HIGH COURT OF AUSTRALIA

KIEFEL CJ,
GAGELER, KEANE, EDELMAN AND GLEESON JJ

JONG HAN PARK APPELLANT

AND

THE QUEEN RESPONDENT

Park v The Queen
[2021] HCA 37
Date of Hearing: 2 September 2021
Date of Judgment: 10 November 2021
S61/2021

ORDER

Appeal dismissed.

On appeal from the Supreme Court of New South Wales

Representation

B J Rigg SC with J S Paingakulam for the appellant (instructed by Legal Aid NSW)

H Baker SC with B K Baker and K M Jeffreys for the respondent (instructed by Solicitor for Public Prosecutions (NSW))

CATCHWORDS

Park v The Queen

Criminal law – Sentence – Plea of guilty – Where appellant sentenced in District Court of New South Wales for multiple offences including taking a conveyance without consent of owner contrary to s 154A(1)(a) of *Crimes Act 1900* (NSW) ("offence") – Where maximum penalty for offence five years' imprisonment – Where offence dealt with as a "related offence" under s 165 of *Criminal Procedure Act 1986* (NSW) – Where sentencing court subject to jurisdictional limit of two years' imprisonment for offence – Where s 22(1) of *Crimes (Sentencing Procedure) Act 1999* (NSW) provided sentencing court may impose lesser penalty than it would otherwise have imposed but for plea of guilty – Where sentencing judge awarded 25% discount for guilty plea for offence – Where indicative sentence of two years and eight months' imprisonment exceeded jurisdictional limit – Whether sentence that court "would otherwise have imposed" can exceed jurisdictional limit.

Words and phrases – "aggregate sentence", "appropriate sentence", "discount to the sentence", "guilty plea", "indicative sentence", "jurisdictional limit", "lesser penalty than it would otherwise have imposed", "maximum penalty", "plea of guilty", "sentence in excess of the jurisdictional limit".

Crimes (Sentencing Procedure) Act 1999 (NSW), ss 21A, 22(1), 53A.
Criminal Procedure Act 1986 (NSW), ss 168(3), 268(1A).

1 KIEFEL CJ, GAGELER, KEANE, EDELMAN AND GLEESON JJ. This appeal concerns the correct interpretation of s 22 of the *Crimes (Sentencing Procedure) Act 1999* (NSW) ("the Sentencing Act"), which prescribes the manner in which certain courts, including, relevantly, the District and Local Courts of New South Wales, are required to take into account an offender's guilty plea in passing sentence. At the time of the relevant offending, s 22 provided:

> "(1) In passing sentence for an offence on an offender who has pleaded guilty to the offence, a court must take into account –
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> (a) the fact that the offender has pleaded guilty, and
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> (b) when the offender pleaded guilty or indicated an intention to plead guilty, and
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> (c) the circumstances in which the offender indicated an intention to plead guilty,
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> and may accordingly impose a lesser penalty than it would otherwise have imposed.
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> (1A) A lesser penalty imposed under this section must not be unreasonably disproportionate to the nature and circumstances of the offence.
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> (2) When passing sentence on such an offender, a court that does not impose a lesser penalty under this section must indicate to the offender, and make a record of, its reasons for not doing so.
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> (3) Subsection (2) does not limit any other requirement that a court has, apart from that subsection, to record the reasons for its decisions.
>
> (4) The failure of a court to comply with this section does not invalidate any sentence imposed by the court."

2 When s 22 is read in its context, the sentence that the court "would otherwise have imposed" in s 22(1) is the sentence that the court would otherwise have imposed in accordance with the Sentencing Act. That sentence is determined without regard to any jurisdictional limit affecting the court's sentencing power under the *Criminal Procedure Act 1986* (NSW) ("the Criminal Procedure Act"). Any relevant jurisdictional limit is applied by the sentencing judge after the judge has determined the appropriate sentence for the offence. The majority of the Court

of Criminal Appeal of the Supreme Court of New South Wales correctly interpreted s 22 and, accordingly, the appeal must fail.

Background to appeal

3 On 6 November 2018, the appellant was sentenced in the District Court of New South Wales to an aggregate sentence of imprisonment of 11 years, with a non-parole period of eight years, for multiple offences including an offence of taking a conveyance without the consent of the owner contrary to s 154A(1)(a) of the *Crimes Act 1900* (NSW) ("the offence").

