HIGH COURT OF AUSTRALIA

FRENCH CJ,
KIEFEL, BELL, GAGELER AND KEANE JJ

CMB APPELLANT

AND

ATTORNEY GENERAL FOR NEW SOUTH WALES RESPONDENT

CMB v Attorney General for New South Wales
[2015] HCA 9
11 March 2015
S257/2014

ORDER

1. *Appeal allowed.*

2. *Set aside the orders of the Court of Criminal Appeal of the Supreme Court of New South Wales made on 19 March 2014.*

3. *Remit the matter to the Court of Criminal Appeal of the Supreme Court of New South Wales for determination.*

On appeal from the Supreme Court of New South Wales

Representation

C T Loukas SC and G A Bashir SC with B C Dean for the appellant (instructed by Legal Aid NSW)

J V Agius SC with B K Baker for the respondent (instructed by Crown Solicitor (NSW))

CATCHWORDS

CMB v Attorney General for New South Wales

Criminal law – Sentencing – Sentence increased on prosecution appeal under s 5D of *Criminal Appeal Act* 1912 (NSW) – Appellant charged with sexual assault of daughter – Director of Public Prosecutions referred appellant for assessment for pre-trial diversion program – During assessment appellant disclosed further offences committed against daughter – First set of offences dealt with under program – Appellant charged with further offences and sentenced to good behaviour bonds with condition appellant complete program – Attorney General filed notice of appeal – Court of Criminal Appeal allowed appeal and re-sentenced appellant to five years and six months' imprisonment – Whether Court of Criminal Appeal erred in not exercising residual discretion to decline to interfere – Whether Court of Criminal Appeal erred in placing onus upon appellant with regard to exercise of residual discretion to dismiss appeal and limiting purpose of Crown appeals – Whether Court of Criminal Appeal erred in application of s 23 of *Crimes (Sentencing Procedure) Act* 1999 (NSW) and principles regarding voluntary disclosure of otherwise unknown guilt.

Words and phrases – "discretion not to intervene", "leniency", "manifestly inadequate", "onus", "proper sentence", "residual discretion", "restraint", "unreasonably disproportionate".

Criminal Appeal Act 1912 (NSW), s 5D.
Pre-Trial Diversion of Offenders Act 1985 (NSW).
Crimes (Sentencing Procedure) Act 1999 (NSW), s 23.

1 FRENCH CJ AND GAGELER J. The office of the Director of Public Prosecutions ("the DPP") was established by statute in New South Wales in 1986[1]. The DPP is responsible to the Attorney General for the exercise of statutory functions[2] which include the institution and conduct, on behalf of the Crown, of prosecutions for indictable offences, relevantly in the District Court[3]. The statutory functions for which the DPP is responsible to the Attorney General also include the institution and conduct, on behalf of the Crown, of an appeal, relevantly in the Court of Criminal Appeal, in respect of any such prosecution[4].

2 Since 1986, s 5D(1) of the *Criminal Appeal Act* 1912 (NSW) has provided:

> "The Attorney-General or the Director of Public Prosecutions may appeal to the Court of Criminal Appeal against any sentence pronounced by the court of trial in any proceedings to which the Crown was a party and the Court of Criminal Appeal may in its discretion vary the sentence and impose such sentence as to the said court may seem proper."

3 The present appeal to this Court, by "CMB", is from a decision given by the Court of Criminal Appeal on an appeal by the Attorney General against a sentence pronounced by the District Court for offences prosecuted by the DPP. CMB had confessed to those offences, and pleaded guilty to them. The District Court, at the request of CMB and of the DPP, imposed a non-custodial sentence. The DPP announced that he would not appeal. The Attorney General appealed some weeks later.

4 The Court of Criminal Appeal found the District Court to have proceeded on a legal misunderstanding in sentencing CMB. It found the non-custodial sentence pronounced by the District Court to have been manifestly inadequate. It went on to formulate and explain the custodial sentence which to it seemed proper.

5 As the final step in its reasoning, the Court of Criminal Appeal turned to the discretion conferred by s 5D of the *Criminal Appeal Act*. It stated that it took the law to be that the respondent to an appeal under that section had the onus of establishing that the discretion should be exercised in his or her favour. It stated

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1 *Director of Public Prosecutions Act* 1986 (NSW).

2 Section 4(3) of the *Director of Public Prosecutions Act* 1986 (NSW).

3 Section 7(1)(a) of the *Director of Public Prosecutions Act* 1986 (NSW).

4 Section 7(1)(b) of the *Director of Public Prosecutions Act* 1986 (NSW).

its conclusion in terms which reflected that onus. It said that it was ultimately not satisfied that there was any reason why it should exercise the discretion not to intervene. It then made orders having the effect of varying the sentence pronounced by the District Court by imposing the custodial sentence which to it seemed proper.

6 The Court of Criminal Appeal was wrong in the view it took of the law in that final step in its reasoning. It is the appellant in an appeal under s 5D of the *Criminal Appeal Act* who throughout has the burden of establishing that the discretion conferred by that section should be exercised to vary the sentence imposed by the court of trial.

7 The Court of Criminal Appeal's erroneous view of the discretion was material to its decision. In light of the peculiarity of the background circumstances and of the conduct of the representative of the DPP in the District Court, it cannot be said that it was not open to the Court of Criminal Appeal in the Attorney General's appeal to it to have exercised the discretion against imposing the custodial sentence.

8 The consequence is that CMB's appeal to this Court must be allowed. The decision of the Court of Criminal Appeal must be set aside, and the Attorney General's appeal against the sentence pronounced by the District Court must be remitted to the Court of Criminal Appeal for reconsideration.

9 To explain that result, it is necessary first to explain the background to the prosecution which the DPP brought against CMB in the District Court.

Background

10 The background to the prosecution lay in curial and non-curial procedures for which provision was made in the *Pre-Trial Diversion of Offenders Act* 1985 (NSW). That Act provided for the protection of children who had been victims of sexual assault by a person who is a parent (or the spouse or de-facto partner of a parent) through the establishment and operation of a program for the treatment of such a person, which was administered by the Department of Health[5]. The program was known in practice as the Cedar Cottage Program ("the Program").

11 The *Pre-Trial Diversion of Offenders Act* allowed the DPP to refer a person charged with a sexual assault offence committed on a child of the person or person's spouse for assessment in relation to the person's suitability to participate in the Program[6]. If the Director of the Program assessed the person to

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5 Sections 2A and 30A of the *Pre-Trial Diversion of Offenders Act* 1985 (NSW).

6 Sections 3A and 10 of the *Pre-Trial Diversion of Offenders Act* 1985 (NSW).

be suitable, and if the person pleaded guilty to the charge, the person would be invited to give an undertaking to participate in the Program for a period of up to two years[7]. On that undertaking being given, the person would be convicted, but would not be sentenced or otherwise dealt with in relation to the offence provided the person complied with the undertaking and other statutory requirements[8].

12 The procedures for referral of a person and for assessment in relation to that person's suitability to enter into the Program depended on the existence of a regulation made under the *Pre-Trial Diversion of Offenders Act*[9]. A regulation which was made in 2005 remained in existence until 31 August 2012[10]. It was repealed on 1 September 2012[11]. There is no dispute that the effect of that repeal was that the procedures for which the Act provided remained available to a person in relation to charges laid before 1 September 2012[12], but that those procedures were not available to a person in relation to charges laid on or after 1 September 2012.

