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SUPREME COURT OF THE AUSTRALIAN CAPITAL TERRITORY

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JUDGES

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THE HONOURABLE CHRISSA LOUKAS-KARLSSON
THE HONOURABLE BELINDA BAKER
THE HONOURABLE VERITY ALEXANDRA McWILLIAM
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21 ACTLR

TABLE OF CASES REPORTED IN THIS VOLUME

TABLE OF CASES JUDICIALLY CONSIDERED IN CASES REPORTED IN THIS VOLUME

STATUTES, RULES, ETC JUDICIALLY CONSIDERED

NEW ZEALAND

New Zealand Bill of Rights Act 1990

TABLE OF CASES CITED IN THE JUDGMENTS

Note: The reference is given to the page number where cited in each report.

SUPREME COURT OF THE AUSTRALIAN CAPITAL TERRITORY
(COURT OF APPEAL)

Collaery v The Queen (No 2)*

[2021] ACTCA 28

Murrell CJ, Burns and Wigney JJ

17, 18 May, 6 October 2021

Criminal Law — National security — Order preventing disclosure of protected information — Whether order should be made — Whether interests of proper administration of justice outweigh risk of prejudice to national security — National Security Information (Criminal and Civil Proceedings) Act 2004 (Cth), s 31(7), (8).

The appellant was charged with four counts of breaching s 39 of the *Intelligence Services Act 2001* (Cth), and one count of conspiring with another person to breach s 39. While the appellant was still awaiting trial, the Attorney-General of the Commonwealth filed in the proceedings in the Supreme Court a certificate pursuant to s 26 of the *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth) (the NSIA), identifying the parts of the evidence that he said should not be publicly disclosed. This was followed by an application for orders under s 31 of the NSIA which if made, would have the effect of requiring that significant parts of the trial not be conducted in public and that persons involved in the trial, including the jurors, not disclose the evidence given during those closed portions of the trial. On 26 June 2020 the Supreme Court made an order under s 31(4) of the NSIA prohibiting public disclosure of certain information likely to be disclosed to the Court in the appellant's trial. The appellant appealed from the order.

Section 31 of the NSIA provides that in deciding which order to make, the court must take into account the matters in s 31(7) and (8) which provide, *inter alia*:

> *Factors to be considered*
>
> (7) The Court must, in deciding what order to make under this section, consider the following matters:
>
> (a) whether, having regard to the Attorney-General's certificate, there would be a risk of prejudice to national security if:
>
> (i) where the certificate was given under subsection 26(2) or (3) — the information were disclosed in contravention of the certificate;

*[NOTE: The judgment was published in this form following subsequent orders made by the court on the application of the Attorney-General of the Commonwealth (*Collaery v The Queen (No 3)* [2021] ACTCA 34; *Collaery v The Queen (No 4)* [2023] ACTCA 47).]

…

(b) whether any such order would have a substantial adverse effect on the defendant's right to receive a fair hearing, including in particular on the conduct of his or her defence;

(c) any other matter the court considers relevant.

(8) In making its decision, the Court must give greatest weight to the matter mentioned in paragraph (7)(a).

The Court identified the following questions arising in the appeal which challenged the conclusions reached in the court below.

(a) Have the statements made by the appellant already been confirmed or denied?

(b) Did the evidence before the primary judge establish that publication of the Identified Matters involved a relevant risk of prejudice to national security?

(c) Will refusal to permit the publication of the Identified Matters prejudice the appellant's right to a fair trial?

(d) What matters concerning the proper administration of justice are relevant, and what weight should be given to them?

Held, allowing the appeal:

(1) In an appeal by way of rehearing, it was necessary to identify the nature of the decision from which the appeal is brought. In particular, it was necessary to distinguish between decisions that were truly discretionary (in the sense that they permit a range of outcomes or a latitude of choice) and those that had a single correct outcome (unique-outcome decisions). Where the decision under appeal is discretionary, the appellate court will not interfere unless there has been an error or fact or law (express or by implication) by the court below. Where the decision under appeal is a unique-outcome decision, the appellate court is required to substitute its own conclusion where it disagrees with that of the court below which may be referred to as the "correctness standard". [53]-[54]

House v The King (1936) 55 CLR 499; *Warren v Coombes* (1979) 142 CLR 531; *Jamsek v ZG Operations Australia Pty Ltd* [2020] FCAFC 119; (2020) 279 FCR 114; *Minister for Immigration and Border Protection v SZVFW* [2018] HCA 30; (2018) 264 CLR 541, applied.

(2) As the task imposed by s 31(1) of the NSIA does not allow for a choice between multiple correct outcomes, the decision was a unique-outcome decision, and the applicable standard of review is the correctness standard. [55]-[56]

(3) The bringing of the charges against the appellant could not amount to a confirmation that any particular factual assertion made by the appellant is or is not true, particularly as the respondent had provided no particulars of the charges. Further, no statement made by the appellant, constituting the charges, had been confirmed by or on behalf of the Commonwealth. [84], [95]

(4) On its face, s 31(7)(a) of the NSIA does not prescribe a level of risk that is relevant for the purposes of the provision. Further it does not require that an identified risk is likely to occur. [99]

(5) The terms of s 31 of the NSIA are mandatory, and the court must, after the hearing required by s 27(3) of the NSIA, make one of the available orders in s 31. In considering what order to make the court must consider those matters set out in

s 31(7). If a risk of prejudice to national security is merely remote, it is unlikely to outweigh the legitimate expectation that criminal proceedings will be conducted in open court. [100]

(6) In applying s 31, a court must undertake its own assessment of the risk of prejudice to national security if the subject information is disclosed and balance any identified risks against the other considerations mandated by s 31(7). [101]

(7) One of the defining characteristics of Australian courts is the adherence, as a general rule, to the open court principle. [109]

Wainohu v New South Wales [2011] HCA 24; (2011) 243 CLR 181, referred to.

(8) The provisions of s 31(7) of the NSIA do not directly refer to the administration of justice, but such matters may be considered under s 31(7)(c). [112]

(9) The evidence led by the Attorney-General was replete with speculation and devoid of any specific basis for concluding that significant risks to national security would materialise if the Identified Matters were published. On the other hand, the risk of damage to public confidence in the administration of justice where proceedings, or parts of proceedings, are held in closed court was very real, particularly so in the case of criminal prosecutions. [122], [123]-[124]

(10) The interests of the proper administration of justice clearly outweighed any risk of prejudice to national security. [126]

Cases Cited

Aldi Foods Pty Ltd v Moroccanoil Israel Ltd (2018) 261 FCR 301.

August v Federal Commissioner of Taxation (2013) 94 ATR 376.

Bright v The Queen [2018] ACTCA 39.

Dietrich v The Queen (1992) 177 CLR 292.

Fox v Percy (2003) 214 CLR 118.

Hillier v The Queen (2008) 1 ACTLR 235.

Hogan v Hinch (2011) 243 CLR 506.

House v The King (1936) 55 CLR 499.

Immigration and Border Protection, Minister for v SZVFW (2018) 264 CLR 541.

Jago v District Court (NSW) (1989) 168 CLR 23.

Jamsek v ZG Operations Australia Pty Ltd (2020) 279 FCR 114.

John Fairfax Publications Pty Ltd v District Court (NSW) (2004) 61 NSWLR 344.

Jovanovic v The Queen [2015] ACTCA 29.

Lacey v Attorney-General (Qld) (2011) 242 CLR 573.

Lodhi v The Queen (2007) 179 A Crim R 470.

McKinney v The Queen (1991) 171 CLR 468.

Moevao v Department of Labour [1980] 1 NZLR 464.

Orr v Holmes (1948) 76 CLR 632.

R v Collaery (No 7) (2020) 283 A Crim R 524.

R v Macfarlane; Ex parte O'Flanagan (1923) 32 CLR 518.