4 The offence was dealt with as a "related offence" within the meaning of s 165 of the Criminal Procedure Act and the appellant pleaded guilty to the offence. The maximum penalty for the offence was five years' imprisonment[1] but the District Court's sentencing power was affected by s 168(3) of the Criminal Procedure Act, which provided:

> "In sentencing or otherwise dealing with a person for a back up offence or related offence, the court has the same functions, and is subject to the same restrictions and procedures, as the Local Court."

5 By s 268(1A) of the Criminal Procedure Act, the maximum term of imprisonment that the Local Court could have imposed for the offence was two years. The combined operation of ss 168(3) and 268(1A) was to impose a jurisdictional limit upon the District Court of two years' imprisonment in sentencing the appellant for the offence ("the jurisdictional limit").

6 As the sentencing judge (Judge Bennett) imposed an aggregate sentence in accordance with s 53A of the Sentencing Act, his Honour was required by s 53A(2)(b) to indicate "the sentence that would have been imposed for each offence (after taking into account such matters as are relevant under Part 3 or any other provision of this Act) had separate sentences been imposed instead of an aggregate sentence". His Honour indicated a sentence of two years' imprisonment for the offence after "applying a discount of 25%" and noted that he had "applied a 25% discount to the sentence that would have otherwise been imposed" to reflect the utility of the appellant's early plea of guilty. As all members of the Court of Criminal Appeal inferred, but for the appellant's guilty plea, his Honour's

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1 *Crimes Act 1900* (NSW), ss 116, 117, 154A.

indicative sentence would have been two years and eight months' imprisonment, being a sentence in excess of the jurisdictional limit[2].

7 The 25% discount conforms with *R v Thomson*[3], the Court of Criminal Appeal's guideline judgment for imposing a sentence in accordance with s 22 where a plea of guilty is entered. *R v Thomson* states that the utilitarian value of a plea to the criminal justice system should generally be assessed in the range of 10-25% discount on a sentence[4].

8 The appellant's appeal against sentence was dismissed by the Court of Criminal Appeal (Bathurst CJ and R A Hulme J, Fullerton J dissenting). The majority concluded that the sentencing judge proceeded in "the orthodox and correct fashion" in assessing the appropriate sentence for the offence within the context of the prescribed maximum penalty, synthesising all relevant facts and circumstances with any discount for the guilty plea then applied[5]. If that sentence exceeded a jurisdictional limit, it was then necessary to reduce it to be within the limit. In dissent, Fullerton J considered that s 22(1) obliges a sentencing court to apply the discount allowed for the plea of guilty to a sentence that the court would in fact have imposed but for the guilty plea and, where there is a jurisdictional limit for a particular offence, the court is to have regard to that limit when applying the discount[6].

9 The majority's approach was first stated by the Court of Criminal Appeal in 2008 in *Lapa v The Queen*[7], a decision followed by the Court of Appeal of the

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2 *Park v The Queen* (2020) 282 A Crim R 551 at 553 [3], 578 [130], 586 [169].

3 (2000) 49 NSWLR 383.

4 (2000) 49 NSWLR 383 at 418 [152], 419 [160].

5 *Park v The Queen* (2020) 282 A Crim R 551 at 560 [32], 591-592 [197], [202]. See also *Wong v The Queen* (2001) 207 CLR 584 at 611-612 [74]-[76]; *Markarian v The Queen* (2005) 228 CLR 357 at 373-375 [37], 377-378 [51], 387 [73].

6 *Park v The Queen* (2020) 282 A Crim R 551 at 581 [142].

7 (2008) 192 A Crim R 305 at 309 [17].

Supreme Court of Western Australia[8]. Without referring to *Lapa v The Queen*, in *Mundine v The Queen* the Court of Criminal Appeal concluded that the jurisdictional limit did not apply prior to the discount for a plea of guilty[9]. The appellant accepted that, if his interpretation of s 22 is correct, then the Court of Criminal Appeal's decisions in *Lapa v The Queen* and *Mundine v The Queen* were wrong.