13 CMB sexually assaulted his daughter on numerous occasions between 2004 and 2006. She was then aged between 10 and 12. Some but not all of the assaults came to light in 2011 when his daughter reported them to police. She was then aged 17.

14 As a result of his daughter's report, CMB was interviewed by police on 27 October 2011. He was on that day charged with 22 sexual offences committed against his daughter between 2004 and 2006. The DPP later reduced those charges to five counts of aggravated sexual assault, two counts of attempted aggravated indecent assault, and three counts of aggravated indecent assault ("the first set of charges").

15 The DPP referred CMB for assessment in relation to his suitability to participate in the Program in April 2012. In October 2012, in the course of being assessed for participation in the Program, CMB disclosed to Program staff that he

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7 Section 23 of the *Pre-Trial Diversion of Offenders Act* 1985 (NSW).

8 Sections 24 and 30(1) of the *Pre-Trial Diversion of Offenders Act* 1985 (NSW).

9 Sections 10(a) and 14(1) of the *Pre-Trial Diversion of Offenders Act* 1985 (NSW).

10 Pre-Trial Diversion of Offenders Regulation 2005 (NSW).

11 Section 10(2) of the *Subordinate Legislation Act* 1989 (NSW).

12 Section 30 of the *Interpretation Act* 1987 (NSW).

had committed additional sexual assaults against his daughter. Neither he nor she had previously referred to those additional sexual assaults. Like other persons being assessed to participate in the Program, CMB was encouraged by Program staff to make additional disclosures as a sign of a positive commitment to change and was encouraged to make them before entering into the Program so as to avoid later difficulties. That is what he did.

16 Through meeting with Program staff, it became apparent to CMB that the only adequate way for him to show remorse was to disclose the additional sexual assaults to police. At his request, CMB was then interviewed again by police on 2 November 2012. He was cautioned at the beginning of that interview. He explained to police that he was making further disclosures as part of the assessment process for the Program. As a result of those further disclosures, he was on that day charged with nine further sexual offences committed against his daughter in 2005 and 2006. The DPP later reduced those charges to four counts of aggravated sexual assault and one count of aggravated indecent assault ("the second set of charges").

17 On 23 November 2012, CMB pleaded guilty to both sets of charges and was committed to the District Court for sentence. In the meantime, he had been assessed by the Director of the Program to be suitable to participate in the Program. The procedures for which the *Pre-Trial Diversion of Offenders Act* provided remained available to CMB in relation to the first set of charges. The repeal of the regulation on 1 September 2012 had the result, however, that those procedures were not available to him in relation to the second set of charges.

18 Each count of aggravated sexual assault carried a maximum penalty of 20 years' imprisonment, with a standard non-parole period of 10 years[13]. Each count of aggravated indecent assault, and each count of attempted aggravated indecent assault, carried a maximum of seven years' imprisonment, with a standard non-parole period of five years[14].

The DPP's prosecution

19 Both sets of charges were listed before Ellis DCJ for submissions on sentence on 31 January 2013. With respect to the first set of charges, CMB on that date gave an undertaking to participate in the Program for two years.

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13 Section 61J of the *Crimes Act* 1900 (NSW) and s 54D of the *Crimes (Sentencing Procedure) Act* 1999 (NSW).

14 Sections 61M and 61P of the *Crimes Act* 1900 (NSW) and s 54D of the *Crimes (Sentencing Procedure) Act* 1999 (NSW).

20 With respect to the second set of charges, counsel for CMB initially asked on 31 January 2013 that the sentencing proceedings be adjourned until after CMB's completion of the Program. The representative of the DPP initially agreed to that request. When his Honour indicated that if CMB "was going to get a sentence of imprisonment it ought to be now", the representative of the DPP responded by saying that, although the second set of charges called for a custodial sentence, "the Crown would have to say" that a custodial sentence "would be against the spirit of the [P]rogram". His Honour went on to raise the possibility of giving CMB a good behaviour bond conditional on his completion of the Program. Both representatives then expressed agreement with that suggestion. His Honour adjourned the sentencing hearing on the second set of charges to allow the views of CMB's daughter to be ascertained.

21 When the hearing on sentencing on the second set of charges resumed on 4 April 2013, documents tendered included a report prepared by the Director of the Program, which showed that CMB was making satisfactory progress in the Program. Documents tendered also included a victim impact statement in which CMB's daughter explained that CMB's actions had left her "not ever wanting to be associated" with him and in which she said that "the leniency offered to the offender because of the familiar relationship" caused her to "doubt the effectiveness" of the legal system. The representatives of the DPP and CMB both nevertheless indicated that they were still in agreement that it would not be appropriate for CMB to be sentenced to imprisonment and that it would be appropriate for CMB to be given a good behaviour bond conditional on his completion of the Program. The representative of the DPP specifically reiterated that a custodial sentence would be "against the spirit of the [P]rogram".

22 His Honour proceeded accordingly to sentence CMB to a two year good behaviour bond in respect of the offence of aggravated indecent assault and a three year good behaviour bond in respect of the four offences of aggravated sexual assault, each conditional on CMB completing the Program. His Honour's remarks on sentencing indicated that he mistakenly understood that the second set of charges would not have been laid had the regulation remained in force. The truth was that disclosures made under, or as part of the assessment process for, the Program gave rise to no immunity from prosecution. There was nothing to remove Program staff from the ordinary legal obligation to notify police of offences to which a person confessed. The truth was also that there was no guarantee that the DPP would have referred CMB for assessment in respect of the second set of charges. Whether or not they were conscious of the mistake at the time, neither the representative of the DPP nor the representative of CMB drew the mistake to his Honour's attention. His Honour went on to say that "the only fair and just outcome" in the circumstances was to produce, by means of good behaviour bonds, an outcome which would be "identical to that of all other offenders who have been honest and made admissions of other acts as part of their involvement in the … Program". His Honour specifically referred to the

victim impact statement and emphasised that, had it not been for the Program, CMB would "in the normal course of events" have received "a lengthy sentence of imprisonment".

The Attorney General's appeal

23 The DPP publicly announced on 17 July 2013 that he had decided not to appeal against the sentence pronounced by Ellis DCJ in light of the "unique history" of the matter "including the fact that the additional charges were only disclosed at the behest of Cedar Cottage staff". The Attorney General gave notice of his intention to appeal on 26 July 2013 and filed a notice of appeal on 6 August 2013.

24 The Court of Criminal Appeal (Ward JA, Harrison and R A Hulme JJ) heard the Attorney General's appeal on 10 December 2013 and delivered its decision on 19 March 2014. It upheld a ground of the Attorney General's appeal framed in terms that Ellis DCJ erroneously took into account how CMB's disclosures of the additional sexual offences committed against his daughter in 2005 and 2006 would have been dealt with had the regulation not been repealed[15]. It also upheld grounds framed in terms that his Honour gave insufficient weight to the objective seriousness of the offences and that the sentences were manifestly inadequate[16]. Neither of those holdings is the subject of a ground of appeal to this Court.

25 Turning to what it considered to be the proper sentence, the Court of Criminal Appeal emphasised the objective seriousness of the offences, which in its opinion made a sentence of full-time imprisonment appropriate even after subjective and procedural considerations were taken into account, including, most prominently, the circumstance that the facts underpinning the second set of charges only came to light as the result of CMB's disclosures made during the process of his assessment for the Program. Using language drawn from *R v Ellis*[17] and from the effect of s 23(3) of the *Crimes (Sentencing Procedure) Act* 1999 (NSW), however, it emphasised that "the significant added element of leniency to which [CMB] is therefore entitled must not lead to a sentence that is unreasonably disproportionate to the nature and circumstances of the offences"[18]. It added the observation that CMB made those disclosures during the process of

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15 *R v CMB* [2014] NSWCCA 5 at [82]-[84].