Russell v Russell (1976) 134 CLR 495.

TS v DT [2020] ACTCA 43.

Wainohu v New South Wales (2011) 243 CLR 181.

Warren v Coombes (1979) 142 CLR 531.

Wollongong Corporation v Cowan (1955) 93 CLR 435.

Appeal

The appellant appealed against an order by the Supreme Court prohibiting public disclosure of certain information likely to be disclosed in the appellant's trial.

B Walker SC with *C Ward* SC and *K Archer*, for the appellant.

R Maidment QC with *C Tran*, for the respondent.

J Kirk SC with *A Mitchelmore* SC, *T Begbie* QC and *D Forrester*, for the intervenor (Attorney-General of the Commonwealth).

Cur adv vult

6 October 2021

The Court

1 The appellant, Bernard Collaery, is awaiting trial on four charges of breaching s 39 of the *Intelligence Services Act 2001* (Cth) (the ISA), and one charge of conspiring with another person (referred to as Witness K) to breach s 39 of the ISA. Subject to exceptions, s 39 makes it an offence punishable by 10 years' imprisonment for a person to communicate any information that was acquired or prepared by or on behalf of the Australian Secret Intelligence Service (ASIS) in connection with its functions or that relates to the performance by ASIS of its functions, where the information has come to the person's knowledge by reason of them having entered into a contract, agreement or arrangement with ASIS.

2 On 26 June 2020 the primary judge made an order under s 31(4) of the *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth) (the NSIA) which has the effect of prohibiting public disclosure of certain information likely to be disclosed to the Court in the appellant's trial: *R v Collaery (No 7)* [2020] ACTSC 165; (2020) 283 A Crim R 524. A consequence of the order is that part, perhaps a large part, of the appellant's trial will be closed to the public and evidence that is important in the trial will not be disclosed to the public. The appellant has appealed from that order.

3 The charges concern the appellant's conduct between 2012 and 2014. It is said that the appellant disclosed, or conspired to disclose, information concerning [REDACTED].

4 Reports of an alleged espionage operation have long been in the public domain. As the primary judge observed, on 3 May 2013 the then Minister for Foreign Affairs and the then Attorney-General for Australia issued a joint press release stating that Timor-Leste had initiated arbitration under the 2006 Treaty challenging its validity on the ground that, "by engaging in espionage" in 2004, the Australian government had failed to conduct the Treaty negotiations in

good faith. Many press articles referring to an alleged espionage operation were in evidence before the primary judge. There can be no doubt that the defendant's allegations have received substantial coverage in the press and on television.

5 The Australian government has a policy that it neither confirms nor denies reports of matters relating to national security (the NCND policy). It has maintained that stance in relation to the defendant's allegations.

6 As the primary judge observed, in the appellant's trial the respondent must prove that some of the information communicated by the appellant was "prepared by or on behalf of ASIS in connection with its functions" or that it "relates to the performance by ASIS of its functions": s 39(1)(a) of the ISA.

7 During this appeal, there was debate about whether the respondent had to prove that information communicated by the appellant was factually true. It is unnecessary to resolve that issue because the respondent accepts that some of the information was factually true and, at the appellant's trial, it proposes to tender documents that will prove that the defendant's allegations were either true or false.

8 The Attorney-General maintains that the evidence that establishes which parts of the information communicated were factually true should be led in closed court and should be subject to orders prohibiting disclosure to persons other than those necessarily involved in the trial. By this means, the NCND policy would be maintained as far as the general public was concerned.

9 All relevant information has been provided to the appellant and his lawyers. The issue is not whether the information should be disclosed to an accused person but whether it should be publicly disclosed.

10 A certificate issued by the Attorney-General pursuant to s 26 of the NSIA defined the "sensitive information" by reference to the respondent's brief of evidence, in which the Attorney-General had highlighted the parts that he said should not be publicly disclosed. In the proceeding below, the Attorney-General pressed for an order under s 31(4) of the NSIA preventing public disclosure of all the highlighted parts. Ultimately, the appellant accepted that much of the highlighted material should not be disclosed. He sought public disclosure only of information relating to the truth of six specific matters (the Identified Matters).

11 The primary judge concluded that none of the highlighted material, or any information that might reveal or tend to confirm or deny the truth of the material, should be publicly disclosed, including any material or information relating to the truth of the Identified Matters.

12 In the present appeal, the issue is whether in relation to the Identified Matters, that conclusion was wrong.

13 The Identified Matters are that:

[REDACTED]

The NSIA

14 A history of the background to the NSIA is found at [11]-[13] of the primary judge's reasons, and it is not necessary to repeat that history.

15 We draw attention to the relevant provisions of the NSIA.

16 The long title to the NSIA establishes that the purpose of the Act is to protect certain information from disclosure, inter alia, in federal criminal proceedings. The object of the NSIA is found in s 3:

> **3 Object of this Act**
>
> (1) The object of this Act is to prevent the discourse of information in federal criminal proceedings … where the disclosure is likely to prejudice national security, except to the extent that preventing the disclosure would seriously interfere with the administration of justice.
>
> (2) In exercising powers or performing functions under this Act, a court must have regard to the object of this Act.

17 The NSIA obliges a prosecutor, a defendant or a defendant's legal representative who knows or believes that national security information will be disclosed in a federal criminal proceeding to notify the Attorney-General: s 24 of the NSIA. If the Attorney-General considers that the disclosure is likely to prejudice national security, the Attorney-General may, among other things, provide the potential discloser with a certificate that describes the information and states that the potential discloser must not, except in permitted circumstances, disclose the information: s 26 of the NSIA. Until the commencement of the hearing required by s 27(3) of the NSIA, such a certificate is conclusive evidence that disclosure of the information is likely to prejudice national security: s 27(1) of the NSIA.

18 Where a s 26 certificate is given by the Attorney-General to a potential discloser in federal criminal proceedings before the commencement of the trial, the court must hold a hearing to determine whether to make an order under s 31 in relation to the disclosure of the protected information: s 27(3) of the NSIA.

19 After holding a hearing as required by s 27(3), the court must make an order under subs (2), (4) or (5) of s 31: s 31(1) of the NSIA.

20 Orders under s 31(2) and s 31(4) are orders that specified persons must not, except in permitted circumstances, disclose the information in the proceeding. Section 16 of the NSIA defines permitted circumstances as follows:

> **16 Disclosure of information in permitted circumstances**
>
> A person discloses information ***in permitted circumstances*** if:
>
> (a) the person is the prosecutor in a federal criminal proceeding and the person discloses the information in the course of his or her duties in relation to the proceedings; or
>
> (b) the person discloses the information in circumstances specified by the Attorney-General in a certificate or advice given under section 26, 28, 38F or 38H.

21 An order under s 31(5) permits the disclosure of the information in the proceeding.

22 In deciding which order to make, the court must take into account the matters that are found in s 31(7) to (8):

Factors to be considered

(7) The Court must, in deciding what order to make under this section, consider the following matters:

(a) whether, having regard to the Attorney-General's certificate, there would be a risk of prejudice to national security if:

(i) where the certificate was given under subsection 26(2) or (3) — the information were disclosed in contravention of the certificate;

…

(b) whether any such order would have a substantial adverse effect on the defendant's right to receive a fair hearing, including in particular on the conduct of his or her defence;

(c) any other matter the court considers relevant.

(8) In making its decision, the Court must give greatest weight to the matter mentioned in paragraph (7)(a).