10 More recently, in *Hanna v The Queen*, Bell P and R A Hulme J applied the decision under appeal[10]. Although Simpson A-JA concluded that adherence to precedent required that approach, her Honour expressed a preference for Fullerton J's interpretation[11].

Appellant's argument

11 The appellant argued that the majority of the Court of Criminal Appeal erred in interpreting the phrase "it would otherwise have imposed" in s 22, and contended that Fullerton J's interpretation in dissent was correct. That is, the indicative sentence for the offence was said to reveal error on the part of the sentencing judge because, by reason of the jurisdictional limit, two years and eight months' imprisonment was not a sentence that his Honour "would otherwise have imposed".

12 The appellant argued that, on the plain and natural meaning of s 22, the sentencing court is empowered to "impose a lesser penalty" which is "[a] lesser penalty imposed under this section"[12]. If a court seeks to exercise the s 22 power in the offender's favour, it must impose a penalty that is less than it could (and therefore would) otherwise impose in passing sentence. Where the sentencing court is subject to a jurisdictional limit (apart from the maximum penalty imposed

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8 *Wiltshire v Mafi* (2010) 211 A Crim R 326 at 333 [29].

9 [2017] NSWCCA 97 at [19], [67], [92].

10 (2020) 102 NSWLR 244 at 245 [1]-[5], 258 [99].

11 *Hanna v The Queen* (2020) 102 NSWLR 244 at 256-257 [85]-[87].

12 *Crimes (Sentencing Procedure) Act 1999* (NSW), s 22(1A).

for the offence), the court's capacity to "impose a lesser penalty" will necessarily be affected by the jurisdictional limit.

13 Further, the appellant argued, s 22 should be interpreted consistently with s 53A(2) of the Sentencing Act, which was held in *Mundine v The Queen*[13] to require a court to state an indicative sentence for each offence not exceeding the court's jurisdictional limit for the offence when it imposes an aggregate sentence for multiple offences under s 53A(1). As noted above, this argument does not find support in *Mundine v The Queen*, where the Court of Criminal Appeal accepted that the jurisdictional limit did not apply to "the starting point prior to the discount for the plea"[14].

14 The appellant argued that his interpretation promotes the purpose of s 22, namely, to encourage offenders to plead guilty, with consequent utilitarian benefits including saving court time and reducing burdens on victims, police, courts and others. According to the appellant, the purpose of s 22 is fulfilled where it results in visible rewards for guilty pleas. Conversely, the purpose is defeated if the offender's guilty plea does not result in a reduced sentence, except in cases where the sentencing judge has positively determined not to impose a lesser penalty under s 22.

The proper construction

15 On its face, and if s 22 is read apart from its context, the appellant's interpretation is plausible. However, the following contextual considerations point decisively away from that interpretation.

16 The Sentencing Act establishes uniform rules for sentencing across all courts that exercise criminal jurisdiction except the Children's Court of New South Wales[15]. Section 3A of the Sentencing Act states the purposes for which a court may impose a sentence on an offender, including "(a) to ensure that the offender is adequately punished for the offence". Part 2 of the Sentencing Act specifies the penalties that may be imposed by the relevant courts. Part 3 of the Sentencing Act, which is entitled "Sentencing procedures generally", applies to the imposition of

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13 [2017] NSWCCA 97 at [19], [67], [92].

14 [2017] NSWCCA 97 at [19].

15 See *Crimes (Sentencing Procedure) Act 1999* (NSW), s 3(1) definition of "court".

all penalties imposed by a relevant court, whether under the Sentencing Act or otherwise[16]. At the relevant time, Parts 4 to 8C of the Sentencing Act principally concerned sentencing procedures, by reference to the kinds of sentence that may be imposed: imprisonment, intensive correction orders, home detention orders, community service orders, good behaviour bonds, non-association and place restriction orders, and intervention program orders.

17 The uniform approach to sentencing across courts is reinforced by Div 1 of Pt 3 of the Sentencing Act, which, at the relevant time, comprised ss 21 to 25, and sets out general matters about sentencing procedures generally. Section 21 confers a general power to reduce penalties. Of relevance to this appeal, s 21(2) provides:

> "If by any provision of an Act or statutory rule an offender is made liable to imprisonment for a specified term, a court may nevertheless impose a sentence of imprisonment for a lesser term."