16 *R v CMB* [2014] NSWCCA 5 at [87]-[89].

17 (1986) 6 NSWLR 603 at 604.

18 *R v CMB* [2014] NSWCCA 5 at [93].

assessment for the Program only after the first set of charges were laid, as a result of the police investigation which followed his daughter's report to police, and in circumstances where participation in the Program would allow him to avoid being sentenced for the offences to which the first set of charges related. There was, it opined, a "considerable element of self-interest" in the disclosures, "which were not in those circumstances unambiguously altruistic or purely cathartic"[19].

26 In respect of the offence of aggravated indecent assault, the Court of Criminal Appeal considered that CMB should be sentenced to a term of nine months, with a non-parole period of six months. In respect of each of the four offences of aggravated sexual assault, it considered that CMB should be sentenced to a term of three years, with a non-parole period of two years. Allowing for some accumulation of some of the offences to reflect the fact that they concerned discrete incidents, it considered that CMB should be sentenced to an aggregate sentence of five years and six months with a non-parole period of three years[20]. That was the sentence it went on, in the orders which it made, to impose.

27 Before doing so, however, the Court of Criminal Appeal turned at the end of its reasons for judgment to address what it had earlier described as its "residual discretion to decline to interfere with a sentence even though it is erroneously lenient"[21]. It noted that, while s 68A of the *Crimes (Appeal and Review) Act* 2001 (NSW) has the effect that presumed distress or anxiety occasioned by resentencing must be disregarded in the exercise of that discretion, evidence of actual distress or anxiety occasioned to a respondent to an appeal under s 5D of the *Criminal Appeal Act* must be taken into account[22]. In that respect, it placed weight on evidence adduced by CMB as to the anxiety and distress he felt since being notified of the Attorney General's decision to appeal and as to his progress in the Program to date, which would be cut short by imprisonment[23]. Although emphasising that the representative of the DPP had not engaged in conduct which "could be characterised as either inappropriate or unfair", it acknowledged that the representative of the DPP "was largely, if not predominantly, responsible for the way in which his Honour dealt with [CMB] in the first instance"[24]. It also

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19 *R v CMB* [2014] NSWCCA 5 at [93].

20 *R v CMB* [2014] NSWCCA 5 at [101].

21 *R v CMB* [2014] NSWCCA 5 at [57].

22 *R v CMB* [2014] NSWCCA 5 at [58], [103].

23 *R v CMB* [2014] NSWCCA 5 at [94]-[95], [103]-[104], [109].

24 *R v CMB* [2014] NSWCCA 5 at [106]-[107].

acknowledged that the repeal and non-replacement of the regulation meant that the circumstances which gave rise to CMB's disclosures were "unlikely ever to arise again" with the result that its decision would be "of no utility in guiding courts or practitioners with respect to the operation of the *Pre-Trial Diversion of Offenders Act*"[25].

28 The joint reasons for judgment of the Court of Criminal Appeal concluded[26]:

> "We are ultimately not satisfied that there is any basis upon which, or reason why, this Court should exercise its residual discretion not to intervene. We take the law to be that 'the onus lies upon the respondent to establish that that discretion ought to be exercised in his or her favour'. The respondent in this case has identified and analysed an impressive collection of factors pertinently informing the exercise of that discretion. The identified matters do not satisfy us, however, that his Honour's sentencing discretion did not wholly miscarry in a way that mandates correction in this Court. It is correspondingly wholly inappropriate in this case to exercise the available discretion not to intervene."

The words endorsed as a statement of the applicable law were extracted from the earlier decision of the Court of Criminal Appeal in *R v Smith*[27].

This appeal

29 The grant of special leave to appeal limits CMB's appeal to this Court to two grounds. The first goes to the Court of Criminal Appeal's approach to the discretion conferred by s 5D of the *Criminal Appeal Act*. It is that the Court of Criminal Appeal erred by imposing an "onus" on the respondent to such an appeal, and by failing to have regard to its "limiting purpose".

30 The second ground goes to the Court of Criminal Appeal's formulation of the sentence which to it seemed proper. It is that the Court of Criminal Appeal erred in the way it applied *R v Ellis* and s 23(3) of the *Crimes (Sentencing Procedure) Act* to the disclosures CMB made during the process of his assessment for the Program. The reduction in sentence to which the Court of Criminal Appeal was prepared to treat CMB as entitled by reason of making the disclosures should have been greater.

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25 *R v CMB* [2014] NSWCCA 5 at [108].

26 *R v CMB* [2014] NSWCCA 5 at [110] (internal reference omitted).

27 [2007] NSWCCA 100 at [60].

31 As to the first of those grounds, the Attorney General confesses error to the extent that he argues that the discretion conferred by s 5D of the *Criminal Appeal Act* imports no onus one way or the other. But, the Attorney General says, the error was immaterial because imposition of a custodial sentence on CMB was inevitable. As to the second ground, the Attorney General argues that the limited reduction in sentence to which the Court of Criminal Appeal was prepared to treat CMB as entitled by reason of making the disclosures fell within the scope of the discretionary judgment committed to a sentencing court by s 23 of the *Crimes (Sentencing Procedure) Act* and involved no error of principle.

Discretion

32 Section 5D of the *Criminal Appeal Act* serves the dual function of conferring capacity on the Attorney General or the DPP to appeal against a sentence pronounced by a court of trial in proceedings to which the Crown in right of New South Wales was a party, and of conferring power on the Court of Criminal Appeal in such an appeal to impose a different sentence. That power is conferred by the concluding words of s 5D(1) in terms that "the Court of Criminal Appeal may in its discretion vary the sentence and impose such sentence as to the said court may seem proper".

33 Descriptions of the discretion expressly so conferred on the Court of Criminal Appeal as "residual" ought not to be misunderstood. To enliven the discretion, it is incumbent on the appellant in an appeal under s 5D to demonstrate that the sentence pronounced by the court of trial turned on one or more specific errors of law or of fact, or, in the totality of the circumstances, was unreasonable or plainly unjust[28]. The discretion is residual only in the sense that its exercise does not fall to be considered unless that threshold is met. Once the discretion is enlivened, it remains incumbent on the appellant in an appeal under s 5D to demonstrate that the discretion should be exercised.

34 Accordingly, as Heydon JA succinctly put it in *R v Hernando*[29]:

> "if [the Court of Criminal Appeal] is to accede to the Crown's desire that the respondent be sentenced more heavily, it must surmount two hurdles. The first is to locate an appellable error in the sentencing judge's discretionary decision. The second is to negate any reason why the

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28 *Markarian v The Queen* (2005) 228 CLR 357 at 371 [28]; [2005] HCA 25; *Carroll v The Queen* (2009) 83 ALJR 579 at 581 [7]; 254 ALR 379 at 381; [2009] HCA 13, citing *House v The King* (1936) 55 CLR 499 at 504-505; [1936] HCA 40; *Bugmy v The Queen* (2013) 249 CLR 571 at 597 [51]; [2013] HCA 37.

29 (2002) 136 A Crim R 451 at 458 [12].

> residual discretion of the Court of Criminal Appeal not to interfere should be exercised."

The Court of Criminal Appeal, in this case and in *R v Smith*, was wrong to depart from that statement of the law.

