a discretion on a court to reopen criminal proceedings to "impose a penalty that is in accordance with the law" and, "if necessary", to "amend any relevant conviction or order"[99]. The criminal proceedings in which that discretion applies are confined to those in which a court has "imposed a penalty that is contrary to law" or "failed to impose a penalty that is required to be imposed by law"[100]. Any right of appeal is unaffected[101], save as to the time for commencing an appeal against a reimposed penalty[102].

39 This appeal concerns when one of the threshold conditions for consideration of the exercise of that statutory discretion to reopen criminal proceedings is met. When has a court imposed a "penalty that is contrary to law"?

40 The appellant argues that it is enough that the court has made an error of law in exercising its discretion to impose the penalty. A majority of the Court of Criminal Appeal rejected that argument. They held that such an error of law can result in a penalty that is contrary to law, but only if the error has resulted in the court imposing a penalty which is outside the range which the court could have imposed in the lawful exercise of its discretion. They said that the relevant question is whether or not the court "sentencing in accordance with the correct principles could have imposed the penalty which was in fact imposed"[103].

41 I would also reject the appellant's argument. Taking a narrower view than the Court of Criminal Appeal, I would hold that a penalty is only contrary to law, in the sense required to meet the threshold condition for consideration of the exercise of the discretion to reopen, if the order imposing the penalty is in its terms an order that the court could not have made in the criminal proceedings.

42 A provision conferring power on courts is not to be read down by making an implication or imposing a limitation which is not found in its express words[104]. Yet a "central and pervading tenet of the judicial system is that

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99 Section 43(2).

100 Section 43(1).

101 Section 43(4).

102 Section 43(5).

103 *Achurch v The Queen (No 2)* [2013] NSWCCA 117 at [73]. See also at [63], [98], [110], [112].

104 *Owners of "Shin Kobe Maru" v Empire Shipping Co Inc* (1994) 181 CLR 404 at 421; [1994] HCA 54.

controversies, once resolved, are not to be reopened except in a few, narrowly defined, circumstances"[105]. Words conferring a power to reopen ought not to be read widely.

43 The words "contrary to law" are by no means incapable of describing a penalty imposed in breach of an express or implied condition of discretion such as would warrant appellate intervention[106]. Here, however, that reading of those words is too wide.

44 Legislative history reveals the legislative purpose of conferring the power to reopen to be quite narrow. The current provision derives in relevant part from the re-enactment in 1999 of a provision introduced in 1988[107] giving to all courts the same power to reopen which had first been given to magistrates in 1986[108].

45 The power as first given to magistrates in 1986 was explained at the time of its enactment "only [to] allow the magistrate to correct a sentence which is patently in error" and to be "necessary because on occasions magistrates are handing down sentences which they do not have the power to impose"[109]. The errors being made were "often only discovered after the time for an appeal [had] expired", leaving "only one avenue of relief, namely, an application to the Supreme Court of New South Wales to quash the order and refer the matter back to the magistrate"[110]. Two specific areas of sentencing were identified as highlighting the problem: the imposition of a period of disqualification less than the minimum period prescribed for a motor traffic offence; and the sentencing of

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105 *Burrell v The Queen* (2008) 238 CLR 218 at 223 [15]; [2008] HCA 34, quoting *D'Orta-Ekenaike v Victoria Legal Aid* (2005) 223 CLR 1 at 17 [34]; [2005] HCA 12.

106 Cf *Barbaro v The Queen* (2014) 88 ALJR 372 at 382 [61]; 305 ALR 323 at 335-336; [2014] HCA 2.

107 Section 19 (renumbered s 24) of the *Criminal Procedure Act* 1986 (NSW), introduced by the *Criminal Procedure (Amendment) Act* 1988 (NSW).

108 Section 100HA of the *Justices Act* 1902 (NSW), introduced by the *Justices (Amendment) Act* 1986 (NSW).

109 New South Wales, Legislative Assembly, *Parliamentary Debates* (Hansard), 1 May 1986 at 3591.

110 New South Wales, Legislative Assembly, *Parliamentary Debates* (Hansard), 1 May 1986 at 3591-3592.

an ineligible person to periodic detention[111]. It was noted that provisions giving magistrates similar powers to reopen then existed in Tasmania, Western Australia and Queensland[112].

46 The extension of the power to other courts in 1988 was explained at that time as making the same procedure available to all judicial officers, thereby saving costs and relieving appellate courts of unnecessary work. It was emphasised that the discretion "can only be used where there has been a technical error in the sentence imposed" (the example was again given of the imposition of a disqualification period less than that required for a motor traffic offence) and "cannot be used to review a penalty by way of appeal"[113].

47 Legislative history to that point therefore reveals that the purpose of the power to reopen was to enable a court to ensure that an order that the court had made in the resolution of criminal proceedings was an order which operated, in its terms, to impose a penalty that the court was empowered to impose in those proceedings, as well as to impose a penalty that the court was required to impose in those proceedings. The importance of having such a power to reopen reposed in the court itself was to avoid the need for an appeal, or for an application in the original supervisory jurisdiction of the Supreme Court, merely to correct an error or omission apparent from the terms of the earlier order considered in the context of the criminal proceedings. Whether the purpose extended to the correction of an error or omission apparent only from information not placed before the court in the criminal proceedings is unclear, and goes to an issue which does not now need to be resolved[114]. What is clear is that the legislative purpose was emphatically not to empower a court to reopen criminal proceedings so as to reconsider its reasons for making that earlier order either generally or by way of asking, as if on appeal, whether its exercise of any discretion in those reasons was in accordance with law.