Like s 22, s 21(2) confers upon a relevant court the power to impose a sentence without reference to the possible effect of a jurisdictional limit.

18 Section 21A(1) specifies the matters that a court is to take into account "[i]n determining the appropriate sentence for an offence". The matters comprise aggravating factors referred to in s 21A(2) that are relevant and known to the court; mitigating factors referred to in s 21A(3) that are relevant and known to the court; and any other objective or subjective factor that affects the relative seriousness of the offence. Section 21A(1) also states that the matters referred to in s 21A(1) are in addition to any other matters that are required or permitted to be taken into account by the court under any Act or rule of law.

19 Contrary to the appellant's submission, a jurisdictional limit is not a matter required to be taken into account "[i]n determining the appropriate sentence for an offence" in accordance with s 21A. A jurisdictional limit relates to the sentencing court, not to the task of identifying and synthesising the relevant factors that are weighed to determine the appropriate sentence. To the contrary, the maximum penalty for an offence is a matter that is almost always required to be taken into

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16 *Crimes (Sentencing Procedure) Act 1999* (NSW), s 4(3).

account to determine the appropriate sentence, including where the maximum penalty exceeds a relevant jurisdictional limit[17].

20 Most importantly, the mitigating factors in s 21A(3) included, at the relevant time, "(k) a plea of guilty by the offender (as provided by section 22)". Thus, the court was required to apply s 22 for the purpose of determining the appropriate sentence for an offence in accordance with s 21A(1), that is, without regard to the jurisdictional limit. Once the court applied s 22 for this purpose, s 22 had no further work to do. The appellant did not attempt to reconcile his interpretation of s 22 with the process for determining the appropriate sentence for an offence in s 21A.

21 Similarly, s 21A(3)(l) and (m) require the court to have regard to "the degree of pre-trial disclosure by the defence (as provided by section 22A)" and "assistance by the offender to law enforcement authorities (as provided by section 23)" as mitigating factors in determining the appropriate sentence for an offence. Like ss 21(2) and 22, ss 22A(1) and 23(1) also confer upon a relevant court the power to impose "a lesser penalty than it would otherwise impose" without reference to the possible effect of a jurisdictional limit.

22 Application of s 22 prior to, and without regard to, any jurisdictional limit is not inconsistent with the purpose of s 22, which encourages guilty pleas without mandating discounts and while ensuring that sentences are not "unreasonably disproportionate to the nature and circumstances of the offence". In the case of an offender such as the appellant, the jurisdictional limit itself provided an incentive to a guilty plea because, although the prosecutor was entitled to elect to have the offence dealt with on indictment, in the case of a plea of guilty this election could not be made after the presentation of the facts relied upon by the prosecution to prove the offence[18]. In many cases, such an offender could have expected to receive

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17 *R v Doan* (2000) 50 NSWLR 115 at 123 [35]; *Markarian v The Queen* (2005) 228 CLR 357 at 372 [30]-[31]; *R v Duncan* (2007) 172 A Crim R 111 at 117 [20] per Nettle JA, Chernov and Vincent JJA agreeing.

18 *Criminal Procedure Act 1986* (NSW), ss 260(2), 263(3)(b).

a sentence considerably higher than the jurisdictional limit, even after a plea, if their matter had not been dealt with summarily[19].

23 An interpretation of s 22 that does not have regard to any jurisdictional limit is consistent with the more general rule that a court exercising summary jurisdiction has regard to the maximum penalty for the offence as the starting point for sentencing, and not a lower jurisdictional limit. This rule was stated by the Court of Criminal Appeal in *R v Doan* as follows[20]:

> "[W]here the maximum applicable penalty is lower because the charge has been prosecuted within the limited summary jurisdiction of the Local Court, that court should impose a penalty reflecting the objective seriousness of the offence, tempered if appropriate by subjective circumstances, taking care only not to exceed the maximum jurisdictional limit. The implication of the argument of the appellant that, in lieu of prescribed maximum penalties exceeding two years imprisonment, a maximum of two years imprisonment for all offences triable summarily in the Local Court has been substituted, must be rejected. As must also be rejected, the corollary that a sentence of two years imprisonment should be reserved for a 'worst case'."