23 The term "national security" is defined in s 8 of the NSIA to mean "Australia's defence, security, international relations or law enforcement interests". In s 9, the NSIA picks up the meaning of the term "security" in the *Australian Security Intelligence Organisation Act 1979* (Cth):

security means:

(a) the protection of, and the people of, the Commonwealth and the several States and Territories from:

(i) espionage;

(ii) sabotage;

(iii) politically motivated violence;

(iv) promotion of communal violence;

(v) attacks on Australia's defence system; or

(vi) acts of foreign interference;

whether directed from, or committed within, Australia or not; and

(aa) the protection of Australia's territorial and border integrity from serious threats; and

(b) the carrying out of Australia's responsibilities to any foreign country in relation to a matter mentioned in any of the subparagraphs of paragraph (a) or the matter mentioned in paragraph (aa).

24 The term "international relations" is defined in s 10 of the NSIA to mean "political, military and economic relations with foreign governments and international organisations".

25 The term "law enforcement interests" is defined in s 11:

11 Meaning of *law enforcement interests*

In this Act, ***law enforcement interests*** includes interests in the following:

(a) avoiding disruption to national and international efforts relating to law enforcement, criminal intelligence, criminal investigation, foreign intelligence and security intelligence;

(b) protecting the technologies and methods used to collect, analyse, secure or otherwise deal with, criminal intelligence, foreign intelligence or security intelligence;

(c) the protection and safety of informants and of persons associated with informants;

(d) ensuring that intelligence and law enforcement agencies are not discouraged from giving information to a nation's government and government agencies.

26 The NSIA deals with information and the extent to which certain information may be disclosed in court proceedings. It casts the net very wide when identifying the interests and activities that may come within its ambit. Of course, the information must pertain to a subject matter of a type that the NSIA seeks to protect; it is in the identification of those subject matters that the NSIA reveals a very broad approach.

27 In the present case, on 29 May 2018 the respondent gave notice pursuant to s 6(2) of the NSIA that the Act applied to the proceedings against the appellant. On 21 August 2019, the respondent gave notice to the Attorney-General under s 24(1) of the NSIA that she believed that she would disclose national security information in the proceedings against the appellant. On 18 September 2019, the Attorney-General issued a certificate under s 26 of the NSIA, which was amended by a further certificate issued on 20 November 2019. The effect of the certificates was that specified information in the prosecution brief relating to [REDACTED] and information which may directly or indirectly reveal that information or tend to confirm or deny that information, was not to be disclosed except in certain circumstances.

The hearing before the primary judge

28 In the hearing under s 27(3) of the NSIA, the evidence before the primary judge was principally by affidavit. Seven witnesses provided affidavits which were read in the Attorney-General's case. All but one of those witnesses were cross-examined on behalf of the appellant. Affidavits of 10 witnesses were read in the appellant's case, including affidavits from Xanana Gusmao and Jose Ramos-Horta, former Prime Ministers of Timor-Leste. Only three of the deponents were required for cross-examination.

29 The primary judge accepted that the witnesses were honest and credible. His Honour noted that the witnesses for the Attorney-General tended to be serving or recently retired senior officers of the government, which meant that they were likely to be more acutely aware of the currency and immediacy of risks to the national security. On the other hand, many of the appellant's witnesses were former senior officers of the Commonwealth who had been retired for some time. The primary judge considered that the appellant's witnesses had a broader perspective on the significance of risks created by the public disclosure of information.

The primary judge's decision

30 At [92], the primary judge found that the evidence called by the Attorney-General supported the following propositions:

(a) The NCND principle was a significant and long-standing policy of the Australian government.

[REDACTED]

(g) The confidence that underpins intelligence sharing relationships with Australia's network of foreign intelligence relationships, including the Five Eyes countries, would be undermined if ASIS was unwilling or unable to protect its secret information.

31 At [93], the primary judge found that the evidence called by the appellant supported the following propositions:

(a) The NCND principle is a generally accepted policy. The issue is whether it should continue to be applied in the circumstances of the current case.

[REDACTED]

(f) Disclosure would improve Australian's reputation internationally by demonstrating its commitment to transparency and the rule of law.

(g) The continuation of the prosecution itself would damage relations with Timor-Leste and its discontinuation would be of benefit to bilateral relations.

(h) Conduct of any part of the prosecution in secret would harm Australian's international reputation.

32 This distillation of the evidence by the primary judge was not challenged in the present appeal.

33 The primary judge made the following findings:

(a) The nature of the prejudice to national security risked by public disclosure of the information was "a risk of incremental prejudice [REDACTED]". It was not possible to determine with certainty when and how that prejudice may occur or, if an event occurred, whether the event was caused by disclosure.

[REDACTED]

(f) If the information was disclosed, it was unlikely that there would be any dramatic, adverse consequences for Australia in its relationship with Timor-Leste.

[REDACTED]

(j) Some harm would be done to Australian's intelligence activities if the information was published generally.

(i) There would be reputational harm to Australia arising from its inability to prosecute allegedly significant breaches of national security laws.

(ii) There was a limited risk that the Identified Matters could be used for "mosaic analysis" by foreign intelligence services.

(iii) Disclosure would provide an incentive for persons disclosing national security information to do so in a public manner and would disincentivise the prosecution of persons alleged to have disclosed national security information.

[REDACTED]

(n) The impact of disclosure on Australia's international reputation may be ameliorated by the perception that disclosure was consistent with Australia's liberal values, and its commitment to transparency and the rule of law.

34 In the primary proceeding, it was common ground that some parts of the appellant's trial could not be conducted in public. Consequently, consideration of the practical consequences of the orders sought by the Attorney-General involved a comparison of two scenarios, each of which contemplated that significant parts of the evidence would be heard in closed court. However, the orders sought by the Attorney-General would involve a greater restriction on the openness of the court; impacting the open court principle.

35 The primary judge referred to the judgment of French CJ in *Hogan v Hinch* [2011] HCA 4; (2011) 243 CLR 506 at [20]-[22] regarding the open court principle:

> 20 An essential characteristic of courts is that they sit in public. That principle is a means to an end, and not an end in itself. Its rationale is the benefit that flows from subjecting court proceedings to public and professional scrutiny. It is also critical to the maintenance of public confidence in the courts. Under the *Constitution* courts capable of exercising the judicial power of the Commonwealth must at all times be and appear to be independent and impartial tribunals. The open-court principle serves to maintain that standard. However, it is not absolute.
>
> 21 It has long been accepted at common law that the application of the open justice principle may be limited in the exercise of a superior court's inherent jurisdiction or an inferior court's implied powers. This may be done where it is necessary to secure the proper administration of justice. In a proceeding involving a secret technical process, a public hearing of evidence of the secret process could "cause an entire destruction of the whole matter in dispute". Similar considerations inform restrictions on the disclosure in open court of evidence in an action for injunctive relief against an anticipated breach of confidence. In the prosecution of a blackmailer, the name of the blackmailer's victim, called as prosecution witness, may be suppressed because of the "keen public interest in getting blackmailers convicted and sentenced" and the difficulties that may be encountered in getting complainants to come forward "unless they are given this kind of protection". So too, in particular circumstances may the name of a police informant or the identity of an undercover police officer. The categories of case are not closed, although they will not lightly be extended. Where "exceptional and compelling considerations going to national security" require that the confidentiality of certain matters be preserved, a departure from the ordinary open justice principle may be justified. The character of the proceedings and the nature of the function conferred upon the court may also qualify the application of the open-court principle. The jurisdiction of courts in relation to wards of the State and mentally ill people was historically an exception to the general rule that proceedings should be held in public because of the jurisdiction exercised in such cases was "parental and administrative, and the disposal of controverted questions … an incident only in the jurisdiction". Proceedings not "in the ordinary course of litigation", such as applications for leave to appeal, can also be determined without a public hearing.
>
> 22 It is a common law corollary of the open-court principle that, absent any restriction ordered by the court, anybody may publish a fair and accurate report of the proceedings, including the names of the parties and

> witnesses, and the evidence, testimonial, documentary or physical, that has been given in the proceedings.

(Citations omitted.)