35 The second of the two hurdles to which Heydon JA referred in *R v Hernando* has a statutory foundation and a systemic significance. Before s 5D of the *Criminal Appeal Act* was amended to add reference to the DPP, Barwick CJ said in *Griffiths v The Queen*[30]:

> "On my view of the proper meaning of s 5D in the context of the *Criminal Appeal Act*, an appeal by the Attorney-General should be a rarity, brought only to establish some matter of principle and to afford an opportunity for the Court of Criminal Appeal to perform its proper function in this respect, namely, to lay down principles for the governance and guidance of courts having the duty of sentencing convicted persons."

With the clarification that the reference to "matter of principle" by Barwick CJ "must be understood as encompassing what is necessary to avoid … manifest inadequacy or inconsistency in sentencing standards"[31], his Honour's explanation of the nature of an appeal under s 5D has since been said to represent "general and authoritative guidance to the Courts of Criminal Appeal of this country"[32]. It expresses the "limiting purpose" of an appeal under s 5D, and in so doing provides "a framework within which to assess the significance of factors relevant to the exercise of the discretion"[33].

36 Having found the sentence pronounced by Ellis DCJ to be manifestly inadequate, the critical error of the Court of Criminal Appeal in the present case was to treat the residual discretion thereby enlivened as a hurdle for CMB to surmount rather than as the second of the hurdles for the Attorney General to surmount. Contrary to the submission of the Attorney General in this Court, it cannot be concluded that the error was immaterial.

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30 (1977) 137 CLR 293 at 310; [1977] HCA 44.

31 *Everett v The Queen* (1994) 181 CLR 295 at 300; [1994] HCA 49. See also *Munda v Western Australia* (2013) 249 CLR 600 at 623-624 [68]-[69]; [2013] HCA 38.

32 *Malvaso v The Queen* (1989) 168 CLR 227 at 234; [1989] HCA 58.

33 *Green v The Queen* (2011) 244 CLR 462 at 477 [36]; [2011] HCA 49. See also *Malvaso v The Queen* (1989) 168 CLR 227 at 234-235.

37 Within the framework provided by the explanation of the nature of an appeal under s 5D of the *Criminal Appeal Act* given by Barwick CJ in *Griffiths v The Queen*, two considerations weighed strongly against interference with the sentence which had been pronounced by Ellis DCJ. One was that highlighted by the DPP in his publicly stated reasons for not appealing: that the peculiarity of the circumstances rendered the decisions of both the District Court and the Court of Criminal Appeal of no precedential value. The case, although one of manifest inadequacy of sentence, was therefore not one in respect of which it could be said that "to decline to intervene would have been to perpetuate a manifest injustice"[34].

38 The other important consideration was the role played by the DPP in bringing about the sentence pronounced by Ellis DCJ. The Attorney General and the DPP both having capacity to appeal under s 5D, no distinction can be drawn between them for the purpose of considering, on an appeal, the conduct of the prosecution before the court of trial. The Attorney General in the appeal to the Court of Criminal Appeal, and the DPP in the prosecution in the District Court, were each the representative of the Crown in right of New South Wales. The Crown (by whomever it is represented) has a duty to assist a sentencing court to avoid appealable error. That duty would be hollow were it not to remain rare that an "appellate court would intervene on an appeal against sentence to correct an alleged error by increasing the sentence if the Crown had not done what was reasonably required to assist the sentencing judge to avoid the error"[35].

39 This Court, it has repeatedly been said, is not a sentencing court[36]. The weight to be given to those, and other, considerations in the exercise of the residual discretion in the overall circumstances of this case is not for this Court to determine and was properly a matter for the Court of Criminal Appeal. For CMB's appeal to this Court to be allowed on the first ground, and for the Attorney General's appeal against the sentence pronounced by the District Court to be remitted to the Court of Criminal Appeal for reconsideration, it is unnecessary and inappropriate for this Court to go further than to reject the conclusion that the discretion could only reasonably have been exercised affirmatively to vary the sentence pronounced by Ellis DCJ and to impose the custodial sentence which the Court of Criminal Appeal considered proper.

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34 Cf *Munda v Western Australia* (2013) 249 CLR 600 at 625 [76].

35 *R v Tait* (1979) 24 ALR 473 at 477.

36 *Johnson v The Queen* (2004) 78 ALJR 616 at 626 [35]; 205 ALR 346 at 358; [2004] HCA 15; *Markarian v The Queen* (2005) 228 CLR 357 at 376 [44]; *Bugmy v The Queen* (2013) 249 CLR 571 at 596 [49].

Reduction for disclosure

40 In *R v Ellis*, after stating that "[i]t is part of the policy of the criminal law to encourage a guilty person to come forward and disclose both the fact of an offence having been committed and confession of guilt of that offence", Street CJ said[37]:

> "The leniency that follows a confession of guilt in the form of a plea of guilty is a well recognised part of the body of principles that cover sentencing. Although less well recognised, because less frequently encountered, the disclosure of an otherwise unknown guilt of an offence merits a significant added element of leniency, the degree of which will vary according to the degree of likelihood of that guilt being discovered by the law enforcement authorities, as well as guilt being established against the person concerned."

41 The policy of the criminal law to which Street CJ referred now finds statutory expression in the *Crimes (Sentencing Procedure) Act*, s 22 of which concerns confession of guilt, and s 23 of which encompasses the provision of assistance to law enforcement authorities including by disclosure of the commission of an offence. In each of those circumstances, by operation of ss 22(1) and 23(1) respectively, a sentencing court may impose a lesser penalty than it would otherwise impose. And in each of those circumstances, by operation of ss 22(1A) and 23(3) respectively, the lesser penalty imposed "must not be unreasonably disproportionate to the nature and circumstances of the offence". It has been held that whether or not a lesser penalty is "unreasonably" disproportionate to the nature and circumstances of the offence, within the meaning of s 23(3), turns on an evaluative judgment which itself takes into account the nature and extent of the assistance provided to law enforcement authorities[38].

42 There can be no doubt that the Court of Criminal Appeal framed its reasons for decision consistently with *R v Ellis* when it referred to "the significant added element of leniency to which [CMB] is therefore entitled"[39]. There can equally be no doubt that the Court of Criminal Appeal framed its reasons for decision consistently with s 23(3) of the *Crimes (Sentencing Procedure) Act* when it added the qualification that the significant added element of leniency

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37 (1986) 6 NSWLR 603 at 604.

38 *C* (1994) 75 A Crim R 309 at 315.

39 *R v CMB* [2014] NSWCCA 5 at [93].

"must not lead to a sentence that is unreasonably disproportionate to the nature and circumstances of the offences"[40].

43 McHugh J pointed out in *Ryan v The Queen*[41] that the statement in *R v Ellis* that "the disclosure of an otherwise unknown guilt of an offence merits a significant added element of leniency" "is not the statement of a rule to be quantitatively, rigidly or mechanically applied":

> "It is an indication that, in determining the appropriate sentence, the disclosure of what was an unknown offence is a significant and not an insubstantial matter to be considered on the credit side of the sentencing process. How significant depends on the facts and circumstances of the case."

44 The extent to which it was appropriate to reduce the sentence otherwise proper to impose on CMB, having regard to the circumstance that the facts underpinning the second set of charges only came to light as the result of his disclosures made during the process of his assessment for the Program, is a topic on which reasonable minds might differ. Neither the emphasis given by the Court of Criminal Appeal to the disclosure having been to the benefit of CMB (given the pendency of the first set of charges), nor that given to the objective seriousness of the offences, is indicative of any error of principle. The second ground of the appeal is not made out.

