HIGH COURT OF AUSTRALIA

FRENCH CJ,
HAYNE, KIEFEL, BELL AND GAGELER JJ

Matter No M3/2013

PASQUALE BARBARO — APPLICANT

AND

THE QUEEN — RESPONDENT

Matter No M1/2013

SAVERIO ZIRILLI — APPLICANT

AND

THE QUEEN — RESPONDENT

Barbaro v The Queen
Zirilli v The Queen
[2014] HCA 2
12 February 2014
M3/2013 & M1/2013

ORDER

Matter No M3/2013

1. Special leave to appeal granted.

2. Appeal treated as instituted, heard instanter and dismissed.

Matter No M1/2013

1. Special leave to appeal granted.

2. Appeal treated as instituted, heard instanter and dismissed.

On appeal from the Supreme Court of Victoria

Representation

S J Odgers SC with T Kassimatis for the applicant in M3/2013 (instructed by Theo Magazis & Associates)

B G Walmsley SC with F H Todd for the applicant in M1/2013 (instructed by Acquaro & Co)

R J Bromwich SC with B M Young SC for the respondent in both matters (instructed by Director of Public Prosecutions (Cth))

G J C Silbert SC with B L Sonnet for the Director of Public Prosecutions (Victoria), intervening in both matters (instructed by Solicitor for Public Prosecutions (Vic))

CATCHWORDS

Barbaro v The Queen
Zirilli v The Queen

Criminal law – Sentence – Principles – Applicants pleaded guilty to offences against laws of Commonwealth after prosecution expressed views about available range of sentences that could be imposed on each applicant – Sentencing judge refused to receive submission from prosecution about available range of sentences – Whether duty of prosecution to make submission as to available range of sentences – Whether submission as to range amounts to submission of law – Whether failure to receive prosecution submission as to range procedurally unfair – Whether failure to receive prosecution submission as to range failure to take account of relevant consideration.

Words and phrases – "available range of sentences", "submission of law".

Crimes Act 1914 (Cth), Pt IB.

1 FRENCH CJ, HAYNE, KIEFEL AND BELL JJ. Each applicant pleaded guilty in the Supreme Court of Victoria to serious offences against laws of the Commonwealth. Each was sentenced to a very lengthy term of imprisonment: Mr Barbaro to life imprisonment with a non-parole period of 30 years, Mr Zirilli to 26 years' imprisonment with a non-parole period of 18 years.

2 Each seeks special leave to appeal to this Court to allege that the sentencing hearing was procedurally unfair and that the sentencing judge failed to take into account a relevant consideration. The applications were referred for argument, as on an appeal, before an enlarged Bench. The applications were heard together. Each application for special leave to appeal should be granted but each appeal dismissed.

The applicants' arguments

3 The applicants submitted that the sentencing hearing was unfair because the sentencing judge (King J) said at the outset that she did not seek, and would not receive, any submission from the prosecution about what range of sentences she could impose upon each applicant. The applicants further submitted that the sentencing judge thereby precluded herself from taking account of a consideration relevant to sentencing.

4 The applications to this Court were argued on the basis that the sentencing judge made no factual or legal error in fixing either the separate sentences imposed for the offences admitted or the total effective sentences imposed. In particular, the applications proceeded from the premise that the sentences imposed were not manifestly excessive. Yet each applicant argued that the prosecution should have been permitted (or even required) to submit to the sentencing judge that the sentences should be fixed within ranges the upper limits of which were less than the head sentences which were imposed on each applicant and less than the non-parole period fixed in Mr Barbaro's case.

5 The prosecution, it was argued, should have been permitted (or required) to do this for two reasons. First, plea agreements had been made and the matters had been "settled" on the basis of what the prosecution had said to be its views of the available sentencing range for each applicant. Second, the applicants could have used these views to their advantage in the course of the sentencing hearing had the prosecution been permitted to put them forward.

Two flawed premises

6 The applicants' arguments depend on two flawed premises. The first is that the prosecution is permitted (or required) to submit to a sentencing judge its

view of what are the bounds of the range of sentences which may be imposed on an offender. That premise, in turn, depends on the premise that such a submission is a submission of law. For the reasons which follow, each premise is wrong.

7 The prosecution's statement of what are the bounds of the available range of sentences is a statement of opinion. Its expression advances no proposition of law or fact which a sentencing judge may properly take into account in finding the relevant facts, deciding the applicable principles of law or applying those principles to the facts to yield the sentence to be imposed. That being so, the prosecution is not required, and should not be permitted, to make such a statement of bounds to a sentencing judge.

8 Because the premises for the applicants' arguments are wrong, the appeals must fail. Before examining the premises further, however, it is necessary to say something about the facts.

Charges, pleas and sentences

9 The applicants each pleaded guilty to three counts charging offences against laws of the Commonwealth: conspiracy to commit an offence of trafficking a commercial quantity of a controlled drug (MDMA)[1], trafficking a commercial quantity of a controlled drug (MDMA)[2] and attempting to possess a commercial quantity of an unlawfully imported border controlled drug (cocaine)[3].

