HIGH COURT OF AUSTRALIA

BELL, GAGELER AND NETTLE JJ

JESSE CUMBERLAND APPELLANT

AND

THE QUEEN RESPONDENT

Cumberland v The Queen
[2020] HCA 21
Date of Hearing: 15 April 2020
Date of Order: 15 April 2020
Date of Publication of Reasons: 3 June 2020
D23/2019

ORDER

1. *Appeal allowed.*

2. *The orders of the Court of Criminal Appeal of the Supreme Court of the Northern Territory made on 19 June 2019 are set aside and in lieu thereof it is ordered that the appeal to the Court of Criminal Appeal is dismissed.*

On appeal from the Supreme Court of the Northern Territory

Representation

M E Shaw QC with S A McDonald and M W Thomas for the appellant (instructed by Peter McQueen, Solicitor)

M W Nathan SC for the respondent (instructed by Director of Public Prosecutions (NT))

CATCHWORDS

Cumberland v The Queen

Criminal practice – Appeal – Crown appeal against sentence – Where appellant sentenced on pleas of guilty to six offences arising out of course of commercial dealing in cannabis plant material and MDMA – Where prosecution appealed against sentence on ground of manifest inadequacy – Where three-member Bench of Court of Criminal Appeal ("CCA") heard appeal and announced intention to allow appeal but referred relevant question of statutory construction to five-member Bench – Where eleven months after initial hearing, CCA delivered judgment of five-member Bench, then immediately re-constituted to deliver judgment of three-member Bench, allowing appeal and re-sentencing to increased term of imprisonment – Where appellant not given opportunity to place material before CCA as to progress in custody, nor make submissions on re-sentence or dismissal of appeal in exercise of "residual discretion" – Whether CCA failed to accord appellant procedural fairness in conduct of hearing of appeal against sentence – Whether CCA erred in determining to allow appeal against sentence when all circumstances relevant to exercise of "residual discretion" not yet known – Whether matter should be remitted to CCA for re-sentencing of appellant.

Words and phrases – "aggregate sentence", "Crown appeal against sentence", "delay in the appeal process", "discretionary factors against allowing the Crown appeal", "imminence of the offender's release", "manifestly inadequate", "procedural fairness", "proper exercise of discretion", "re-sentencing exercise", "residual discretion".

Criminal Code (NT), s 414(1)(c).

1 BELL, GAGELER AND NETTLE JJ. On 11 April 2018, the appellant was sentenced in the Supreme Court of the Northern Territory (Blokland J) on his pleas of guilty to six offences against the *Misuse of Drugs Act 1990* (NT) ("the MDA"). The offences arose out of a course of commercial dealing in cannabis plant material and MDMA[1], commonly known as "ecstasy". The appellant, who was aged between 20 and 22 years at the time of the offending, was sentenced to an aggregate term of four years and six months' imprisonment to date from 27 June 2017. The sentencing judge directed his release from custody after two years, with the balance of the sentence being suspended for a term of three years.

2 On 30 April 2018, the prosecution appealed against the sentence on the ground that it was manifestly inadequate[2]. The appeal was heard by the Court of Criminal Appeal of the Supreme Court of the Northern Territory (Kelly, Barr and Hiley JJ) on 18 July 2018. Following the hearing, the proceedings took an unusual course resulting in a delay of ten and a half months between the announcement, on 2 August 2018, that the appeal was to be allowed and the making of orders re-sentencing the appellant. On 19 June 2019, seven days before he was due to be released under Blokland J's order, the appellant was re-sentenced to a term of eight years' imprisonment with a non-parole period of five years, five months and one week. In the way the proceedings were finalised, the appellant was not given the opportunity to place material before the Court of Criminal Appeal as to his progress in custody, nor to make submissions on re-sentence or dismissal of the appeal in the exercise of "residual discretion"[3].

3 On 11 December 2019, Bell and Nettle JJ granted the appellant special leave to appeal from the orders of the Court of Criminal Appeal. The appeal was heard on 15 April 2020. At the conclusion of the hearing, the Court made orders allowing the appeal, setting aside the orders of the Court of Criminal Appeal, and ordering that the appeal to that Court be dismissed. These are the reasons for the making of those orders.