Orders

45 The following orders are to be made:

(1) Appeal allowed.

(2) Set aside the orders made by the Court of Criminal Appeal on 19 March 2014.

(3) Remit the Attorney General's appeal to the Court of Criminal Appeal.

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40 *R v CMB* [2014] NSWCCA 5 at [93].

41 (2001) 206 CLR 267 at 272-273 [15]; [2001] HCA 21.

KIEFEL, BELL AND KEANE JJ.

Introduction

46 The facts, the scheme of the *Pre-Trial Diversion of Offenders Act* 1985 (NSW) ("the Diversion Act") and the procedural history are set out in the reasons of French CJ and Gageler J. For the reasons to be given, we would uphold each of CMB's grounds of appeal. Before turning to those grounds, it is convenient to note some further aspects of the procedural history.

47 As the result of the enactment of the *Director of Public Prosecutions Act* 1986 (NSW) and cognate legislation[42], the Attorney General for the State of New South Wales and the Director of Public Prosecutions ("the DPP") are each authorised to institute and conduct prosecutions on indictment on behalf of the Crown in right of New South Wales. The Attorney General and the DPP acting on behalf of the Crown may each appeal to the Court of Criminal Appeal against any sentence pronounced by the court of trial arising out of such a prosecution. The primacy of the Attorney General as first Law Officer of New South Wales is reflected in statutory provision for the Attorney General to furnish guidelines to the DPP, including with respect to the circumstances in which the Director is to institute and carry on prosecutions for offences[43], save that a guideline may not be furnished with respect to a particular case[44]. No issue as to the regularity of the Attorney General's appeal against the sentences imposed on CMB following a prosecution instituted and conducted by the DPP is presented.

48 The Attorney General's appeal to the Court of Criminal Appeal of the Supreme Court of New South Wales (Ward JA, Harrison and R A Hulme JJ) was on two grounds. The second ground charged manifest inadequacy of sentence. The first ground contended that the sentencing judge's discretion (Ellis DCJ) was vitiated by legal error in three respects. The Court of Criminal Appeal rejected the second of the asserted errors[45] and, correctly, identified the third asserted error as a particular of the second ground[46]. The Court of Criminal Appeal found

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42 *Criminal Appeal (Amendment) Act* 1986 (NSW); *Crown Prosecutors Act* 1986 (NSW); *District Court (Amendment) Act* 1986 (NSW); *Miscellaneous Acts (Public Prosecutions) Amendment Act* 1986 (NSW).

43 *Director of Public Prosecutions Act* 1986 (NSW), s 26(1)-(2).

44 *Director of Public Prosecutions Act* 1986 (NSW), s 26(3).

45 *R v CMB* [2014] NSWCCA 5 at [85].

46 *R v CMB* [2014] NSWCCA 5 at [87].

that Ellis DCJ erred in the first respect particularised[47]. This was the complaint that Ellis DCJ took into account an erroneous consideration, namely, how CMB's disclosure of the offences would have been dealt with when the Pre-Trial Diversion of Offenders Regulation 2005 ("the Regulation") had effect. In the way the ground was developed, the complaint was both that it was an error to structure sentences in an endeavour to reproduce the effect of the Regulation[48] and that Ellis DCJ had proceeded upon a mistaken understanding of the effect of the Regulation in any event[49]. Ellis DCJ sentenced CMB upon the understanding that the Regulation contained a provision which allowed a participant in the Pre-Trial Diversion of Offenders Program[50] ("the Program") to make "full disclosure" of further child sexual assault offences and continue in the Program "without further charges or the matter being relayed back to the court"[51]. The Regulation made no such provision.

49 The Court of Criminal Appeal found that Ellis DCJ's misapprehension was due to the prosecutor's failure to address him on the correct state of the law[52]. At the hearing before Ellis DCJ on 31 January 2013, the prosecutor stated that she did not object to the second set of charges being adjourned from time to time to permit CMB to complete the Program. She submitted that, in light of the serious nature of the charges, it would be "unfair" and "against the spirit of the program" to proceed immediately to sentence. The prosecutor stated that as CMB had disclosed the offences as part of the Program, had the Regulation not "lapse[d]", the offences would have been incorporated into the Program.

50 The Regulation made provision respecting the referral and assessment of persons to whom the Diversion Act applied[53]. It is common ground that from 1 September 2012, on which date the Regulation was repealed, no further

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47 *R v CMB* [2014] NSWCCA 5 at [84].

48 *R v CMB* [2014] NSWCCA 5 at [29].

49 *R v CMB* [2014] NSWCCA 5 at [31].

50 Diversion Act, s 30A.

51 *R v CMB* [2014] NSWCCA 5 at [31].

52 *R v CMB* [2014] NSWCCA 5 at [83].

53 Diversion Act, s 3A: "This Act applies to a person who is charged with a child sexual assault offence committed with or upon the person's child or the child of the person's spouse or de facto partner."

referrals for assessment of suitability for the Program could be made. The prosecutor's statements at the hearing on 31 January 2013 may be thought to have fairly described the practical operation of the scheme up to 1 September 2012. The former Director of the Program stated in an affidavit that was before the Court of Criminal Appeal that, prior to the repeal of the Regulation, a person in CMB's position could apply to have offences disclosed during the assessment dealt with under the Diversion Act, provided the disclosure was made before the person gave the undertaking to the court, and provided the DPP and the Director of the Program agreed to that course.

51 At the resumed hearing on 4 April 2013, Ellis DCJ asked the prosecutor if a regulation had provided for further offences disclosed during the assessment to be dealt with as "part and parcel of what had brought [the offender] before Cedar Cottage in the first place". The prosecutor confirmed that the Regulation made such provision and said that the disclosure of further offences would not necessarily have generated fresh charges. In each of these respects, the prosecutor's statement was wrong. However, the prosecutor's support for the sentencing order that Ellis DCJ proposed was not based upon a wrong understanding of the Regulation. The prosecutor supported non-custodial sentences because the offences which CMB disclosed were offences that the victim did not recall and CMB made the disclosures because he was required to take responsibility for his conduct and "come clean" as part of his assessment for the Program.

52 The position taken by the prosecution before Ellis DCJ was that CMB's voluntary disclosure of his guilt of offences that would otherwise have been undetected permitted the imposition of non-custodial sentences.

Ground One – The exercise of the residual discretion

53 The first ground of appeal in this Court asserts that the Court of Criminal Appeal erred by placing an onus on CMB to demonstrate that the prosecution appeal should be dismissed and by its failure to take into account the "limiting purpose" of prosecution appeals.

54 The law reposes a wide discretion in the sentencing judge as to the determination of the appropriate sentence for the offender and the offence[54].

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54 *Lowndes v The Queen* (1999) 195 CLR 665 at 671-672 [15]; [1999] HCA 29; *Wong v The Queen* (2001) 207 CLR 584 at 612 [77] per Gaudron, Gummow and Hayne JJ; [2001] HCA 64; *Markarian v The Queen* (2005) 228 CLR 357 at 371 [27] per Gleeson CJ, Gummow, Hayne and Callinan JJ; [2005] HCA 25; *Elias v The Queen* (2013) 248 CLR 483 at 494-495 [27]; [2013] HCA 31.