10 The first count related to more than 15 million tablets containing MDMA (or ecstasy) imported into Australia from Europe in 2007, but seized before the applicants could take possession of them. The tablets contained more than 1.4 tonnes of pure MDMA and had a wholesale value of about $122 million. The applicants had proposed to be involved in the trafficking of all of the tablets.

11 The second count related to a further 1.2 million tablets containing MDMA bought from the same European suppliers as the tablets the subject of the first count. These tablets were bought from the suppliers at a price which would reduce the amount which they were owed for the tablets which had been the

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1 Contrary to ss 11.5(1) and 302.2(1) of the *Criminal Code* (Cth).

2 Contrary to s 302.2(1) of the *Criminal Code*.

3 Contrary to ss 11.1(1) and 307.5(1) of the *Criminal Code*.

subject of the failed 2007 trafficking. The 1.2 million tablets came in two batches from Sydney and were trafficked during 2008. Some of the second batch of these tablets were seized. The whole of the second batch of tablets contained more than 50 kg of pure MDMA. By the time Mr Barbaro was arrested, in August 2008, he had received more than $7.25 million from selling tablets which were the subject of the second count. He had paid to the European suppliers much of the amount received from trafficking in the tablets but had retained about $1.75 million.

12 The third count related to cocaine, the pure weight of which was nearly 100 kg. Authorities found and seized the cocaine soon after it was imported and before the applicants could take possession of it. On this count, Mr Barbaro was charged as the principal offender and Mr Zirilli as an aider and abettor. The sentencing judge sentenced on the basis that the cocaine imported had cost about $600,000 but was worth about $40 million.

13 Mr Barbaro admitted[4] his guilt in respect of three further Commonwealth offences and asked that they be taken into account in passing sentence on him for the offences to which he pleaded guilty and for which he was convicted. The further offences were conspiracy to import a commercial quantity of a border controlled precursor substance (pseudoephedrine)[5], dealing with money of a value of $1 million or more which was proceeds of crime[6], and receiving, possessing and disposing of money which it was reasonable to suspect was proceeds of crime in relation to an indictable offence[7].

14 Mr Barbaro was sentenced to a total effective sentence of life imprisonment and a non-parole period of 30 years was fixed. Mr Zirilli was sentenced to a total effective sentence of 26 years' imprisonment with a non-parole period of 18 years. It is not necessary to describe how the sentences were structured. Mr Barbaro was refused[8] leave to appeal to the Court of Appeal of the Supreme Court against the sentences imposed by King J; Mr Zirilli was granted leave to appeal on one ground but his appeal was dismissed.

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4 *Crimes Act* 1914 (Cth), s 16BA.

5 Contrary to ss 11.5(1) and 307.11(1) of the *Criminal Code*.

6 Contrary to s 400.3(1) of the *Criminal Code*.

7 Contrary to s 400.9(1) of the *Criminal Code* as in force at the time of the offence.

8 *Barbaro v The Queen* [2012] VSCA 288.

Plea agreements

15 Before the applicants indicated to the Commonwealth Director of Public Prosecutions that they would plead guilty to certain charges, there were discussions between the lawyers for the applicants and the prosecution about what charges would be preferred. In the course of those discussions, the prosecution told the applicants' lawyers that the "sentencing range", in Mr Barbaro's case, was a head sentence of 32 to 37 years with a non-parole period of 24 to 28 years and, in Mr Zirilli's case, a head sentence of 21 to 25 years with a non-parole period of 16 to 19 years.

16 Both applicants thereafter told the prosecution that they would enter pleas of guilty and, in Mr Barbaro's case, make the additional admissions which have already been noted.

The sentencing hearing

17 Early in the sentencing hearing, King J made plain that she did not intend to ask any party what ranges the sentences to be imposed on each applicant should fall within. In the course of the hearing, counsel then appearing for Mr Zirilli told King J what the prosecution had said was the sentencing range for his client; counsel then appearing for Mr Barbaro did not. The prosecutor appearing at the sentencing hearing made no submission about what range of sentences could be imposed on either Mr Barbaro or Mr Zirilli.

18 In the course of the sentencing hearing, King J told counsel for Mr Barbaro that she was considering fixing a head sentence of life imprisonment on the first count, on the basis that Mr Barbaro's conduct was an example of the worst kind of offending, thus warranting imposition of the maximum sentence fixed for the offence. Counsel for Mr Barbaro responded by submitting that worse cases could be imagined. There was no dispute in this Court, however, that it was open to King J to find that the conduct founding the first count against Mr Barbaro was an example of the worst kind of offending.

19 Mr Barbaro was sentenced on the basis that he was "at the apex of the criminal group". The quantity of MDMA which was the subject of the first count was the largest amount ever seized in Australia. The profit sought from trafficking the drugs the subject of that count was many millions of dollars. And, of course, there were the other offences which Mr Barbaro admitted he had committed. Mr Barbaro challenged none of these conclusions. Despite the prosecution having told Mr Barbaro's lawyers that a head sentence should be fixed between 32 and 37 years, Mr Barbaro's application to this Court accepted that a head sentence of life imprisonment was not manifestly excessive.