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1 This is the short name for the chemical compound methylenedioxymethamphetamine, a dangerous drug under Sch 1 to the *Misuse of Drugs Act*.

2 *Criminal Code* (NT), s 414(1)(c).

3 *Green v The Queen* (2011) 244 CLR 462 at 465-466 [1] per French CJ, Crennan and Kiefel JJ.

Crown appeals

4 Section 414(1)(c) of the *Criminal Code* (NT) ("the Code") confers on the Crown a right of appeal to the Court of Criminal Appeal against any sentence imposed for an indictable offence. Section 414(1A) provides that, in exercising its discretion on a Crown appeal against sentence, the Court of Criminal Appeal must not take into account any element of double jeopardy, involving the respondent being sentenced again, when deciding whether to allow the appeal or to impose another sentence or both.

5 Section 414(1A), like the equivalent provision under the New South Wales sentencing statute considered in *Green v The Queen*[4], was enacted to implement the proposal of the Council of Australian Governments for Double Jeopardy Law Reform[5]. As with the provision considered in *Green*, it is clear that s 414(1A) does not extinguish the appellate court's discretion, commonly referred to as the "residual discretion", to dismiss a Crown appeal notwithstanding that the sentence is erroneously lenient[6].

6 As explained in the joint reasons in *Green*, Crown appeals are distinguished from offender appeals against sentence in that their primary purpose is not directed to the correction of error in the particular case, but rather, to laying down principles for the guidance of sentencing judges[7]. And as their Honours also explained, the circumstances may be such that any guidance provided to sentencing judges is limited, while allowing the appeal may occasion injustice[8]. Among the circumstances that their Honours identified as enlivening the residual discretion is

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4 (2011) 244 CLR 462.

5 *Green v The Queen* (2011) 244 CLR 462 at 471 [25] per French CJ, Crennan and Kiefel JJ; Northern Territory, Legislative Assembly, *Parliamentary Debates* (Hansard), 23 February 2011 at 7394-7395.

6 *Green v The Queen* (2011) 244 CLR 462 at 471-472 [26] per French CJ, Crennan and Kiefel JJ.

7 *Green v The Queen* (2011) 244 CLR 462 at 465-466 [1] per French CJ, Crennan and Kiefel JJ.

8 *Green v The Queen* (2011) 244 CLR 462 at 466 [2] per French CJ, Crennan and Kiefel JJ.

delay in the appeal process[9]. Another circumstance that may enliven the discretion is the imminence of the offender's release from custody, on parole or otherwise[10].

The grounds of challenge

7 The appeal was brought on three grounds, namely, that the Court of Criminal Appeal erred by: (i) failing to consider and apply the principles relating to Crown appeals in deciding whether to allow the appeal and in re-sentencing the appellant; (ii) separately determining that the appeal should be allowed when the circumstances at the time of any re-sentencing were not known; and (iii) failing to accord the appellant procedural fairness in the conduct of the hearing of the appeal.

8 There was no challenge to the Court of Criminal Appeal's conclusion that the sentence imposed by the sentencing judge was manifestly inadequate. For that reason, the agreed facts upon which the sentencing proceeded, and the sentencing judge's findings with respect to the appellant's circumstances, can be briefly stated.

The proceedings before the sentencing judge

9 The appellant pleaded guilty to the unlawful supply of a dangerous drug, cannabis plant material, in a circumstance of aggravation, namely, that the recipient of the supply was a child (count 1)[11]. The facts of this offence are that the appellant supplied cannabis plant material on multiple occasions to a 16-year-old girl, knowing that she was a child. The supplies were in varying quantities, such as seven, 14 or 28 grams at a time. They took place over a period of four months between 16 April 2015 and 1 January 2016. The appellant was aged 20 and 21 years during this period.

10 Counts 2 and 3 charged the appellant with the intentional supply of a commercial quantity of cannabis plant material between 17 July 2016 and 25 April 2017 (count 2)[12], and in the same period, with the receipt of $368,120 in cash, knowing it was obtained directly or indirectly from the supply of the drug

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9 *Green v The Queen* (2011) 244 CLR 462 at 466 [2] per French CJ, Crennan and Kiefel JJ.