36 In addition, his Honour referred to the importance of open courts in permitting scrutiny of prosecutorial decisions that would otherwise be difficult to scrutinise. His Honour noted that the allegations of impropriety by the Australian government had been widely publicised, and that there was considerable public interest in the appellant's prosecution.

37 Another aspect of the open court principle to which the primary judge referred is that, if the appellant is convicted, there will be limitations on the reasons for sentence that can be made publicly available, depriving the public of the ability to understand and scrutinise the sentencing exercise.

38 In the proceeding before the primary judge, the appellant submitted that, at the trial, he would experience specific prejudice because of the effect on the jury of the court being opened and closed and the use of other techniques to prevent public disclosure of parts of the evidence. The appellant submitted that those matters and the associated direction that the jury must not disclose evidence heard in closed court may give the jurors the impression that the appellant's acts had indeed caused and continued to cause significant risks to national security.

39 The primary judge acknowledged that, if the orders sought by the Attorney-General were made, the appellant's trial would be "significantly complicated". However, it was his Honour's view that any potential prejudice to the appellant could be overcome by appropriate directions to the jury. The primary judge concluded, at [139]:

> In my view, given that protective orders will need to be made in any event, the additional scope of those orders contended for by the Attorney-General are not such as to give rise to a significant prejudice to the defendant by reason of the practical consequences of the making of protective orders and the effect of those orders on the members of the jury. I consider that the additional restrictions that would be imposed as a result of the orders contended for by the Attorney-General would not be such as to render the defendant's trial unfair or to create a significant risk of the injury being unfairly prejudiced against the defendant.

40 Having considered the matters referred to above, the primary judge turned to the statutory criteria in s 31(7) of the NSIA.

41 With regard to the first criterion (s 31(7)(a): whether, having regard to the Attorney-General's certificate, there would be a risk of prejudice to national security if the information was disclosed in contravention of the certificate), the primary judge referred to his analysis of the risk to national security if the information was published (as summarised above), and concluded that there was such a risk. The primary judge said that the risk was "neither immediate nor catastrophic", but his Honour concluded that disclosure would be likely to cause some damage to [REDACTED]. His Honour was unable to determine how the risks identified by him would manifest or when, but he considered that they were real risks.

42 Turning to the second statutory criterion (s 31(7)(b): whether any order would have a substantial adverse effect on the appellant's right to receive a

fair hearing, including in particular to the conduct of his defence), the primary judge noted that the appellant had received all the relevant information and would be "substantially unrestrained" in his capacity to use that information in the trial. Although the restrictions sought by the Attorney-General would require the opening and closing of the court at various times during the trial and it would be necessary to manage confidential information, his Honour was of the view that any potential prejudice to the appellant could be addressed by appropriate directions to the jury.

43 Regarding the third statutory criterion (s 31(7)(c): any other matter the court considers relevant), the primary judge acknowledged the importance of the open court principle but noted that the principle may be departed from if there are good reasons to do so in the proper administration of justice. His Honour went on to observe, at [146]:

> In a case involving allegations that information has been unlawfully disclosed, it is not inconsistent with the proper administration of justice that the public disclosure of the accuracy or otherwise of that information not be compelled as a condition of enforcing the law. To approach the matter otherwise would tend to undermine the law in question.

44 With regard to the appellant's contention that benefits would accrue to Australia if the information was disclosed, the primary judge considered that any such benefits would be substantially outweighed by the adverse consequences of disclosure.

45 The primary judge noted that, in applying the statutory criteria in s 31(7) of the NSIA, a court is obliged to give greatest weight to the risk of prejudice to national security if the information is disclosed: s 31(8) of the NSIA. By reference to the decision of *Lodhi v The Queen* [2007] NSWCCA 360; (2007) 179 A Crim R 470, his Honour concluded that the effect of s 31(8) was not that the statutory criteria set out in s 31(7)(b) and (c) were to be disregarded, but that s 31(8) guided the relative weight to be given to the criteria. While accepting that a risk of prejudice to national security would not necessarily determine the issue, his Honour considered that, in the subject case, the risk was a real one, and was entitled to significant weight. His Honour concluded that it was appropriate to make the orders sought by the Attorney-General because to do so would not have a substantial adverse effect on the appellant's right to a fair trial and, in the subject case, the open court principle did not outweigh the desirability of protecting the information from public disclosure.

The nature of the appeal

46 Appeals are creatures of statue; they do not exist at common law; *Lacey v Attorney-General (Qld)* [2011] HCA 10; (2011) 242 CLR 573 at [8] (*Lacey*). In *Lacey* at [57], the majority of the High Court (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ), identified the most common classes of appeal as:

> 1. Appeal in the strict sense — in which the court has jurisdiction to determine whether the decision under appeal was or was not erroneous on the evidence and the law as it stood when the original decision was given.

> Unless the matter is remitted for rehearing, a court hearing an appeal in the strict sense can only give the decision that should have been given at first instance.
>
> 2. Appeal de novo — where the court hears the matter afresh, may hear it on fresh material and may overturn the decision appealed from regardless of error.
> 3. Appeal by way of rehearing — where the court conducts a rehearing on the materials before the primary judge in which it is authorised to determine whether the order that is the subject of the appeal is the result of some legal, factual or discretionary error. In some cases in an appeal by way of rehearing there will be a power to receive additional evidence. In some cases there will be a statutory indication that the powers may be exercised whether or not that was an error at first instance.

(Citations omitted.)

47 The appeal from the decision of the primary judge is under s 37 of the NSIA, which is in the following terms:

> **37 Appeals against court orders under section 31**
>
> (1) The prosecutor, the defendant or the Attorney-General may appeal against any order of the court made under section 31.
>
> (2) The court that has jurisdiction to hear and determine appeals from the judgment on the trial in the proceeding has jurisdiction to hear and determine any appeal under this section.

48 This Court has jurisdiction to hear and determine any appeal from any judgment on the trial of the proceeding in the Supreme Court. Accordingly, it has jurisdiction to hear and determine the present appeal.

49 The parties agreed that the appeal was by way of rehearing, that is, it was an appeal within the third category referred to by the majority in *Lacey*. It was also common ground between the parties that the provisions of the *Judiciary Act 1903* (Cth) (*Judiciary Act*) "pick up", the provisions of s 37N of the *Supreme Court Act 1933* (ACT) (SCA) as to the procedures applicable to the appeal. Of particular relevance is s 37N(3) of the SCA, which permits the Court to receive further evidence on appeal. There was disagreement between the Attorney-General and the respondent as to whether s 37N of the SCA was picked up by s 68(1) or 79(1) of the *Judiciary Act*, but it is unnecessary to resolve that point as, by some mechanism, s 37N of the SCA applies to the present appeal.

50 Later in these reasons, we will return to the appellant's application to lead fresh evidence on the appeal.

51 On an appeal by way of rehearing, the appellate court is obliged to conduct a "real review" of the proceeding below and the primary judge's reasons. In *Fox v Percy* [2003] HCA 22; (2003) 214 CLR 118 at [25], the plurality of the High Court (Gleeson CJ, Gummow and Kirby JJ) said of such an appeal:

> Within the constrains marked out by the nature of the appellate process, the appellate court is obliged to conduct a real review of the trial and, in cases where the trial was conducted before a judge sitting alone, of that judge's reasons. Appellate courts are not excused from the task of "weighing conflicting evidence

> and drawing [their] own inference and conclusions, though [they] should always bear in mind that [they have] neither seen not heard the witnesses, and should make due allowance in this respect". In *Warren v Coombes*, the majority of this Court reiterated the rule that:
>
> > [I]n general an appellate court is in as good a position as the trial judge to decide on the proper inference to be drawn from facts which are undisputed or which, having been disputed, are established by the findings of the trial judge. In deciding what is the proper inference to be drawn, the appellate court will give respect and weight to the conclusion of the trial judge but, once having reached its own conclusion, will not shrink from giving effect to it.