Proffering a sentencing range

20 To explain why the prosecution told the applicants' lawyers what range of sentences the prosecution considered could be imposed on the applicants, it is necessary to refer to *R v MacNeil-Brown*[9], a decision of the Court of Appeal of the Supreme Court of Victoria.

21 In *MacNeil-Brown*, a majority of the Court of Appeal (Maxwell P, Vincent and Redlich JJA, Buchanan and Kellam JJA dissenting on this point) held[10] that "the making of submissions on sentencing range is an aspect of the duty of the prosecutor to assist the court". Accordingly, a sentencing judge could reasonably expect[11] the prosecutor to make a submission on sentencing range if either "the court requests such assistance" or, "even though no such request has been made, the prosecutor perceives a significant risk that the court will fall into error regarding the applicable range unless such a submission is made". The majority in *MacNeil-Brown* held[12] in respect of the first appellant in that case that the sentencing judge had not erred in insisting that counsel for the prosecution state the range within which the sentence to be imposed on the offender should fall. The offender's appeal against sentence was dismissed.

22 As a result of what was said by the majority in *MacNeil-Brown*, a practice has developed in Victoria of a sentencing judge asking counsel for the prosecution to make a submission as to the "available range" of sentences. (Remarks made by King J in the course of the sentencing hearing in these matters suggest that the practice may not be followed at first instance in the Supreme Court.)

23 To the extent to which *MacNeil-Brown* stands as authority supporting the practice of counsel for the prosecution providing a submission about the bounds of the available range of sentences, the decision should be overruled. The practice to which *MacNeil-Brown* has given rise should cease. The practice is wrong in principle. (These conclusions make it unnecessary to examine any question about the applicability of such a practice in a State court exercising

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9 (2008) 20 VR 677. The first appellant in that case applied for special leave to appeal to this Court but the application was refused: [2008] HCATrans 411.

10 (2008) 20 VR 677 at 678 [2].

11 (2008) 20 VR 677 at 678 [3].

12 (2008) 20 VR 677 at 701 [82].

jurisdiction conferred by s 68(2) of the *Judiciary Act* 1903 (Cth) and sentencing offenders for offences against the laws of the Commonwealth in accordance with the requirements of Pt IB of the *Crimes Act* 1914 (Cth).)

"Available range"

24 To expose the error in principle, it is necessary to begin by examining what is meant by an "available range" of sentences for an offender.

25 Except where a mandatory sentence is prescribed, a judge fixing the sentence to be imposed on an offender exercises a discretionary judgment. The exercise of discretion is subject to applicable statutory provisions and judge-made law. In particular, when sentencing offenders for offences against the laws of the Commonwealth, a sentencing judge is bound to apply those provisions of Pt IB of the *Crimes Act* 1914 which govern the sentencing of federal offenders. That Part provides[13] the fundamental starting point for the sentencing of offenders for federal offences.

26 Reference to an "available range" of sentences derives from the well-known principles in *House v The King*[14]. The residuary category of error in discretionary judgment identified[15] in *House* is where the result embodied in the court's order "is unreasonable or plainly unjust" and the appellate court infers "that in some way there has been a failure properly to exercise the discretion which the law reposes in the court of first instance". In the field of sentencing appeals, this kind of error is usually referred to as "manifest excess" or "manifest inadequacy". But this kind of error can also be (and often is) described as the sentence imposed falling outside the *range* of sentences which could have been imposed if proper principles had been applied. It is, then, common to speak of a sentence as falling outside the *available* range of sentences.

27 The conclusion that a sentence passed at first instance should be set aside as manifestly excessive or manifestly inadequate says no more or less than that some "substantial wrong has in fact occurred"[16] in fixing that sentence. For the reasons which follow, the essentially *negative* proposition that a sentence is so

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13 *Hili v The Queen* (2010) 242 CLR 520 at 527-530 [20]-[29]; [2010] HCA 45.

14 (1936) 55 CLR 499; [1936] HCA 40.

15 (1936) 55 CLR 499 at 505.

16 *House* (1936) 55 CLR 499 at 505.

wrong that there must have been some misapplication of principle in fixing it cannot safely be transformed into any *positive* statement of the upper and lower limits within which a sentence could properly have been imposed.

28 Despite the frequency with which reference is made in reasons for judgment disposing of sentencing appeals to an "available range" of sentences, stating the bounds of an "available range" of sentences is apt to mislead. The conclusion that an error has (or has not) been made neither permits nor requires setting the bounds of the range of sentences within which the sentence should (or could) have fallen. If a sentence passed at first instance is set aside as manifestly excessive or manifestly inadequate, the sentencing discretion must be re-exercised and a different sentence fixed. Fixing that different sentence neither permits nor requires the re-sentencing court to determine the bounds of the range within which the sentence should fall.