24 The appellant did not dispute the correctness of *R v Doan* or its application to this appeal, but submitted that *R v Doan* does not preclude the separate application of s 22 at the final stage of the sentencing process, having regard to the jurisdictional limit, and following the earlier determination of an appropriate penalty with due regard to the maximum penalty for the offence and all other relevant factors. On the appellant's construction, where there is a relevant jurisdictional limit, the court would be required to determine the appropriate sentence in two stages, contrary to s 21A. The first stage would identify the appropriate penalty putting aside the utilitarian value of the guilty plea (and, presumably, any utilitarian considerations arising from pre-trial disclosure or assistance to law enforcement authorities falling within s 22A or s 23); the second stage would consider whether to reduce the sentence below the jurisdictional limit

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19 See, eg, the cases cited in *Park v The Queen* (2020) 282 A Crim R 551 at 589-590 [185]-[189].

20 (2000) 50 NSWLR 115 at 123 [35]. See also *Re Attorney-General's Application under s 37 of the Crimes (Sentencing Procedure) Act 1999 (NSW) (No 2 of 2002)* (2002) 137 A Crim R 196 at 203-204 [27]; *R v El Masri* [2005] NSWCCA 167 at [30]; *Kerr v The Queen* [2008] NSWCCA 133 at [31]; *Lapa v The Queen* (2008) 192 A Crim R 305 at 308-309 [16].

having regard to the matters set out in s 22, including the statutory requirement in s 22(1A) that a lesser sentence must not be unreasonably disproportionate to the nature and circumstances of the offence and the first stage of the assessment.

25 In addition, the appellant's interpretation requires different application of the guideline judgment in *R v Thomson*, depending upon the sentencing court's jurisdiction. To illustrate, in the offence the subject of this appeal, the discount was assessed at eight months, being 25% of two years and eight months, and the jurisdictional limit was said to result in an indicative sentence of two years. If the discount was similarly assessed by reference to the jurisdictional limit, a 25% discount would be six months, being 25% of two years, and would produce a sentence of 18 months. Not only would the sentencing court have reached a different indicative sentence on the same facts, it would have been required to satisfy itself that the application of that discount would not be "unreasonably disproportionate to the nature and circumstances of the offence".

26 Finally, once the different purposes of ss 22 and 53A are recognised, and s 53A(2)(b) is read as a whole and in context, s 53A provides only limited support for the appellant's interpretation of s 22. Section 53A is contained in Div 1 of Pt 4 of the Sentencing Act, which deals with setting terms of imprisonment. Section 53A is relevantly subject to s 49(2)(a), which provides that the term of an aggregate sentence of imprisonment must not be more than the sum of "the maximum periods of imprisonment that could have been imposed" if separate sentences of imprisonment "had been imposed" in respect of each offence to which the sentence relates. Further, the requirement in s 53A(2)(b) is to indicate a sentence "after taking into account such matters as are relevant under Part 3" and "had separate sentences been imposed instead of an aggregate sentence". Matters relevant under Pt 3 include s 33, concerning outstanding charges that may be taken into account. By s 33(3), if the court takes a further offence into account, the penalty imposed for the principal offence must not exceed "the maximum penalty that the court could have imposed for the principal offence had the further offence not been taken into account".

27 Section 22 concerns the determination of the appropriate sentence for an individual offence. Section 53A applies once the sentencing judge has determined appropriate sentences for each of multiple offences, and the section permits a single sentence to be imposed for multiple offences, "to simplify the process when setting sentences for multiple offences, such that the overall impact of the sentence is clear, as is the court's assessment of the offender's criminality with respect to

each offence"[21]. Among other things, the indicative sentences required by s 53A(2)(b) assist in explaining how the aggregate sentence was arrived at[22].

Conclusion

28 The appeal must be dismissed.

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21 New South Wales, Legislative Council, *Parliamentary Debates* (Hansard), 23 November 2010 at 27870.

22 *R v Nykolyn* [2012] NSWCCA 219 at [58]; *PD v The Queen* [2012] NSWCCA 242 at [43]; *JM v The Queen* (2014) 246 A Crim R 528 at 537-538 [40].