10 *Munda v Western Australia* (2013) 249 CLR 600 at 625 [77] per French CJ, Hayne, Crennan, Kiefel, Gageler and Keane JJ.

11 *Misuse of Drugs Act*, s 5(1) and (2)(a)(iii).

12 *Misuse of Drugs Act*, s 5(1).

(count 3)[13]. The facts of these offences are that, over a period of nine months, the appellant sold over 30 kilograms of cannabis plant material in return for the receipt of $368,120. His profit from these sales amounted to $61,676. The commercial quantity for cannabis plant material is 500 grams[14].

11 Counts 4 and 5 charged the appellant with the intentional supply of a commercial quantity of MDMA between 21 August 2016 and 25 April 2017 (count 4)[15], and in the same period, with the receipt of $45,375 in cash, knowing that it was obtained directly or indirectly from the supply of MDMA (count 5)[16]. The facts of these offences are that, over the course of eight months, the appellant sold 425.6 grams of MDMA and received $45,375 from the sales, making a profit of approximately $13,285. The commercial quantity for MDMA is 25 grams[17].

12 Count 6 charged the appellant with possessing $8,060 in cash, knowing that it was obtained from the supply of dangerous drugs contrary to the MDA, on 25 April 2017[18]. This count related to the discovery of $8,060 in cash at the appellant's residence during the execution of a search warrant by the Northern Territory Police. In the course of the search, the police also located a further 451.77 grams of cannabis, 0.66 grams of MDMA, 0.28 grams of MDA[19] and a variety of drug-related paraphernalia.

13 The appellant was aged 23 years at the date of sentence. He had been raised in a supportive and caring family environment. He had a reasonable work history and no relevant criminal history. In 2010, at the age of 15, he was the victim of a violent assault, which left him with long-term anxiety, fear and anger management problems. Louise McKenna, a psychologist, reported that the appellant met the diagnostic criteria for severe anxiety, depression and post-traumatic stress disorder as a result of the assault. The history that she obtained included that the appellant started using cannabis at the age of 17 and MDMA at the age of 20. His use of both

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13 *Misuse of Drugs Act*, s 8(1).

14 *Misuse of Drugs Act*, Sch 2.

15 *Misuse of Drugs Act*, s 5(1).

16 *Misuse of Drugs Act*, s 8(1).

17 *Misuse of Drugs Act*, Sch 1.

18 *Misuse of Drugs Act*, s 8(1).

19 This is the short name for the chemical compound methylenedioxyamphetamine, a dangerous drug under Sch 1 to the *Misuse of Drugs Act*.

drugs had developed into a daily dependency. Ms McKenna noted that between 52 and 66 percent of people diagnosed with post-traumatic stress disorder develop substance abuse issues.

14 The sentencing judge noted Ms McKenna's assessment that the appellant presented as a low risk of re-offending. He had attended drug counselling and was reported to have made significant progress. Her Honour accepted that there was an indirect connection between the earlier assault and the appellant's offending in that the assault had led to his drug use. Nonetheless, her Honour said this link did not explain the "very high-level, deliberate, effectively greed-based offending on an ongoing basis". Her Honour concluded:

> "The sheer gravity of the offending tends to point towards setting a non-parole period. However, with the timely pleas of guilty, his relatively young age, the matters of life adversity and psychological issues, and importantly, the good progress towards rehabilitation, the Court is justified to pass a total sentence of less than 5 years and order partial suspension on conditions set by Corrections. General deterrence, however, demands he must still serve a further term."

15 Section 40(1) of the *Sentencing Act 1995* (NT) provides that a court which sentences an offender to a term of imprisonment of not more than five years may make an order suspending the sentence where it is satisfied that it is desirable to do so. Under s 40(8) of the *Sentencing Act*, "[a] partly suspended sentence of imprisonment is taken, for all purposes, to be a sentence of imprisonment for the whole term stated by the court".