The role of the judge and of the prosecution

29 The practice countenanced by *MacNeil-Brown* assumes that the prosecution's proffering a statement of the bounds of the available range of sentences will assist the sentencing judge to come to a fair and proper result. That assumption depends upon the prosecution determining the supposed range dispassionately. It depends upon the prosecution acting not only fairly (as it must) but in the role which Buchanan JA rightly described[17] as that of "a surrogate judge". That is not the role of the prosecution.

30 As Gleeson CJ noted[18], when Chief Justice of New South Wales, it is common, when leniency is sought for an offender who intends to assist, or has assisted, the authorities, that the argument in favour of leniency comes from both the prosecution and the offender. In those circumstances "it is understandable that [the prosecuting authorities] regard it as advancing the interests which they represent to see that such assistance is suitably and publicly rewarded"[19]. In such a case, there is "usually no-one to put an opposing or qualifying point of view" and the sentencing judge "must be astute to ensure that [the court] is being given accurate, reliable, and complete information concerning the alleged assistance and the benefits said to flow from it"[20]. And in such a case, the prosecution may

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17 (2008) 20 VR 677 at 710 [128].

18 *R v Gallagher* (1991) 23 NSWLR 220 at 232.

19 (1991) 23 NSWLR 220 at 232.

20 (1991) 23 NSWLR 220 at 232.

have a view of the available sentencing range which gives undue weight to the assistance which the offender has given or promised.

31 Similar considerations arise in cases, such as these, where pleas of guilty avoid very long and costly trials. It is again in the interests of those whom the prosecution represents to see that the utilitarian value of such pleas is suitably and publicly rewarded. And again, the offender will not be heard to submit to the contrary. But in this kind of case, too, the prosecution may have a view of the available sentencing range which gives undue weight to the avoidance of trial.

32 In either of the cases described, the prosecution forms a view which (properly) reflects the interests that the prosecution is bound to advance. But that view is not, and cannot be, dispassionate.

33 The statement by the prosecution of the bounds of an available range of sentences may lead to erroneous views about its importance in the process of sentencing with consequential blurring of what should be a sharp distinction between the role of the judge and the role of the prosecution in that process. If a judge sentences within the range which has been suggested by the prosecution, the statement of that range may well be seen as suggesting that the sentencing judge has been swayed by the prosecution's view of what punishment should be imposed. By contrast, if the sentencing judge fixes a sentence outside the suggested range, appeal against sentence seems well-nigh inevitable.

The sentencing task

34 Fixing the bounds of a range within which a sentence should fall or within which a sentence that has been imposed should have fallen wrongly suggests that sentencing is a mathematical exercise. Sentencing an offender is not, and cannot be undertaken as, some exercise in addition or subtraction. A sentencing judge must reach a single sentence for each offence and must do so by balancing[21] many different and conflicting features. The sentence cannot, and should not, be broken down into some set of component parts. As the plurality said[22] in *Wong v The Queen*, "[s]o long as a sentencing judge must, or may, take account of *all* of the circumstances of the offence and the offender, to single out some of those considerations and attribute specific numerical or proportionate value to some features, distorts the already difficult balancing exercise which the judge must perform" (original emphasis).

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21 *Wong v The Queen* (2001) 207 CLR 584 at 611 [75]; [2001] HCA 64.

22 (2001) 207 CLR 584 at 612 [76].

35 No less importantly, any determination of the bounds of an available range of sentences would have to depend upon first, what considerations are judged to bear upon the fixing of sentence and second, what effect is given to those considerations. Hence, if a party to sentencing proceedings proffers a range of sentences as the range within which a particular sentence should be imposed upon an offender, the range will necessarily reflect conclusions or assumptions (stated or unstated) which have been made about what considerations bear upon sentence and what weight is given to each. As Buchanan JA rightly said[23] in *MacNeil-Brown*, even if those conclusions and assumptions were all to be exposed, "it is not possible to explain the part played by those facts and factors in arriving at the figures advanced by counsel without resorting to the mathematical approach" to sentencing which this Court has rejected.

36 If a party makes a submission to a sentencing judge about the bounds of an available range of sentences, the conclusions or assumptions which underpin that range can be based only upon predictions about what facts will be found by the sentencing judge. In some cases, there may be little controversy about the facts. But that will not always be so. In the present cases, for example, counsel for Mr Zirilli told the sentencing judge that the prosecution accepted that Mr Zirilli's guilty plea indicated his remorse. Presumably the range of sentences which the prosecution indicated in correspondence with Mr Zirilli's lawyers reflected this view of the matter. But the sentencing judge did not accept that Mr Zirilli was remorseful. Necessarily, then, the range of sentences proffered by the prosecution was fixed on a false basis.

37 This serves to demonstrate that bare statement of a range tells a sentencing judge nothing of the conclusions or assumptions upon which the range depends. And if, as will often be the case, counsel who appears for the prosecution on a sentencing hearing was not responsible for deciding what range would be proffered, the judge will have little or no assistance towards understanding why the range was fixed as it was.