52 In order to vary or reverse the decision of the primary judge, it is necessary for the appellate court to identify error in the primary judge's findings or conclusions: *Jamsek v ZG Operations Australia Pty Ltd* [2020] FCAFC 119; (2020) 279 FCR 114 (*Jamsek*) at [165]. In *Aldi Foods Pty Ltd v Moroccanoil Israel Ltd* [2018] FCAFC 93; (2018) 261 FCR 301 at [45], Perram J (with whom Allsop CJ and Markovic J agreed on this point) said:

> Error is not demonstrated merely because the appellate court disagrees with the primary judge. At the risk of stating the obvious, error is demonstrated where it is shown that some aspect of the trial judge's reasoning is wrong. How the trial judge's reasoning may be shown to be wrong depends on what that reasoning is about.

(Citations omitted.)

53 In an appeal by way of rehearing, it is necessary to identify the nature of the decision from which the appeal is brought. In particular, it is necessary to distinguish between decisions that are truly discretionary (in the sense that they permit a range of outcomes or a latitude of choice) and those that have a single correct outcome (unique-outcome decisions). This distinction determines the standard of review applicable or, to express it another way, the degree of deference that the appeal court should give to the original decision. Where the decision under appeal is discretionary, the appellate court will not interfere unless there has been an error or fact or law (express or by implication) by the primary judge: *House v The King* (1936) 55 CLR 499. Where the decision under appeal is a unique-outcome decision, the decision of the majority in *Warren v Coombes* (1979) 142 CLR 531 obliges the appellate court to "substitute its own conclusion where it disagrees with that of the primary judge": *Jamsek* at [169]. This may be referred to as the "correctness standard".

54 Regarding this distinction, in *Minister for Immigration and Border Protection v SZVFW* [2018] HCA 30; (2018) 264 CLR 541, Gageler J said at [49]:

> The line is drawn by reference to whether the legal criterion applied or purportedly applied by the primary judge to reach the conclusion demands a unique outcome, in which case the correctness standard applies, or tolerates a range of outcomes, in which case the *House v The King* standard applies. The resultant line is not bright, but it is tolerably clear and workable.

55 The task required by s 31(1) of the NSIA has features that suggest the exercise of a discretion, in that a court performing the task must determine what

weight to give to disparate circumstances and principles in order to arrive at a conclusion. In the proper fulfilment of that task, different judges may give different weight to relevant circumstances or principles.

56 On the other hand, there cannot be two correct answers to the task, one being to permit publication of the subject material and the other being to prohibit it. Contradictory answers cannot both be correct in the circumstances of a particular case. As the task imposed by s 31(1) does not allow for a choice between multiple correct outcomes, the decision is a unique-outcome decision, and the applicable standard of review is the correctness standard.

The application to lead further evidence

57 The appellant applied to lead further evidence (evidence that was not before the primary judge). Ultimately, the proposed evidence as narrowed to:

(a) a letter dated 8 February 2012 from the Senior Executive Advisor to the Prime Minister of Timor-Leste to the Australian Ambassador in Dili;

(b) a letter dated 6 February 2013 from the Prime Minister of Timor-Leste to the Honourable Julia Gillard, Prime Minister of Australia;

(c) a file note dated 14 January 2013 concerning a meeting between the Prime Minister of Timor-Leste and a special envoy representing the Australian Prime Minister;

(d) a document titled "Draft opening statement";

(e) a document containing "talking points" for a meeting between the Senior Minister and Minister for Foreign Affairs and Cooperation for Timor-Leste and the Australian Government.

58 As noted above s 37N(3) of the SCA permits the Court to receive further evidence on the hearing of the appeal. The principles applicable to an application to lead further evidence were stated in *Jovanovic v The Queen* [2015] ACTCA 29, at [22]-[23]:

> 22 Ordinarily further evidence will not be admitted on an appeal if it was available, or could reasonably have been obtained at the time of the hearing: *Hillier v The Queen* (2008) 1 ACTLR 235 at [160]. Different considerations may apply where there is a question about whether an irregularity in the proceedings has prevented a party from putting his or her case effectively: *Hillier* at [161]. A decision to withhold evidence at trial will weigh heavily against its reception on appeal: *Hillier* at [164].
>
> 23 As noted in *Hillier* at [160], s 27(1) of the *Federal Court of Australia Act 1976* (Cth) similarly provides that when hearing an appeal, the court may "in its discretion receive further evidence". In *August v Commissioner of Taxation* [2013] FCAFC 85 at [116] the Court observed:
>
> > The authorities make it clear that the exercising the discretion [to receive further evidence] the Court is not constrained by the factors relevant at common law as enunciated in *Orr v Holmes and Another* [1948] HCA 16; (1948) 76 CLR 632 and *Council of the City of Greater Wollongong v Cowan* [1955] HCA 16; (1955) 93 CLR 435. That is not to say that the common law factors are not relevant, only that they are not the only relevant factors. In many cases it would be most material to consider whether the evidence could have been

> called at trial and, if it could have been, the reasons it was not, and the extent to which the further evidence had the ability affect the result.

At [119] the Court further explained:

> … it should be noted that it is well-established by the authorities that the power in s 27 of the *Federal Court of Australia Act 1976* (Cth) and equivalent sections in other Acts is a remedial power and that an important consideration in terms of the exercise of the power is whether the further evidence would have produced a different result had it been available to the trial or, at least, was likely to have produced a different result.

(Citations omitted.)

59 These principles were reiterated in *Bright v The Queen* [2018] ACTCA 39 and *TS v DT* [2020] ACTCA 43.

60 The proposed evidence was produced under subpoenas directed to various organs of the Australian government. A series of "cascading subpoenas" was issued by the appellant, commencing before the hearing at first instance and continuing until at least the end of 2020. Associated applications by the respondents to set aside the subpoenas or limit the material to be produced delayed production until 2021. As material was produced and inspected, it prompted further subpoenas. It is not suggested that the appellant's conduct in issuing the subpoenas was improper or dilatory. He provided a satisfactory explanation for not placing the subpoenaed material before the primary judge.

61 [REDACTED]. This is relevant to the continuing efficacy of the NCND policy as it relates to these events.

62 The question that must be answered is: had this material been before the primary judge, is it likely that the result of the hearing would have been different? The clear answer is "no". The primary judge accepted [REDACTED]. Consequently, the further evidence would have made no difference to the findings and orders made by the primary judge.

63 The application to lead further evidence should be refused.

The grounds of appeal

64 The grounds of appeal pleaded by the appellant were legion. It is not necessary to set them all out. Where, as here, the decision appealed from is a unique-outcome decision, the ultimate question for the appellate court must be: was the decision correct?

65 We will adopt the general approach taken by the appellant and consider four questions before returning to determine the correctness of the primary judge's conclusions. These questions interrogate intermediate conclusions reached by the primary judge. They are:

(a) Have the statements made by the appellant already been confirmed or denied?

(b) Did the evidence before the primary judge establish that publication of the Identified Matters involved a relevant risk of prejudice to national security?

(c) Will refusal to permit the publication of the Identified Matters prejudice the appellant's right to a fair trial?

(d) What matters concerning the proper administration of justice are relevant, and what weight should be given to them?

66 Before turning to these questions, we will set out detail of the charges against the appellant and briefly summarise the effect of the evidence directed towards establishing that publication of the Identified Matters would create a risk of prejudice to national security, as argued by the Attorney-General.

The charges

67 Count 1 alleges that an offence contrary to s 11.5 of the *Criminal Code 1995* (Cth) and s 39 of the ISA occurred between about 1 December 2008 and 31 May 2013. The charge alleges that the appellant conspired with Witness K to communicate information or matters to the government of Timor-Leste that was prepared by or on behalf of ASIS, in connection with, or related to, its functions.