16 The maximum penalty for the offences charged in counts 1 and 2 was 14 years' imprisonment. The maximum penalty for the offences charged in counts 3 to 6 was 25 years' imprisonment. The sentencing judge allowed a 25 percent reduction in the sentence that would otherwise have been imposed to reflect the appellant's early pleas of guilty. The starting point for the sentence was six years' imprisonment. Her Honour directed that the sentence was to be suspended after two years' imprisonment with an operational period of three years from the date of release, during which the appellant must not commit another offence punishable on conviction by imprisonment[20]. For the first year after his release, her Honour directed that the appellant was to be subject to supervision and to wear an approved monitoring device. The backdating of the sentence to 27 June 2017 took into account pre-sentence custody and a period during which the appellant had been on strict bail conditions.

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20 *Sentencing Act*, s 40(6).

The course of proceedings in the Court of Criminal Appeal

17 The prosecution's argument in the Court of Criminal Appeal relied, among other authorities, on *R v Roe*[21], in which it was said that the supply of a commercial quantity of a dangerous drug (in that case methamphetamine) requires that punishment, denunciation and deterrence serve as the main objects of sentencing[22].

18 The appellant (the respondent in the Court of Criminal Appeal) submitted that the sentence was not erroneously inadequate. In the event that the Court of Criminal Appeal found that it was, the appellant did not submit that any factor would engage the residual discretion to dismiss the Crown appeal. At the conclusion of the hearing, the appellant was given leave to make submissions in writing within 14 days with respect to the question of re-sentence in the event that the appeal should succeed.

19 On 31 July 2018, the appellant's counsel contacted the presiding judge's associate by email requesting that the Court order a report from "Corrections Staff" on the appellant's progress ("the prison report"). Counsel was advised by return email that "the decision" was to be handed down the following morning and that the Court had expressed the desire that the matters raised in the email be addressed on that occasion.

20 On 1 August 2018, the appellant's counsel sent a further email to the presiding judge's associate, raising an issue concerning the application of s 55 of the *Sentencing Act*. Section 55(1) provides that a court sentencing an offender to imprisonment for a "specified offence" for 12 months or longer, where the sentence is not suspended in whole or in part, must fix a period of not less than 70 percent of the period of imprisonment that the offender is to serve under the sentence. Section 55 was amended with effect on 18 July 2016[23]. The offences charged in counts 2 and 4 were "specified offences". Before the amendments, the minimum non-parole period applying to offences under the MDA was 50 percent of the effective sentence.

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21 [2017] NTCCA 7.

22 *R v Roe* [2017] NTCCA 7 at [47].

23 *Justice Legislation Amendment (Drug Offences) Act 2016* (NT), s 45.

21 Relevantly, in his email of 1 August 2018 the appellant's counsel stated:

> "[I]t could be argued that Mr Cumberland is penalised by being subject to th[e] new regime, if the comparison with [*R v Roe*[24]] is utilised, as the comparison is not fair – as the former case was not subject to the new s 55 regime, whereas the [appellant] in this case potentially is. In this regard, the residual discretion referred to in, inter alia, Wilson's case[25] comes into play, as it does in respect to the matter that follows, in relation to rehabilitation."

22 The reference to "Wilson's case"[26] was to Riley CJ's analysis of the scope of the residual discretion following the enactment of s 414(1A) of the Code. His Honour observed that apart from "double jeopardy considerations" the Court of Criminal Appeal retains a residual discretion. His Honour's use of the term "residual discretion" included not only the discretion to dismiss an appeal against an erroneously lenient sentence but also the discretion to impose a lesser sentence than would otherwise be appropriate when allowing an appeal[27]. On the hearing in this Court, the respondent submitted that counsel's email is to be understood, consistently with his disavowal of reliance on the residual discretion at the hearing, not as a submission that the asserted unfairness justified dismissal of the appeal, but as a submission that it warranted a lesser sentence.

23 On 2 August 2018, before hearing the appellant's submissions, the presiding judge announced that "the appeal is allowed for reasons which we will publish in due course". Her Honour stated that the Court had determined to re-sentence the appellant and that the sentence was very likely to be in excess of five years' imprisonment, which would require the fixing of a non-parole period. Her Honour said that this raised issues concerning identification of the statutory minimum non-parole period. The parties were informed that the Court of Criminal Appeal had determined to refer the question of the interpretation of the provisions of the *Sentencing Act* governing minimum non-parole periods to a five-member Bench of the Court of Criminal Appeal.