38 If a sentencing judge is properly informed about the parties' submissions about what facts should be found, the relevant sentencing principles and comparable sentences, the judge will have all the information which is necessary to decide what sentence should be passed without any need for the prosecution to proffer its view about available range. If the judge is not sufficiently informed about what facts may or should be found, about the relevant principles or about comparable sentences, the prosecution's proffering a range may help the

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23 (2008) 20 VR 677 at 710 [127].

sentencing judge avoid imposing a sentence which the prosecution can later say was manifestly inadequate. But it will not do anything to help the judge avoid specific error; it will not necessarily help the judge avoid imposing a sentence which the offender will later allege to be manifestly excessive. Most importantly, it will not assist the judge in carrying out the sentencing task in accordance with proper principle[24].

39 What is more, unless the sentencing judge gives some preliminary indication of the sentence which he or she intends to impose, there can be no occasion for the prosecution to anticipate possible error and make some correcting submission[25]. Even in a case where the judge does give some preliminary indication of the proposed sentence, the role and duty of the prosecution remains the duty which has been indicated earlier in these reasons: to draw to the attention of the judge what are submitted to be the facts that should be found, the relevant principles that should be applied and what has been done in other (more or less) comparable cases. It is neither the role nor the duty of the prosecution to proffer some statement of the specific result which counsel then appearing for the prosecution (or the Director of Public Prosecutions or the Office of Public Prosecutions) considers should be reached or a statement of the bounds within which that result should fall.

40 The setting of bounds to the available range of sentences in a particular case must, however, be distinguished from the proper and ordinary use of sentencing statistics and other material indicating what sentences have been imposed in other (more or less) comparable cases. Consistency of sentencing is important. But the consistency that is sought is consistency in the application of relevant legal principles, not numerical equivalence[26].

41 As the plurality pointed out[27] in *Hili v The Queen*, in seeking consistency sentencing judges must have regard to what has been done in other cases. Those other cases may well establish a range of sentences which have been imposed.

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24 cf *Wong* (2001) 207 CLR 584 at 611 [75]; *Markarian v The Queen* (2005) 228 CLR 357 at 373-375 [37]; [2005] HCA 25; *Muldrock v The Queen* (2011) 244 CLR 120 at 128 [18]; [2011] HCA 39; *Munda v Western Australia* (2013) 87 ALJR 1035 at 1046 [59]; 302 ALR 207 at 219; [2013] HCA 38.

25 cf *MacNeil-Brown* (2008) 20 VR 677 at 678 [3(b)].

26 *Hili* (2010) 242 CLR 520 at 535 [48]-[49].

27 (2010) 242 CLR 520 at 536-537 [53]-[54].

But that history does not establish that the sentences which have been imposed mark the outer bounds of the permissible discretion. The history stands as a yardstick against which to examine a proposed sentence. What is important is the unifying principles which those sentences both reveal and reflect[28]. And as each of Buchanan JA and Kellam JA rightly observed[29] in *MacNeil-Brown*, the synthesis of the "raw material" which must be considered on sentencing, including material like sentencing statistics and information about the sentences imposed in comparable cases, is the task of the sentencing judge, not counsel.

A statement of opinion, not a submission of law

42 Contrary to the view of the majority in *MacNeil-Brown*, the prosecution's conclusion about the bounds of the available range of sentences is a statement of opinion, not a submission of law. A statement of the bounds of the available range of sentences is a conclusion[30] which depends upon identifying (and in many cases assuming) the facts and circumstances relevant to the offence and the offender and striking a balance between the many competing considerations which may bear upon the sentence.

43 A statement of bounds, on its face, purports to identify the points at which conclusions of manifest excess and manifest inadequacy of sentence become open. Leaving aside the evident difficulties which attend such pretended accuracy, it is important to recognise that manifest excess or manifest inadequacy of sentence founds an inference of error in the exercise of the sentencing discretion. But the nature of the error that has been made is not, and cannot be, identified. All that is known is that, because the result "upon the facts ... is unreasonable or plainly unjust, the appellate court may infer that in some way there has been a failure properly to exercise the discretion which the law reposes in the court of first instance"[31]. Hence, stating the bounds of the available range of sentences states no proposition of law.

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28 cf *Wong* (2001) 207 CLR 584 at 606 [59]; *Hili* (2010) 242 CLR 520 at 537 [54]; *Director of Public Prosecutions (Cth) v De La Rosa* (2010) 79 NSWLR 1 at 71 [304] per Simpson J.

29 (2008) 20 VR 677 at 711 [130] per Buchanan JA, 716 [147] per Kellam JA.

30 cf *Hili* (2010) 242 CLR 520 at 538 [59].

31 *House* (1936) 55 CLR 499 at 505.

No want of procedural fairness; no other unfairness

44 The sentencing judge's refusal to receive submissions about range did not deny the applicants procedural fairness. It caused no other unfairness to the applicants.