68 Count 2 alleges that an offence contrary to s 39 of the ISA occurred on 3 December 2013, when the appellant communicated information to Emma Alberici on the ABC Television's "Lateline" program, which information was prepared by or on behalf of ASIS in connection with, or related to, its function.

69 The interview between the appellant and Ms Alberici occurred on the same day that a search warrant was executed by the Australian Security Intelligence Organisation (ASIO) at the appellant's home and office, at which time Australia and Timor-Leste were engaged in arbitration proceedings that had been commenced by Timor-Leste on 23 April 2013 in the International Court of Justice (ICJ). The appellant was retained by the government of Timor-Leste as a legal advisor in that arbitration. The interview with Ms Alberici was lengthy. In it, the appellant made many assertions of fact. He alleged that a "technical team" had been sent to Dili to liaise with an "Australian aid construction team" that was effecting renovations to rooms used by the Timor-Leste Prime Minister and his colleagues. The appellant told Ms Alberici that "bugs" had been inserted in a hollow wall and there had been a "listening post" where a transcript had been prepared. The appellant said that the Australian Minister involved in the negotiations "knew what the Timorese were thinking". The appellant made many other factual assertions.

70 Count 3 is in similar form to Count 2 but relates to a communication between the appellant and Peter Lloyd of ABC News Radio that occurred on 3 December 2013. In the interview with Mr Lloyd, the appellant made the numerous factual assertions, including many concerning [REDACTED].

71 Count 4 is also in a similar form to Count 2 but charges a communication between the appellant and Connor Duffy of ABC Television's "7.30 Report" on 4 December 2013. The appellant made many factual assertions, some of which directly related to [REDACTED].

72 Count 5 is in similar form to Count 2 and alleges communication between the

appellant and Marian Wilkinson and Peter Cronau of ABC Television's "4 Corners". The appellant made many factual assertions regarding [REDACTED].

73 The common factor in each of the interviews that form the basis of charge against the appellant is that he made many factual assertions and communicated information regarding [REDACTED] or the operations of ASIS generally, at least some of which had been prepared by or on behalf of ASIS.

74 Other than by reference to the indictment, there was little clarity about precisely what information formed the basis of each charge. The appellant had not sought, and the respondent had not provided, particulars of the charges.

The evidence of risk to national security

75 On an appeal by way of rehearing, the Court must conduct a real review of the proceeding before the primary judge. We have considered the affidavits before the primary judge, and the transcripts of the oral evidence before his Honour.

76 Little purpose would be achieved by summarising the evidence. The primary judge adequately summarised it.

77 The appellant submitted that his Honour should have been critical of a witness who gave evidence for the Attorney-General.

78 However, his Honour had the benefit of seeing and hearing the witness. We will not cavil with his Honour's assessment of the credibility of the witness. We are not persuaded that the assessment was wrong.

79 The evidence called by the Attorney-General supports the proposition that there is a risk that some harm could come to Australia's security interests, in the broad sense described in the NSIA, if information concerning the Identified Matters was published generally. It is not possible to assess the probability of harm occurring (the level of the risk), the nature of the possible harm, the exact category of national security interest that may be affected, or the duration of any harm.

80 It is appropriate that this consideration be given its full weight when conducting the balancing exercise required by s 31 of the NSIA. What weight the evidence is reasonably capable of bearing is another matter.

(a) Have the statements made by the appellant already been confirmed or denied?

81 The information that the primary judge ruled should not be made public shows that [REDACTED].

82 The appellant submitted that the Commonwealth has publicly confirmed the truth of the matters that were subject of the primary judge's non-disclosure orders by:

(a) publicly disclosing the charges against the appellant by reference to the identified statements of the appellant;

(b) a public statement made by a former Attorney-General and a former Foreign Minister;

(c) the "fact of" the proceedings in the Permanent Court of Arbitration; and

(d) the formal written and oral statements made by Australia in the ICJ in the proceedings brought against Australia by Timor-Leste.

83 The Attorney-General accepted that, by bringing the charges against the appellant, the Commonwealth had "effectively confirmed" the truth of some statements of alleged fact made by the appellant. However, the Attorney-General pointed out that there had been no official confirmation of what parts of the appellant's statements were true and what parts were not; the bringing of charges did not confirm any particular part of the appellant's statements.

84 The Attorney-General's submission is correct. As a matter of logic, the bringing of the charges against the appellant cannot amount to a confirmation that any particular factual assertion made by the appellant is or is not true, particularly as the respondent has provided no particulars of the charges.

85 By letter dated 5 December 2012, the then Prime Minister of Timor-Leste, Kay Rala Xanana Gusmao, wrote to the then Prime Minister of Australia, the Honourable Julia Gillard, expressing the beliefs of the government of Timor-Leste concerning [REDACTED]

[REDACTED]

86 On 17 December 2012, the Australian Prime Minister replied:

[REDACTED]

87 On 23 April 2013, Timor-Leste initiated arbitration proceedings against Australia under the Treaty. On 3 May 2013, the then Australian Foreign Minister and the then Australian Attorney-General issued a press release in the following terms.

> ARBITRATION UNDER THE TIMOR SEA TREATY
>
> Timor-Leste notified Australia on April 23 that it has initiated arbitration under the 2002 Timor Sea Treaty of a dispute related to the 2006 *Treaty on Certain Maritime Arrangements in the Timor Sea* (CMATS).
>
> The arbitration relates to the validity of the CMATS treaty. Timor-Leste argues that CMATS is invalid because it alleges Australia did not conduct the CMATS negotiations in 2004 in good faith by engaging in espionage.
>
> These allegations are not new and it has been the position of successive Australian Governments not to confirm or deny such allegations.
>
> However, Australia has always conducted itself in a professional manner in diplomatic negotiations and conducted the CMATS treaty negotiations in good faith.
>
> Australia considers that the CMATS treaty is valid and remains in force.
>
> Australia remains committed to the Timor Sea treaty framework, including the CMATS treaty. The treaties provide certainty for investors and delivery benefits to both countries from our shared resources including equal sharing of upstream revenue form the Greater Sunrise area.
>
> The Australian Government is considering its response to Timor-Leste's arbitration notification.

88 The appellant submitted that written and oral statements made by Australia in various ICJ proceedings relating to the arbitration requested by Timor-Leste [REDACTED]. The appellant relied on:

(a) the Written Observations of Australia on Timor-Leste's Request for Provision Measures dated 13 January 2014;

(b) the Verbatim Record in the case concerning Questions relating to the Seizure and Detention of Certain Documents and Data (*Timor-Leste v Australia*) held on 21 January 2014;

(c) the Verbatim Record in the case concerning Questions relating to the Seizure and Detention of Certain Documents and Data (*Timor-Leste v Australia*) held on 22 January 2014; and

(d) the Counter-Memorial of Australia in the case concerning Questions relating to the Seizure and Detention of Certain Documents and Data (*Timor-Leste v Australia*) dated 28 July 2014.

89 The proceeding to which these documents relate was commenced by Timor-Leste after ASIO executed a search warrant at the appellant's home office and seized documents and things said to be relevant to Timor-Leste's request for arbitration in the ICJ. In the proceeding relating to the seized documents and things, Timor-Leste argued, inter alia, that the things seized were the subject of legal professional privilege. Australia and its representative before the ICJ made statements to the effect that there was a reasonable apprehension that the appellant had committed national security offences by reason of which he had come into possession of the seized material. Consequently, so it was argued, the material was created or came in to the appellant's possession within an accepted exception to the principles governing legal professional privilege.