Appeals against sentence, whether by the offender or the prosecution, require demonstration of error in one or more of the respects identified in *House v The King*[55]. Where error of that kind is established in an appeal by the offender, it is the duty of the Court of Criminal Appeal to exercise the sentencing discretion afresh[56]. Where error of that kind is established in an appeal by the prosecution, the Court of Criminal Appeal may in its discretion dismiss the appeal notwithstanding that the sentence is erroneously lenient[57]. This is sometimes described as "the residual discretion". As French CJ and Gageler J explain[58], the discretion is residual only in that its exercise does not fall to be considered unless *House* error is established.

55 The joint reasons in *Green v The Queen* explain the difference in appellate approach to offender and prosecution appeals by reference to the purpose that each serves: offender appeals being concerned with the correction of error in the particular case and prosecution appeals being concerned with laying down principles for the guidance of sentencing courts[59]. This is the "limiting purpose" which CMB invokes in his first ground.

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55 (1936) 55 CLR 499 at 505 per Dixon, Evatt and McTiernan JJ; [1936] HCA 40.

56 *Kentwell v The Queen* (2014) 88 ALJR 947 at 957-958 [42]-[43] per French CJ, Hayne, Bell and Keane JJ; 313 ALR 451 at 462; [2014] HCA 37.

57 Section 5D(1) of the *Criminal Appeal Act* 1912 (NSW) provides:

> "The Attorney-General or the Director of Public Prosecutions may appeal to the Court of Criminal Appeal against any sentence pronounced by the court of trial in any proceedings to which the Crown was a party and the Court of Criminal Appeal *may in its discretion* vary the sentence and impose such sentence as to the said court may seem proper." (emphasis added)

58 At [33] above.

59 *Green v The Queen* (2011) 244 CLR 462 at 465-466 [1] per French CJ, Crennan and Kiefel JJ; [2011] HCA 49, citing *Griffiths v The Queen* (1977) 137 CLR 293 at 310 per Barwick CJ; [1977] HCA 44 and *Everett v The Queen* (1994) 181 CLR 295 at 300 per Brennan, Deane, Dawson and Gaudron JJ; [1994] HCA 49, noting the discussion in *Lacey v Attorney-General (Qld)* (2011) 242 CLR 573 at 578-584 [8]-[20] per French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ; [2011] HCA 10 and also noting *R v Borkowski* (2009) 195 A Crim R 1 at 18 [70].

56 In *R v Hernando*, Heydon JA summarised the Court of Criminal Appeal's approach to the disposition of prosecution appeals against sentence[60]:

> "[I]f this Court is to accede to the Crown's desire that the respondent be sentenced more heavily, it must surmount two hurdles. The first is to locate an appellable error in the sentencing judge's discretionary decision. The second is to negate any reason why the residual discretion of the Court of Criminal Appeal not to interfere should be exercised."

57 The second hurdle that his Honour identified reflected the statement in *Malvaso v The Queen* by Deane and McHugh JJ[61], which was adopted in the joint reasons in *Everett v The Queen*[62]:

> "[T]he court entrusted with the jurisdiction to grant or refuse such leave should give careful and distinct consideration to the question whether the Attorney-General has discharged the onus of persuading it that the circumstances are such as to bring the particular case within the rare category in which a grant of leave to the Attorney-General to appeal against sentence is justified."

58 The Court of Criminal Appeal noted that Heydon JA's analysis in *Hernando* has been cited with approval and applied in a number of cases[63]. Their Honours also noted the different approach taken in *R v Smith*, in which it was said that the respondent bears the onus of demonstrating reasons justifying the dismissal of a prosecution appeal in the exercise of discretion[64]. The Court of Criminal Appeal resolved the apparent conflict in its earlier decisions, stating: "We take the law to be that 'the onus lies upon [CMB] to establish that [the

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60 (2002) 136 A Crim R 451 at 458 [12] (Levine J agreeing at 464 [31], Carruthers AJ agreeing at 464 [32]).

61 (1989) 168 CLR 227 at 234-235; [1989] HCA 58.

62 (1994) 181 CLR 295 at 299-300 per Brennan, Deane, Dawson and Gaudron JJ.

63 *R v CMB* [2014] NSWCCA 5 at [81], citing *R v Nguyen* [2004] NSWCCA 155 at [39] and *R v Assaad* [2009] NSWCCA 182 at [46] per McCallum J (McClellan CJ at CL agreeing at [1], Hidden J agreeing at [6]).

64 [2007] NSWCCA 100 at [60] per Simpson J (Howie J agreeing at [70], Hislop J agreeing at [71]).

residual discretion] ought to be exercised in his … favour', as indicated by Simpson J in *R v Smith* at [60]."[65]

59 It is to be observed that the residual discretion was not prominent to the argument in *Smith*. None of the factors that commonly engage it were present and the Court was not referred to *Hernando*.

60 The Attorney General does not support the Court of Criminal Appeal's statement of the onus. In the Attorney General's submission, the exercise of the residual discretion, much like the sentencing discretion, requires that the court weigh all relevant considerations on the strength of the material that the parties place before it. The introduction of an onus of persuasion on this analysis is misplaced. In the Attorney General's submission, the statement of the onus here did not affect the Court of Criminal Appeal's orders: the Court took into account all of the considerations that were capable of engaging the residual discretion and correctly concluded that none justified dismissal of the appeal.

61 In an alternative submission, the Attorney General argues that if it is right to allocate an onus with respect to the dismissal of a prosecution appeal in the exercise of discretion, it is right to allocate the onus to the respondent to the appeal. In this branch of his argument, the Attorney General submits that *Hernando* is wrongly decided and that the statements in *Malvaso* and *Everett* have no application to the disposition of prosecution appeals in New South Wales: *Malvaso* and *Everett* were appeals from jurisdictions that impose a leave requirement on prosecution appeals against sentence. By contrast, under s 5D of the *Criminal Appeal Act* 1912 (NSW) the Attorney General appeals by right.

62 A second matter that is relied upon to distinguish *Malvaso* and *Everett* is s 68A of the *Crimes (Appeal and Review) Act* 2001 (NSW). Section 68A prevents the Court of Criminal Appeal from dismissing a prosecution appeal against sentence because of any element of double jeopardy involved in re-sentencing the offender. The Attorney General observes that the onus spoken of in *Malvaso* and *Everett* is to persuade the appellate court of circumstances bringing the application within the "rare category" in which a grant of leave is justified. The Attorney General, drawing on the analysis in *R v JW*[66], submits that s 68A has done away with appellate consideration of the assumed rarity of prosecution appeals.

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65 *R v CMB* [2014] NSWCCA 5 at [110].

66 (2010) 77 NSWLR 7 at 30 [121]-[129] per Spigelman CJ (Allsop P agreeing at 41 [205], McClellan CJ at CL, Howie and Johnson JJ agreeing at 41 [206]).