48 Between 1988 and 1999, the Court of Criminal Appeal considered the provision then conferring the discretion in four cases. The first two were appeals

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111 New South Wales, Legislative Assembly, *Parliamentary Debates* (Hansard), 1 May 1986 at 3592.

112 New South Wales, Legislative Assembly, *Parliamentary Debates* (Hansard), 1 May 1986 at 3591. The provisions were s 76A of the *Justices Act* 1959 (Tas); s 166B of the *Justices Act* 1902 (WA); s 147A of the *Justices Act* 1886 (Q).

113 New South Wales, Legislative Assembly, *Parliamentary Debates* (Hansard), 21 September 1988 at 1673.

114 Compare *Shortland v Heath* [1977] WAR 61; *Traegar v Pires de Albuquerque* (1997) 18 WAR 432; *Boyd v Sandercock; Ex parte Sandercock* [1990] 2 Qd R 26.

against reimposed penalties. In both of those cases, the threshold condition of the original penalty having been contrary to law was conceded and the only question was as to the exercise of discretion[115]. The third case, in 1994, was an appeal against an original sentence brought in circumstances where the court which had imposed the sentence had held that it lacked power to reopen[116]. The appeal was allowed on the ground that the sentence was manifestly inadequate. Hunt CJ at CL went on to express the view that the court which had imposed the original sentence had been "clearly right" in considering that it lacked power to reopen "to carry out the exercise which this Court has now carried out" in that the discretion to reopen did not permit "a rehearing on the merits"[117]. The other two members of the Court (Smart and Badgery-Parker JJ) specifically refrained from endorsing that view[118].

49 The fourth case, in 1996, was again an appeal against a reimposed penalty. The original penalty was a sentence required by statute to commence on or before the date of imposition, but in fact specified by the court to commence on a later date[119]. The sentence was held to be a penalty that was contrary to law. Badgery-Parker J (with whom Gleeson CJ and Hidden J agreed) remarked:

> "Whatever else [the provision] was intended to do, it was intended to enable the correction of errors in the sentencing process (which is a highly technical process, not in the determination of the appropriate level of sentence, which is very much an intuitive process, but in the formal expression of the results of that determination), a process in which error is apt to occur."

50 In the meantime, the provision had been touched on in the Court of Appeal in 1995 in the course of determining an application in the original jurisdiction of the Supreme Court for judicial review of a penalty imposed by the District Court[120]. Having decided that the application was to be dismissed on its

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115 *R v Petrou* unreported, Court of Criminal Appeal of the Supreme Court of New South Wales, 13 February 1990; *R v Denning* unreported, Court of Criminal Appeal of the Supreme Court of New South Wales, 15 May 1992.

116 *Tolmie* (1994) 72 A Crim R 416.

117 *Tolmie* (1994) 72 A Crim R 416 at 420.

118 *Tolmie* (1994) 72 A Crim R 416 at 421.

119 *R v Tangen* unreported, Court of Criminal Appeal of the Supreme Court of New South Wales, 21 June 1996.

120 *Ho v Director of Public Prosecutions* (1995) 37 NSWLR 393.

merits, Kirby P (with whom Gleeson CJ and Sheller JA agreed) went on to accept a submission that it would in any event have been open to the applicant to have applied to the District Court to reopen[121]. Kirby P said that "[f]or the correction of arguable mistakes in sentencing", the provision "should be given the widest possible operation", and that an error of law in the exercise of sentencing discretion meant that the "resulting penalty is then one 'contrary to law'"[122].

51 Had the view so expressed by Kirby P in 1995 come to represent a settled judicial interpretation, re-enactment of the provision in the same terms in 1999 might have been susceptible of characterisation as its legislative adoption[123]. The view, however, was not necessary to the decision of the Court of Appeal in 1995, was contrary to the view earlier expressed by Hunt CJ at CL, and had not by 1999 been the subject of further appellate consideration in New South Wales. Nothing in the extrinsic material accompanying re-enactment of the provision in 1999 suggests legislative advertence to it. Against it is the legislative purpose revealed by the earlier legislative history, to which I have already referred.

52 Following re-enactment of the provision in 1999 and before the present case, the Court of Criminal Appeal considered the provision in three cases: refusing in two of them to find that its own resentencing on an appeal against sentence had resulted in a penalty that was contrary to law[124], and accepting in the third that the District Court had imposed a penalty that was contrary to law when it made an impermissible direction as to the date of commencement of a sentence[125]. The Court of Appeal also considered the re-enacted provision in two cases: in the first holding that an internally inconsistent order imposed a penalty that was contrary to law[126], and in the second finding no jurisdictional error in a decision of a court refusing to reopen[127]. While some of the reasoning in each of those cases proceeded on an acceptance of a view as to the scope of the threshold

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121 *Ho v Director of Public Prosecutions* (1995) 37 NSWLR 393 at 401-403.

122 *Ho v Director of Public Prosecutions* (1995) 37 NSWLR 393 at 403.

123 *Zickar v MGH Plastic Industries Pty Ltd* (1996) 187 CLR 310 at 329; [1996] HCA 31.

124 *R v Finnie (No 2)* [2004] NSWCCA 150 at [31]; *R v Chalmers (No 2)* (2007) 179 A Crim R 188 at 192 [23].

125 *Thompson-Davis v The Queen* [2013] NSWCCA 75 at [35], [47].

126 *Erceg v District Court (NSW)* (2003) 143 A Crim R 455 at 481-482 [152].

127 *Meakin v Director of Public Prosecutions (NSW)* (2011) 216 A Crim R 128 at 131 [5], 146-147 [92]-[94], 150 [115].

condition which is wider than I have stated it, I see no reason to doubt the outcome of any of them.

53 The appeal should be dismissed.