90 The appellant submitted that these statements were inconsistent with the NCND policy adopted by the Attorney-General in that the statements asserted that the information provided to the appellant by Witness K (and presumably used by the appellant as the basis of the appellant's statements that underpin the present charges) was information prepared by or on behalf of ASIS. Consequently, the truth or falsity of the information that was the subject of the suppression order made by the primary judge had already been confirmed and the NCND policy was not engaged.

91 We reject this submission. The statements made by Australia and its officials were ambiguous regarding which facts asserted by the appellant were correct and which were incorrect. There is no reason to doubt the evidence before the primary judge that [REDACTED].

92 The appellant placed great emphasis on the response by Prime Minister Gillard to [REDACTED] Prime Minister Gusmao's letter of 5 December 2012 as having a particular meaning [REDACTED]. Grammatically, the appellant may be correct. However, in our view, the letter from Prime Minister Gillard should not be read as departing from the NCND policy [REDACTED].

93 The appellant submitted that, if the Identified Matters were not true, there could be no prosecution under s 39 of the ISA and Australia's representatives at

the ICJ could not have asserted that the appellant had committed such an offence. This submission is based upon the proposition that the information the subject of a charge under s 39 must be factually "true" or "correct".

94 Although it is strictly unnecessary to determine the issue in order to resolve the present appeal, there is nothing in s 39 that supports the proposition. Even if, for the purposes of a prosecution under s 39, the information communicated must be factually true, there remains an ambiguity regarding which of the assertions of fact made by the appellant were true. [REDACTED].

95 The statements made by the appellant have not been confirmed.

(b) Did the evidence before the primary judge establish that publication of the Identified Matters involved a relevant risk of prejudice to national security?

96 In determining whether to permit or prohibit publication of the Identified Matters, the primary judge had to consider whether there would be a risk to national security if the material was disclosed: s 31(7)(a) of the NSIA. The appellant submitted that the primary judge had erred in failing to find that any incremental risk to Australia's national security by further public disclosure of the Identified Matters would be remote and not likely to prejudice Australia's national security; it was not a real risk.

97 The term "risk to national security" is not defined in the NSIA.

98 The appellant submitted that s 17 of the NSIA is of some assistance. Section 17 provides that, for the purposes of the NSIA, something is "likely to prejudice national security" if there is a real, and not merely a remote possibility that it will prejudice national security. The appellant submitted that s 17 suggests that the NSIA is not concerned with remote possibilities.

99 Consideration of the text of s 31(7)(a) suggests that it is directed to a "risk" that something will occur, being prejudice to national security if the material is published. The term "risk" refers to the possibility that something will occur in the future. Here, the relevant risk is that national security will be prejudiced, or harmed, if the material is published. On its face, s 31(7)(a) does not prescribe a level of risk that is relevant for the purposes of the provision. It does not require that an identified risk is likely to occur.

100 In any event, the question of whether s 31(7)(a) refers to a real risk and not merely a remote risk is academic. The terms of s 31 of the NSIA are mandatory, and the court must, after the hearing required by s 27(3) of the NSIA, make one of the available orders in s 31. In considering what order to make the court must consider those matters set out in s 31(7) of the NSIA. If a risk of prejudice to national security is merely remote, it is unlikely to outweigh the legitimate expectation that criminal proceedings will be conducted in open court.

101 We consider that the legislature deliberately chose a different and lower benchmark in s 31(7)(a) than the "likely to prejudice national security" benchmark employed elsewhere in the NSIA. In applying s 31, a court must undertake its own assessment of the risk of prejudice to national security if the subject information is disclosed, and balance any identified risks against the other considerations mandated by s 31(7).

102 The primary judge referred to several ways in which the publication of the Identified Matters would create a risk of prejudice to national security: see [33] above. The appellant submitted that the [REDACTED] renders any incremental risk posed by the publication of the Identified Matters "remote, or even non-existent".

103 [REDACTED] are matters relevant to determining whether there is a future risk to national security if the Identified Matters are published.

104 The primary judge described the risks that his Honour identified as "real", ie not merely fanciful. The evidence supports the primary judge's conclusion about "real" risk, but it rises no higher than an assessment that there is a non-fanciful risk that unknown but non-catastrophic consequences may flow from publication of the Identified Matters. We see uncertainty heaped upon uncertainty. However, we do not see error on the part of the primary judge.

105 We digress to say something about the NCND policy, and how that relates to the evaluation of any risk to national security if the Identified Matters are published. The Attorney-General argued that the NCND policy must be protected. However, this appeal is only concerned with the extent to which departure from the NCND policy in the present case may create a risk to national security. Although disclosure of the Identified Matters may result in the creation of risks to national security, this would be the case regardless of the NCND policy. There is no suggestion that the NCND policy will be abandoned generally if the Identified Matters are published. Publication would mean that the policy could no longer sensibly be maintained with regard to the Identified Matters, which may expand the areas of potential risk to national security. The extent or level of that indirect risk, and the nature of the consequences said to be risked, are speculative. Australia has, in the past, departed from the NCND policy.

106 We accept that publication of the Identified Matters would involve a relevant risk of prejudice to national security.

(c) Will refusal to permit publication of the Identified Matters prejudice the appellant's right to a fair trial?

107 The appellant submitted that the right to fair trial encompasses the right to have charges determined in open court unless there are compelling grounds to hear the matter in secret. The appellant referred to the decision of Spigelman CJ in *John Fairfax Publications Pty Ltd v District Court (NSW)* [2004] NSWCA 324; (2004) 61 NSWLR 344, where at [22] his Honour said:

> The principle of a fair trial has been characterised in numerous High Court judgments in the most forceful of terms. It has been described as "the central thesis of the administration of criminal justice"; *McKinney v The Queen* (1991) 171 CLR 468 at 478; as the "central prescript of our criminal law": *Jago* [*v District Court (NSW)* (1989) 168 CLR 23] at 56; as a "fundamental element" or a "fundamental prescript": *Dietrich v The Queen* (1992) 177 CLR 292 at 299, 326; and as an "overriding requirement": *Dietrich* at 330. It is not a new principle. As Isaacs J put it in 1923 with reference to "the elementary right of every accused person to a fair and impartial trial": "Every conviction set aside, every new

> criminal trial ordered, are mere exemplifications of this fundamental principle": *R v MacFarlane; Ex parte O'Flanaghan & O'Kelly* (1923) 32 CLR 518 at 541-542.

108 Earlier, at [18], his Honour said:

> It is well established that the principle of open justice is one of the most fundamental aspects of the system of justice in Australia. The conduct of proceedings in public … is an essential quality of an Australian court of justice.

109 One of the defining characteristics of Australian courts is the adherence, as a general rule, to the open court principle: see *Wainohu v New South Wales* [2011] HCA 24; (2011) 243 CLR 181 per French CJ and Kiefel J at [44] and the cases there cited.

110 The Attorney-General submitted that the primary judge had considered the possible effect of making a non-publication order on the ability of the appellant to receive a fair trial and the appellant had not identified any error in the approach of the primary judge.

111 There is a significant overlap between this issue and the next issue, which concerns the proper administration of justice, as relevant to the evaluation required by s 31(1) of the NSIA.

(d) Matters relevant to the proper administration of justice

112 The provisions of s 31(7) of the NSIA do not directly refer to the administration of justice, but such matters may be considered under s 31(7)(c).