63 *Everett* affirmed Barwick CJ's statement of the principle of appellate restraint in *Griffiths v The Queen*[67]. The latter was an appeal from a decision of the Court of Criminal Appeal of New South Wales in an appeal under s 5D. The statements in *Malvaso* and *Everett* have been accepted as applying with equal force in those jurisdictions that do not impose a leave requirement on prosecution appeals[68]. In *Everett*, the factor militating against the grant of leave was the failure of prosecuting counsel to submit that the sentence proposed by the sentencing judge was erroneously lenient[69]. The joint reasons in *Everett*[70] approved King CJ's statement of principle in *R v Wilton*[71]. That statement was made in the appeal after leave had been granted[72]. Relevantly, King CJ said[73]:

> "[T]his Court should allow the prosecution to put to it, on an appeal against sentence, contentions which were not put to the sentencing Judge, only in exceptional circumstances which appear to justify that course. ... In particular where a submission is made by counsel for a convicted person that a sentence should be suspended or a possible suspension is mentioned by the judge, and this course is regarded by the prosecution as beyond the proper scope of the judge's discretion, a submission to that effect should be made. Generally speaking, if the submission is not made

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67 *Everett v The Queen* (1994) 181 CLR 295 at 300 per Brennan, Deane, Dawson and Gaudron JJ, citing (1977) 137 CLR 293 at 310 and, to the same effect, 327 per Jacobs J (Stephen J agreeing at 312), 329-330 per Murphy J.

68 *Allpass* (1993) 72 A Crim R 561 at 562-563; *R v Wall* (2002) 71 NSWLR 692 at 707 [70] per Wood CJ at CL (Meagher JA agreeing at 694 [1], Bell J agreeing at 713 [93]); *R v JW* (2010) 77 NSWLR 7 at 27 [105]-[107] per Spigelman CJ (Allsop P agreeing at 41 [205], McClellan CJ at CL, Howie and Johnson JJ agreeing at 41 [206]); *Director of Public Prosecutions v Karazisis* (2010) 31 VR 634.

69 (1994) 181 CLR 295 at 300 per Brennan, Deane, Dawson and Gaudron JJ.

70 (1994) 181 CLR 295 at 302 per Brennan, Deane, Dawson and Gaudron JJ.

71 (1981) 28 SASR 362 at 367-368 (Mitchell J agreeing at 369, Williams J agreeing at 369).

72 *Everett v The Queen* (1994) 181 CLR 295 at 303 per Brennan, Deane, Dawson and Gaudron JJ.

73 *R v Wilton* (1981) 28 SASR 362 at 368 (Mitchell J agreeing at 369, Williams J agreeing at 369).

to the sentencing judge the prosecution should not be able to advance that contention successfully on an appeal by the Attorney-General."

64 The determination of the appropriate sentence is one that rests solely with the court[74]. The public interest in the sentencing of offenders does not permit the parties to bind the court by their agreement. Nonetheless, the prosecutor is under a duty to assist the court to avoid appealable error[75]. Where the sentencing judge indicates the form of proposed sentencing order and the prosecutor considers that such a penalty would be manifestly inadequate, the prosecutor discharges his or her duty to the court by so submitting. The failure to do so is a material consideration in the exercise by the Court of Criminal Appeal of the residual discretion. The weight of that consideration will depend upon all of the circumstances. A prosecution concession that a non-custodial sentence is an available disposition is a powerful consideration weighing against intervening to impose a sentence of imprisonment on appeal[76].

65 Among the reasons for restraint in allowing a prosecution appeal on a ground not taken below is the risk of prejudice to the respondent to the appeal, whose case might have been conducted differently had the prosecution's stance been known[77]. The sentencing judge's reasons for sentence will commonly reflect the issues that were live at the sentence hearing. Where, as here, there is no issue as to the appropriate sentencing order, the judge's reasons are likely to

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74 *GAS v The Queen* (2004) 217 CLR 198 at 211 [30]; [2004] HCA 22; *Barbaro v The Queen* (2014) 88 ALJR 372 at 380 [47] per French CJ, Hayne, Kiefel and Bell JJ; 305 ALR 323 at 333; [2014] HCA 2.

75 *R v Tait* (1979) 24 ALR 473 at 477; *Everett v The Queen* (1994) 181 CLR 295 at 302-303 per Brennan, Deane, Dawson and Gaudron JJ, citing *R v Wilton* (1981) 28 SASR 362 at 363-364 per King CJ (Mitchell J agreeing at 369, Williams J agreeing at 369).

76 *R v Wilton* (1981) 28 SASR 362 at 367-368 per King CJ (Mitchell J agreeing at 369, Williams J agreeing at 369); *R v Jermyn* (1985) 2 NSWLR 194 at 197-198 per Street CJ (Lusher J agreeing at 205), 204 per McHugh JA; *Allpass* (1993) 72 A Crim R 561 at 565; *R v Chad* unreported, New South Wales Court of Criminal Appeal, 13 May 1997 at 12 per Hunt CJ at CL (Gleeson CJ agreeing at 14, Sully J agreeing at 14). See also *R v Lay* [2006] NSWCCA 45 at [32] per Buddin J (James J agreeing at [1], Hall J agreeing at [41]); *R v Clifford* [2008] NSWCCA 190 at [97] per Price J (Allsop P agreeing at [1], James J agreeing at [2]).

77 See *Rahme* (1991) 53 A Crim R 8 at 17 per Kirby P (Lee CJ at CL agreeing at 19, Smart J agreeing at 19).

be stated with more economy than if the judge is called upon to give reasons for the imposition of a sentence which the prosecutor contends is impermissibly lenient. These are considerations that inhere in adversarial proceedings and are unconnected to any assumption respecting the rarity of prosecution appeals. The purpose of prosecution appeals may explain why they have been characterised as "exceptional"[78]. The appeal does not provide the occasion for consideration of the correctness of the analysis of the operation of s 68A in *R v JW*.

66 Heydon JA's statement in *Hernando* of the twin hurdles that must be surmounted before the Court of Criminal Appeal proceeds to impose a heavier sentence on the respondent to a prosecution appeal accords with authority and the statutory text. The statement to the contrary in *Smith* is erroneous. The Court of Criminal Appeal was wrong to impose an onus on CMB to establish that the residual discretion should be exercised in his favour.

67 We turn now to the Attorney General's submission that the error did not affect the Court of Criminal Appeal's orders. When it came to consider whether it should dismiss the appeal in the exercise of discretion, the Court of Criminal Appeal confined its consideration of the way the prosecution case was conducted before Ellis DCJ to the prosecutor's erroneous statement of the effect of the Regulation. The Court said that the prosecutor's conduct was neither inappropriate nor unfair[79]. It went on to take into account the failure of CMB's legal representative to complain about the prosecutor's errors at the time and concluded that CMB's "latter day dissatisfaction with what occurred" was as much the result of his representative's "arguably opportunistic, if understandable, failure to correct the error as it is the result of the error itself"[80].

68 It is not apparent that these considerations bore relevantly on whether the non-custodial sentences that were supported by the prosecution before Ellis DCJ should have been set aside at the instance of the prosecution on appeal. The materiality of this latter consideration is captured by McHugh JA in *R v Jermyn*[81]:

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78 *Everett v The Queen* (1994) 181 CLR 295 at 299 per Brennan, Deane, Dawson and Gaudron JJ, 306 per McHugh J.

79 *R v CMB* [2014] NSWCCA 5 at [107].

80 *R v CMB* [2014] NSWCCA 5 at [107].

81 (1985) 2 NSWLR 194 at 204.

> "Only in the rarest of cases, if at all, would a private litigant be allowed to appeal against the exercise of a discretionary judgment in respect of a ground which he had expressly conceded was open in the court below. No doubt the public interest in having proper sentences imposed upon offenders makes the case of the private appeal an imperfect analogy. But when the Attorney-General on behalf of the Crown asks the court to set aside a sentence on a ground which was conceded in the court below, I think that this Court in the exercise of its undoubted discretion should be slow to interfere."