45 Each applicant had a complete opportunity to make his plea in mitigation of sentence and, in the course of doing so, make any relevant submission about what facts should be found for the purposes of sentencing and what principles should be applied in determining the sentences imposed.

46 There was no unfairness in the sentencing judge not asking the prosecution to state an opinion about what range of sentences could be imposed. There was no unfairness in the sentencing judge not asking about what had been said or done in the course of discussions between the prosecution and lawyers for the applicants before the applicants indicated their willingness to plead guilty to certain charges. Neither the outcome of those discussions nor any hope or expectation which the applicants may have entertained as a result was relevant to the task of the sentencing judge.

47 To describe the discussions between the prosecution and lawyers for the applicants as leading to plea agreements (or "settlement" of the matters) cannot obscure three fundamental propositions. First, it is for the prosecution, alone, to decide what charges are to be preferred against an accused person[32]. Second, it is for the accused person, alone, to decide whether to plead guilty to the charges preferred[33]. That decision cannot be made with any foreknowledge of what sentence will be imposed. Neither the prosecution nor the offender's advisers can do anything more than proffer an opinion as to what might reasonably be expected to happen. Third, and of most immediate importance in these applications, it is for the sentencing judge, alone, to decide[34] what sentence will be imposed.

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32 *Barton v The Queen* (1980) 147 CLR 75 at 94-95; [1980] HCA 48; *Maxwell v The Queen* (1996) 184 CLR 501 at 534; [1996] HCA 46; *Cheung v The Queen* (2001) 209 CLR 1 at 22 [47]; [2001] HCA 67; *GAS v The Queen* (2004) 217 CLR 198 at 210 [28]; [2004] HCA 22.

33 *GAS* (2004) 217 CLR 198 at 210-211 [29].

34 *GAS* (2004) 217 CLR 198 at 211 [30].

48 The applicants' allegations of unfairness depended upon giving the plea agreements and the prosecution's expression of opinion about sentencing range relevance and importance that is not consistent with these principles. The prosecution decided what charges would be preferred against the applicants. The applicants decided whether to plead guilty to those charges. They did so in light of whatever advice they had from their own advisers and whatever weight they chose to give to the prosecution's opinions. But they necessarily did so knowing that it was for the judge, alone, to decide what sentence would be passed upon them.

49 The applicants' arguments that the sentencing judge ignored a relevant consideration in sentencing the applicants must also be rejected. Once it is understood that a submission by the prosecution about the bounds of the available range of sentences is no more than a statement of opinion, it follows that the sentencing judge need not, and should not, take it into account in fixing the sentences to be imposed.

Conclusion and orders

50 The applicants were not denied procedural fairness because the sentencing judge would not receive statements of what the prosecution considered to be the bounds of the available sentencing ranges. Not receiving such a statement was not a failure to take account of some material consideration. The applicants demonstrate no other form of unfairness in the sentencing hearings.

51 Each application for special leave should be granted, each appeal treated as instituted and heard instanter but dismissed.

52 GAGELER J. Section 16A(1) of the *Crimes Act* 1914 (Cth) ("the Act") requires a court sentencing a person for a federal offence to "impose a sentence ... that is of a severity appropriate in all the circumstances of the offence". That statutory language reflects the "basic principle of sentencing law" that a sentence "should never exceed that which can be justified as appropriate or proportionate to the gravity of the crime considered in the light of its *objective* circumstances"[35]. The statutory language, in so doing, makes plain that the sentence to be imposed by the court need not be a sentence which is uniquely correct. The range of sentences capable of being characterised as of a severity appropriate in all the circumstances of a particular offence is set by the time-honoured requirement implicit in the section that sentencing discretion "must be exercised judicially, according to rules of reason and justice"[36].

53 Section 16A(2) of the Act goes on to require the court sentencing a person for a federal offence to take into account such matters specified in that section "as are relevant and known to the court". By s 16A(2)(g), those specified matters relevantly include "if the person has pleaded guilty to the charge in respect of the offence – that fact". The introduction to s 16A(2) makes plain, however, that the specified matters required to be taken into account are "[i]n addition to any other matters". The implicit contemplation of that statutory language is that other matters might be required to be taken into account, either by another statute or by the common law[37].

54 Although not explicitly so framed, the argument on behalf of the applicant Saverio Zirilli necessarily turns on establishing that the common law requires a court exercising the sentencing discretion conferred by s 16A(1) of the Act to take into account a prosecution submission as to the range of sentences capable of being characterised as of a severity appropriate in all the circumstances of a particular offence if that prosecution submission has been foreshadowed to the person and taken into account by the person in deciding to plead guilty to the offence. The argument on behalf of the applicant Pasquale Barbaro has the additional strand that a refusal by a court to entertain a prosecution submission in those circumstances can also constitute a denial of procedural fairness.

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35 *Hoare v The Queen* (1989) 167 CLR 348 at 354; [1989] HCA 33 (emphasis in original).