24 The appellant's counsel referred to the need for an order from the Court to obtain a prison report. The presiding judge responded that "there's plenty of time

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24 [2017] NTCCA 7.

25 *R v Wilson* (2011) 30 NTLR 51.

26 *R v Wilson* (2011) 30 NTLR 51.

27 *R v Wilson* (2011) 30 NTLR 51 at 59 [27(e)].

because we've got to work out the basis on which he's going to be sentenced yet with a five-person [B]ench". Barr J informed counsel that the five-member Bench would deal solely with the question of interpretation, and when that question was resolved, "we then revert to the three-person [B]ench which has heard the appeal to this [C]ourt in time". Counsel submitted that he was "keen" nonetheless to obtain the prison report. Barr J pointed out that the report might be out of date by the time the Court came to re-sentence the appellant.

25 No formal orders were made on 2 August 2018. The matter was left on the basis that it would normally take two weeks or thereabouts for the authorities to provide a prison report. It was apparent from the discussion at the conclusion of the proceedings that it was envisaged that, after the five-member Bench delivered judgment, the Court of Criminal Appeal would be re-constituted and an order for a prison report would be made at that time.

26 On 12 March 2019, the Court of Criminal Appeal – constituted by Grant CJ; Kelly, Barr and Hiley JJ; and Riley A-J – heard argument on the question of statutory construction and judgment was reserved. On 17 June 2019, the parties were advised that the matter was listed for decision on 19 June 2019 before Grant CJ, Kelly and Hiley JJ. On that date, immediately following delivery of the judgment of the five-member Bench on the question of construction, the Court of Criminal Appeal was re-constituted and their Honours delivered the judgment of the three-member Bench, allowing the appeal and re-sentencing the appellant. The appellant's counsel had no notice that the latter judgment was to be delivered that day and, contrary to the understanding on which matters had been left at the conclusion of the hearing on 2 August 2018, the appellant was not given an opportunity to have the Court order a prison report.

27 The Court of Criminal Appeal noted that the appellant had conducted a drug-trafficking business involving the supply of large quantities of two dangerous drugs. Their Honours said that substantial terms of imprisonment were warranted in relation to counts 2 and 4[28]. Their Honours made relatively brief reference to the appellant's subjective circumstances[29], observing that, for offences involving the commercial distribution of drugs, the pre-eminent sentencing consideration is general deterrence[30]. Making due allowance for the appellant's youth and lack of

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28 *R v Cumberland* [2019] NTCCA 14 at [19].

29 *R v Cumberland* [2019] NTCCA 14 at [20].

30 *R v Cumberland* [2019] NTCCA 14 at [21], citing *Clarke v The Queen* [2009] NTCCA 5 at [46] per Riley J and *R v Carey* [1998] 4 VR 13 at 17 per Winneke P.

prior convictions, the objective seriousness of the offending was such that the sentencing judge's starting point of an aggregate sentence of six years' imprisonment was held to be manifestly inadequate[31].

28 In re-sentencing the appellant, their Honours took into account "the matters of mitigation identified by the sentencing judge", which included the appellant's youth, health and psychological issues, reasonable work history and favourable references[32]. Their Honours did not refer to the circumstance that the appeal had been pending for 13 months and that the new sentence would take effect one week before the appellant was to be released under the sentencing judge's order.

29 The appellant was re-sentenced to an aggregate sentence of eight years' imprisonment[33]. When account is taken of the 25 percent reduction for pleas of guilty, the effective starting point for the sentence was around ten years and eight months' imprisonment. A non-parole period of five years, five months and one week was specified[34]. The sentence was backdated to 27 June 2017[35]. The first date on which the appellant was eligible for consideration of release on parole was 4 December 2022.

Submissions and consideration

30 In written submissions filed before the hearing in this Court, the respondent conceded that the appellant had been denied procedural fairness by the Court of Criminal Appeal in the conduct of "the resentencing exercise" in that he had not had the opportunity to place further material before the Court. On the hearing, the respondent accepted that the appeal must be allowed on ground three. The appropriate consequential order, in the respondent's submission, was to remit the matter to the Court of Criminal Appeal for the appellant to be re-sentenced following a hearing at which he had the opportunity to adduce evidence and make submissions.