69 The Court of Criminal Appeal had regard to a number of factors bearing on the exercise of its residual discretion. These included: that, as the Program has been dismantled, the determination of the appeal would not provide guidance to courts or practitioners in the future; that the "significant aspect of [the] case", CMB's disclosure of offences in the course of complying with the entry requirements for the Program, is unlikely to ever arise again[82]; and CMB's accepted "rehabilitative achievements"[83]. The Court concluded that it was "ultimately not satisfied that there is any basis upon which, or reason why, [it] should exercise its residual discretion not to intervene"[84]. It is not possible to conclude that, had the Court of Criminal Appeal applied the correct test and considered whether the Attorney General had negated any reason why it should decline to intervene, it would have arrived at the same decision.

Ground Two – CMB's disclosure of otherwise unknown guilt

70 CMB's second ground of appeal contends that the Court of Criminal Appeal misapplied s 23 of the *Crimes (Sentencing Procedure) Act* 1999 (NSW) ("the Sentencing Act") and the related sentencing principle stated in *R v Ellis*[85]. CMB submits that these errors infected the Court of Criminal Appeal's conclusion that the sentences imposed by Ellis DCJ were manifestly inadequate.

71 Section 23 of the Sentencing Act allows the court to impose a lesser penalty than it would otherwise impose taking into account the degree to which the offender has assisted (or undertaken to assist) law enforcement authorities in

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82 *R v CMB* [2014] NSWCCA 5 at [108].

83 *R v CMB* [2014] NSWCCA 5 at [109].

84 *R v CMB* [2014] NSWCCA 5 at [110].

85 (1986) 6 NSWLR 603 at 604 per Street CJ (Hunt J agreeing at 606, Allen J agreeing at 606).

the prevention, detection or investigation of the offence (or any other offence). Section 23(3) provides that a lesser penalty imposed under the section must not be "unreasonably disproportionate to the nature and circumstances of the offence".

72 The principle stated in *Ellis* concerns the significant leniency that may be extended to an offender upon a plea of guilty which results from the offender's voluntary disclosure of otherwise unknown guilt. A disclosure of that kind involves assistance to law enforcement authorities in the detection and investigation of the offence and is subject to the stricture of s 23(3).

73 Ellis DCJ's discretion was to be exercised taking into account s 23 and other provisions of the Sentencing Act, including ss 3, 5, 21, 21A and 22, together with any other matter permitted or required to be taken into account by any rule of law[86]. It was open to Ellis DCJ to impose lesser penalties than would otherwise have been imposed to take into account CMB's assistance to the authorities by his disclosure of his otherwise unknown guilt of the offences. CMB contends that the Court of Criminal Appeal failed to have regard to the leniency that s 23(1) allowed in its determination that the sentences were manifestly inadequate. The Attorney General submits that CMB's challenge misreads the Court of Criminal Appeal's reasons, which, correctly understood, reveal that the complaint is with the weight that the Court of Criminal Appeal allowed on this account.

74 The Court of Criminal Appeal commenced consideration of whether the sentences were manifestly inadequate (ground two in that Court) by setting out the particulars of each offence and the features which demonstrated their objective seriousness: they were not isolated in number; extended over two years; involved "multifaceted" acts; breached the trust between parent and child; and had occasioned substantial emotional harm to CMB's daughter, who was unwilling to engage in the Program[87]. The Court moved immediately to its conclusion[88]:

> "Subject to consideration of whether or not the residual discretion not to intervene should be exercised in this case, we consider that the sentences imposed by his Honour were erroneously lenient and manifestly inadequate. No sentence other than a period of full-time imprisonment is

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86 Sentencing Act, s 21A(1).

87 *R v CMB* [2014] NSWCCA 5 at [88].

88 *R v CMB* [2014] NSWCCA 5 at [89].

> appropriate. That is so in our opinion even after the subjective and procedural considerations are taken into account. These are considered and evaluated below."

75 The Attorney General relies on the last two sentences in the passage above and contends that the conclusion of manifest inadequacy was arrived at after the Court of Criminal Appeal took into account "the subjective and procedural considerations", which consideration included the leniency permitted under s 23.

76 It is apparent that the Court of Criminal Appeal addressed s 23 in the course of determining the "proper sentence" following its determination of manifest inadequacy. The discussion follows analysis of the reports of Dr Hourigan and Dr Jungfer, which were tendered without objection by the prosecution for the purpose of re-sentencing[89]. In the exercise of its discretion in re-sentencing, the Court of Criminal Appeal acknowledged that the offences had only come to light as the result of admissions made by CMB and that his entry to the Program had been conditioned upon "full disclosure of all previous offending conduct"[90]. In an evident reference to the *Ellis* principle and s 23(3), the Court said that the "significant added element of leniency" to which CMB was entitled must not lead to a sentence that is unreasonably disproportionate to the nature and circumstances of the offence[91]. The Court of Criminal Appeal determined the extent of the leniency that s 23(1) allowed upon its factual findings, which departed in material respects from those made by Ellis DCJ. The Court of Criminal Appeal found that CMB's disclosures were "clearly prompted by the looming prospect of imprisonment in relation to the first set of charges"[92]. In the circumstances, CMB's admissions embodied "a considerable element of self-interest", were not "unambiguously altruistic or purely cathartic" and had not been "unconditionally volunteered"[93].

77 CMB's disclosures were of offences of a similar character and seriousness to the offences that were the subject of the daughter's complaint and they had been committed over the same period as the offences to which the Diversion Act applied. The objective seriousness of the offences and the fact they extended

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89 *R v CMB* [2014] NSWCCA 5 at [92].

90 *R v CMB* [2014] NSWCCA 5 at [93].

91 *R v CMB* [2014] NSWCCA 5 at [93].

92 *R v CMB* [2014] NSWCCA 5 at [93].

93 *R v CMB* [2014] NSWCCA 5 at [93].

over a lengthy interval and involved a gross breach of trust support the conclusion that the non-custodial penalties imposed by Ellis DCJ are disproportionate. However, it was open to Ellis DCJ to impose penalties that were disproportionate to the nature and circumstances of the offences in light of his finding that without CMB's honest compliance with the Program the offences would have remained undetected.

78 The mandate of s 23(3) is that a lesser penalty imposed to take account of the offender's assistance to the authorities must not be *unreasonably* disproportionate to the nature and circumstances of the offence. The term "unreasonably" in this context has been given a wide operation[94]. Whether a sentence is unreasonably disproportionate necessarily is a judgment about which reasonable minds may differ. In determining whether the sentences imposed by Ellis DCJ were manifestly inadequate, the issue for the Court of Criminal Appeal was not whether it regarded non-custodial sentences as unreasonably disproportionate to the nature and circumstances of the offences but whether, in the exercise of the discretion that the law reposed in Ellis DCJ, it was open to his Honour upon his unchallenged findings[95] to determine that they were not.

Conclusion and orders

79 Each of CMB's grounds succeeds. The appeal must be allowed and the orders of the Court of Criminal Appeal set aside. The Attorney General submits that in this event his appeal should be remitted to the Court of Criminal Appeal for it to be determined according to law. That submission should be accepted and the orders proposed by French CJ and Gageler J made.

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94 See *C* (1994) 75 A Crim R 309 at 315 per Mahoney JA (Newman J agreeing at 317, James J agreeing at 317), referring to s 442B of the *Crimes Act* 1900 (NSW), the predecessor to s 23(3), which was relevantly in the same terms.

95 *Carroll v The Queen* (2009) 83 ALJR 579 at 584 [24]; 254 ALR 379 at 385; [2009] HCA 13.