36 *House v The King* (1936) 55 CLR 499 at 503; [1936] HCA 40; *Cranssen v The King* (1936) 55 CLR 509 at 513; [1936] HCA 42.

37 *Director of Public Prosecutions (Cth) v Said Khodor el Karhani* (1990) 21 NSWLR 370 at 378. Cf *Hili v The Queen* (2010) 242 CLR 520 at 528 [25]; [2010] HCA 45; *Johnson v The Queen* (2004) 78 ALJR 616 at 622 [15]; 205 ALR 346 at 353; [2004] HCA 15.

55 Those arguments fall to be considered in light of "elementary and fundamental propositions relating to the administration of criminal justice by independent courts" succinctly stated by King CJ in the Supreme Court of South Australia in 1989 in *R v Malvaso*[38].

56 The first proposition requires no elaboration. It is that the jurisdiction to determine the sentence to be imposed is conferred exclusively on the court, not on the prosecution or on the offender either individually or jointly. For the purpose of exercising that jurisdiction, however, the court must find the relevant facts, and may be assisted by submissions of law[39].

57 The second proposition is that "[t]he prosecution has a role in the sentencing process which consists of presenting the facts ... and of making any submissions which it thinks proper on the question of what sentence ought to be imposed"[40]. The earlier common law view that sentence was of no concern to the prosecution could not survive the enactment by State and Territory legislation of prosecution rights to appeal against sentence[41], picked up in respect of sentences of persons for federal offences by s 68(2) of the *Judiciary Act* 1903 (Cth). Once it became open to the prosecution under statute to seek to have a sentence set aside on appeal, it would have been perverse for the common law to have prevented the prosecution from making submissions to the sentencing court to assist that court to avoid appealable error in imposing the sentence. To the contrary, it came firmly to be established that the prosecution has a common law duty to assist the court to avoid such appealable error[42].

58 The final proposition, which is ultimately dispositive of the arguments of the applicants, follows from the other two. It is that such submission as the prosecution may make on the question of what sentence ought to be imposed can

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38 (1989) 50 SASR 503 at 509; reversed on other grounds *Malvaso v The Queen* (1989) 168 CLR 227; [1989] HCA 58.

39 *GAS v The Queen* (2004) 217 CLR 198 at 211-212 [30]-[31], [35]; [2004] HCA 22.

40 *R v Malvaso* (1989) 50 SASR 503 at 509.

41 *R v Tait and Bartley* (1979) 24 ALR 473 at 475, 477.

42 *R v Tait and Bartley* (1979) 24 ALR 473 at 477; *R v Wilton* (1981) 28 SASR 362 at 363-364, 368; *Everett v The Queen* (1994) 181 CLR 295 at 302; [1994] HCA 49; *R v Mangelsdorf* (1995) 66 SASR 60 at 76; *R v Nemer* (2003) 87 SASR 168 at 173 [28].

never carry any greater weight than that of a submission. The attitude or opinion of the prosecution is, "as such, irrelevant"[43].

59 Whether made on behalf of the prosecution or on behalf of the offender, a submission that a sentence within a given range would or would not be available to be imposed by a sentencing court in the circumstances of a particular case is a submission of law. It is a submission that a sentence within that range would or would not meet a limiting condition of the discretion conferred on the court to sentence for the offence and therefore would or would not fall within the limits of a proper exercise of the sentencing discretion. In the specific context of sentencing for a federal offence, it is a submission that a sentence within that range would or would not answer the specific statutory description in s 16A(1) of the Act of a sentence that is of a severity appropriate in all the circumstances of the offence.

60 The character of such a submission as one of law does not depend on the extent of the assistance a court might derive from such a submission, which may vary from court to court. Nor does it depend on the extent to which elaboration of the submission might be possible or appropriate, which may vary from case to case[44].

61 The character of a submission that a sentence within a given range would or would not be available to be imposed by a sentencing court in the circumstances of a particular case as one of law similarly cannot depend on whether the submission is made to a sentencing court or to a court of criminal appeal. The principles of appellate intervention enunciated in *House v The King*[45] and *Cranssen v The King*[46] are not free-standing but reflect limitations on the lawful exercise of the judicial discretion under appeal[47]. It has sometimes been stated that a sentence which is "unreasonable or plainly unjust" within the meaning of that expression as used in *House v The King*[48] is a sentence necessarily affected by some undisclosed but definite and specific error[49]. But

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43 *R v Malvaso* (1989) 50 SASR 503 at 509.

44 Cf *Dinsdale v The Queen* (2000) 202 CLR 321 at 325-326 [6]; [2000] HCA 54; *Markarian v The Queen* (2005) 228 CLR 357 at 375 [39]; [2005] HCA 25.

45 (1936) 55 CLR 499.

46 (1936) 55 CLR 509.

47 *Norbis v Norbis* (1986) 161 CLR 513 at 518, 540; [1986] HCA 17.

48 (1936) 55 CLR 499 at 505.