31 The respondent's concession was confined to remitter for re-sentencing on the footing that dismissal of its appeal in the exercise of the residual discretion had

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31 *R v Cumberland* [2019] NTCCA 14 at [22].

32 *R v Cumberland* [2019] NTCCA 14 at [24].

33 *R v Cumberland* [2019] NTCCA 14 at [28].

34 *R v Cumberland* [2019] NTCCA 14 at [32].

35 *R v Cumberland* [2019] NTCCA 14 at [28].

not been in play before the Court of Criminal Appeal; the appellant's counsel had not purported to rely on it.

32 The respondent's submission was posited on acceptance that counsel's email of 1 August 2018, in which the Court of Criminal Appeal was invited, in terms, to consider the residual discretion, was to be understood as limited to the contention that the Court should impose a reduced sentence in the event that the Crown appeal was allowed. Whether that is so is not known because the appellant's counsel was not given the opportunity to develop the submission before the Court pronounced orders. It remains that the Court was on notice of the appellant's desire to make a submission concerning the residual discretion.

33 More fundamentally, the respondent's submission overlooks that, while it was appropriate for the appellant's counsel to acknowledge on 18 July 2018 that no circumstance engaged the residual discretion, matters were very different 11 months later when the Court of Criminal Appeal delivered judgment. The delay in the appeal process was of a marked degree. By the time the Court of Criminal Appeal came to pronounce sentence, the appellant was within one week of automatic release under the existing sentencing order. Regardless of any submission made on the appellant's behalf at the hearing of the appeal 11 months earlier, this circumstance necessitated consideration of the residual discretion to dismiss the Crown appeal. At all times, the onus was on the respondent to negate the existence of any reason why the Court of Criminal Appeal should decline to interfere notwithstanding that their Honours were satisfied that the sentence was erroneously lenient[36].

34 The respondent sought to neutralise the factor of delay by pointing out that on 2 August 2018 the Court of Criminal Appeal made clear that the appeal was to be allowed and foreshadowed the likelihood of the imposition of a sentence of five years or more. The effect of the submission was that consideration of the residual discretion ceased to be relevant once their Honours signified their intention to allow the appeal. The submission underscores the strength of the appellant's second ground of appeal.

35 The existence of the residual discretion to dismiss a Crown appeal notwithstanding the identification of error below suffices to show that it was an error to decide to allow the appeal before the Court of Criminal Appeal was in a position to make final orders. The delay of ten and a half months inevitably meant that the considerations bearing on whether the appeal should be allowed or

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36 *CMB v Attorney-General (NSW)* (2015) 256 CLR 346 at 366 [56] per Kiefel, Bell and Keane JJ, citing *R v Hernando* (2002) 136 A Crim R 451 at 458 [12] per Heydon JA (Levine J agreeing at 464 [31], Carruthers A-J agreeing at 464 [32]).

dismissed in the proper exercise of discretion were distinctly different from the circumstances that prevailed when the Court announced its intention to allow the appeal. As the appellant submitted, by June 2019 the discretionary factors against allowing the Crown appeal, and increasing the sentence beyond five years, were overwhelming.

36 Had the Court of Criminal Appeal not overlooked the exchange with counsel at the conclusion of proceedings on 2 August 2018, it would have been necessary to order a prison report when the Court re-constituted after the five-member Bench delivered judgment on 19 June 2019. It will be recalled that the preparation of the report is likely to have taken two weeks. The appellant would have been released into the community before the appeal came back before the Court of Criminal Appeal for the making of final orders. That circumstance alone would have weighed heavily in favour of dismissal.

37 In the event, the respondent's concession with respect to ground three entailed that the orders of the Court of Criminal Appeal had to be set aside. The effect of that disposition was to leave in place the original sentence, under which the appellant was to have been released from custody on 26 June 2019. Among the reasons for not remitting the proceeding to the Court of Criminal Appeal is that it would have been futile to do so; the only proper exercise of discretion was to dismiss the Crown appeal. This conclusion took into account that the appellant would have been released into the community pending the determination of the Crown appeal having served nine and a half months in custody in addition to the custodial part of the sentence imposed by Blokland J.