49 Eg *Wong v The Queen* (2001) 207 CLR 584 at 605-606 [58]; [2001] HCA 64.

such a statement can be recognised as universally true only if it is also recognised that a definite and specific error, whether disclosed or undisclosed, may be found in nothing more or less than effect having been given in the exercise of the discretion to "views or opinions which are extreme or misguided"[50]. A sentence may be "unreasonable or plainly unjust" simply "*because* the sentence imposed is manifestly too long or too short"[51] and a sentence which is manifestly too long or too short is, without more, erroneous "in point of principle"[52]. Linking the relevant principle of appellate intervention to the underlying limitation on the lawful exercise of the judicial discretion, it can be seen that a sentence which is "unreasonable or plainly unjust" for no reason other than that it is manifestly too long or too short is a sentence which has not been imposed "according to rules of reason and justice".

62 The majority of the Court of Appeal of the Supreme Court of Victoria in *R v MacNeil-Brown*[53] (Maxwell P, Vincent and Redlich JJA) was in my view correct to hold that the prosecution duty to assist a sentencing court to avoid appealable error requires the prosecutor to make a submission on sentencing range if the sentencing court requests such assistance or if the prosecutor perceives a significant risk that the sentencing court would make an appealable error in the absence of assistance[54]. If a sentencing court can be told after the event on an appeal by the prosecution that the sentence it has imposed is outside the available range for reasons articulated after the event by an appellate court which may or may not "admit of lengthy exposition"[55], the same sentencing court should in principle be able to expect to be assisted before the event by a prosecution submission as to the available range supported by such exposition of the reasons for that range as might at that time seem both possible and appropriate[56]. Such a prosecution submission, where made, has no greater or lesser status than any other submission of law. The sentencing court is not bound to accept the submission and may or may not in the event be assisted by it. The

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50 *Cranssen v The King* (1936) 55 CLR 509 at 520; *Harris v The Queen* (1954) 90 CLR 652 at 655; [1954] HCA 51.

51 *Dinsdale v The Queen* (2000) 202 CLR 321 at 325-326 [6] (emphasis added).

52 *Everett v The Queen* (1994) 181 CLR 295 at 300, citing *Griffiths v The Queen* (1977) 137 CLR 293 at 310; [1977] HCA 44.

53 (2008) 20 VR 677.

54 (2008) 20 VR 677 at 678 [3].

55 *Hili v The Queen* (2010) 242 CLR 520 at 538-539 [59].

56 Cf *Casey* (1986) 20 A Crim R 191 at 195-196.

sentencing court remains obliged to reach, and to give effect to, the court's own conclusion as to the appropriate sentence but remains entitled to expect to be assisted in so doing by appropriate submissions of law.

63 In the circumstances of the present cases, however, the experienced sentencing judge made clear that she would derive no assistance from a prosecution submission as to the available range. It forms no part of the argument of either applicant to suggest that the prosecution in those circumstances failed in the performance of its duty to assist the court to avoid appealable error. Equally, it forms no part of the argument of either applicant to suggest that the sentence imposed on that applicant is "unreasonable or plainly unjust" on the facts found by her Honour.

64 The argument on behalf of both applicants that the common law required the sentencing judge to take the foreshadowed prosecution submission on sentencing range into account as a mandatory relevant consideration founders on a confusion of concepts. The confusion is between a consideration legally mandated to be taken into account in an exercise of discretion, on the one hand, and the range of outcomes able to result from the lawful exercise of that discretion, on the other hand. A submission on sentencing range is a submission as to the bounds of an available exercise of a sentencing discretion once all relevant considerations are taken into account. A submission as to the bounds of an available exercise of a sentencing discretion once all relevant considerations are taken into account cannot, without impossible circularity, be treated as itself a consideration which must be taken into account in the exercise of that discretion.

65 The discrete argument on behalf of the applicant Mr Barbaro that there was in his case a denial of procedural fairness suffers from a discrete conceptual flaw. As counsel for Mr Barbaro quite properly conceded, the prosecution submission her Honour refused to entertain would have been a submission of law which was wrong in law. The submission was therefore one which the sentencing judge would have been bound in law to reject. Procedural unfairness is practical unfairness[57] within the applicable decision-making framework[58]. There is no practical unfairness in the mere failure or refusal of a decision-maker to entertain a submission the decision-maker would have been bound in law to

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57 *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Lam* (2003) 214 CLR 1 at 14 [37]; [2003] HCA 6.

58 *Kioa v West* (1985) 159 CLR 550 at 584; [1985] HCA 81, citing *Mobil Oil Australia Pty Ltd v Federal Commissioner of Taxation* (1963) 113 CLR 475 at 503-504; [1963] HCA 41.

reject[59]. Her Honour's refusal to entertain the foreshadowed prosecution submission was not a denial of procedural fairness and was immaterial.

66 For these reasons, I join in the orders granting each application for special leave to appeal and dismissing each appeal.

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59 Cf *Stead v State Government Insurance Commission* (1986) 161 CLR 141 at 145; [1986] HCA 54; *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82 at 109 [58]; [2000] HCA 57.