113 The appellant submitted that the Court should approach its task in such a way as to avoid harm to public confidence in the judicial process, which may bring the administration of justice into disrepute. In particular, the appellant submitted the Court was being asked to participate in misleading the public [REDACTED]. The appellant submitted that the orders sought by the Attorney-General are likely to significantly undermine the public's confidence in the Court's ability to administer justice in this case and in similar cases. The appellant referred to the judgment of Richardson J of the New Zealand Court of Appeal in the matter of *Moevao v Department of Labour* [1980] 1 NZLR 464 at 484:

> It is not the purpose of the criminal law to punish the guilty at all costs. It is not that that the end may justify whatever means may have been adopted. There are two related aspects of the public interest which bear on this. The first is that the public interest in the due administration of justice necessarily extends to ensuring that the Court's processes are used fairly by State and citizen alike. And the due administration of justice is a continuous process, not confined to the determination of the particular case. It follows that the exercising its inherent jurisdiction the Court is protecting its ability to function as a Court of law in the future as in the case before it. This leads on to the second aspect of the public interest which is in the maintenance of public confidence in the administration of justice. It is contrary to the public interest to allow that confidence to be eroded by a concern that the Court's processes may lend themselves to oppression and injustice.

This passage was cited with approval by Mason CJ in *Jago v District Court (NSW)* (1989) 168 CLR 23 at 29-30, in the context of consideration of the powers of courts to avoid abuse of process.

114 The appellant also referred to the judgment of Gibbs J in *Russell v Russell* (1976) 134 CLR 495, where his Honour said, at 520:

> It is the ordinary rule of the Supreme Court, as of the other courts of the nation, that their proceedings shall be conducted "publicly and in open view" … This rule has the virtue that the proceedings of every court are fully exposed to public and professional scrutiny and criticism, without which abuses may flourish undetected. Further, the public administration of justice tends to maintain confidence in the integrity and independence of the courts. The fact that courts of law are held openly and not in secret is an essential aspect of their character.

(Citations omitted.)

115 His Honour continued:

> Of course there are established exceptions to the general rule that judicial proceedings shall be conducted in public; and the category of such exceptions is not closed to the Parliament. The need to maintain secrecy or confidentiality, or the interests of privacy or delicacy, may in some cases be thought to render it desirable for a matter, or part of it, to be held in closed court.

116 The appellant further submitted that, if he was convicted, the public would not know why he had been prosecuted or the basis of the conviction, which would so interfere with the open court principle as to amount to a serious interference with the administration of justice.

117 The Attorney-General submitted that the primary judge had carefully considered and applied the processes and requirements of the NSIA and had considered matters relevant to the administration of justice. The Attorney-General disputed the submission that the public would be misled [REDACTED].

118 The interests of the administration of justice include the legitimate public interest in ensuring that those charged with national security offences are brought to trial and, if convicted, they are punished.

119 It was not submitted that the prosecution of the appellant could not continue if the Identified Matters were published.

Consideration

120 The primary judge correctly identified the nature of the process that his Honour was required to undertake by s 31(1) of the NSIA and identified the matters that were relevant to the required evaluation.

121 Nevertheless, we are satisfied that the primary judge erred in his Honour's conclusion. Although it is strictly unnecessary to identify how that error came about by, for example, identifying error in the intermediate factual determinations made by the primary judge, it is likely that his Honour gave too much weight to the risk of prejudice to national security and too little weight to the interests of the administration of justice in the circumstances of this case.

122 The appellant's submission that the Identified Matters have been confirmed by the actions or statements of the Commonwealth, its agencies or its officers is not accepted. There is a respectable argument that the NCND policy has continuing application to the Identified Matters. However, the risk of prejudice to national security is low, and the consequences risked are not particularly

significant. [REDACTED] makes it doubtful that there will be any significant risk of prejudice to national security if the Identified Matters are published. The evidence led by the Attorney-General was replete with speculation and devoid of any specific basis for concluding that significant risks to national security would materialise if the Identified Matters were published. It was implicit in the findings of the primary judge that it may be that no risk to national security would materialise.

123 On the other hand, the risk of damage to public confidence in the administration of justice where proceedings, or parts of proceedings, are held in closed court is very real. This is particularly so in the case of criminal prosecutions. From time to time, it is necessary for proceedings, even criminal proceedings, to take place wholly or partly in closed court. It is necessary that there be a "gatekeeper" who determines whether proceedings should be heard in closed court. The Parliament has made the court the gatekeeper for the purposes of the NSIA. The public accepts such decisions when made by a court because the public has confidence in the proper administration of justice in this country. That confidence springs from the general adherence to the open court principle; the public accepts that a few matters must be heard in closed court because it is confident that courts are committed to the open court principle and will only close the courts for cogent reasons.

124 The administration of criminal justice encompasses more than the conduct of a criminal trial. It commences when a decision is made to commence a prosecution and concludes with an acquittal or the imposition of sentence. The decision to commence a criminal prosecution is an opaque process at the best of times. In the present case, there is the additional circumstance that the commencement of the prosecution required the consent of the Attorney-General. The open court principle stands as a bulwark against the possibility of political prosecutions by allowing public scrutiny and assessment of the actions of the respondent and the Attorney-General by reference to the evidence adduced in a criminal trial.

125 The appellant is a former Attorney-General of the Australian Capital Territory and he continues to practice as a lawyer. Convictions on the charges against him may raise questions of his fitness to continue in practice as a lawyer. Convictions may also cause clients, prospective clients, or others with whom the appellant has professional dealings, to question his character. If the orders made by the primary judge are allowed to stand and the appellant is convicted, those dealing with the appellant will have to form assessments of his character and of the significance of the convictions without important information. Those dealing with the appellant may well view the significance of any conviction differently if it is established that the appellant's statements [REDACTED] were made as an exercise of conscience as opposed to disclosing national security information for personal gain or some other dishonourable motive. The maintenance of the present orders would act as a constraint upon the appellant's prospects for rehabilitation.

126 The provisions of s 31(7) of the NSIA make it plain that the matters to which we have referred will not, in all cases, be determinative of what orders should

be made under s 31, and that they must be weighed against any identified risk to national security. However, in this case we are satisfied that the interests of the proper administration of justice clearly outweigh any risk of prejudice to national security.

Orders

127 The appeal is allowed.

128 In the proceedings below, the Attorney-General sought to reply on "court only" material that had not been provided to the appellant because of its sensitivity. The appellant said that the primary judge should not receive the material. The primary judge did not feel compelled to address the admissibility and possible effect of the material because, without reference to it, his Honour was satisfied that the order under s 31(4) of the NSIA should prohibit publication of information concerning the Identified Matters.

129 Subject only to the primary judge's consideration of the admissibility and effect of the "court only" material, the order made by the primary judge should be set aside. Pursuant to s 31(4) of the NSIA there should be an order that is limited to protecting from disclosure the highlighted parts of the brief that, ultimately, the appellant conceded should not be disclosed. The final form of that order is a matter for the primary judge after his Honour has heard further submission from the parties.

130 The matter is remitted to the primary judge to consider the admissibility of the "court only" material and, if it is admissible, the effect of that material on the s 31(4) order.

Appeal allowed

Solicitors for the appellant: *Gilbert + Tobin*.

Solicitors for the respondent: *Commonwealth Director of Public Prosecutions*.

Solicitors for the intervenor: *Australian Government Solicitor*.

RICHARD DAVIES

SUPREME COURT OF THE AUSTRALIAN CAPITAL TERRITORY (COURT OF APPEAL)

Alexander v Bakes

[2023] ACTCA 49

Mossop, Baker and Abraham JJ

9 November, 20 December 2023

Criminal Law — Appeal — Appeal from Magistrates Court against conviction — Appeal from Supreme Court orders dismissing appeal — Nature of appeals — Magistrates Court Act 1930 (ACT), ss 208, 214 — Supreme Court Act 1933 (ACT), s 37O.

Criminal Law — Information — Amendment — Whether amendment was necessary — Whether an objection had been taken so as to enliven the jurisdiction of the Magistrates Court to amend the informations — Magistrates Court Act 1930 (ACT), ss 27, 28.

The appellant was initially charged with a number of counts of obtaining property by deception, the property being described as "money." The prosecution, however, proceeded on the statutory alternative charges of theft. At the conclusion of the prosecution case, the appellant made a no case submission, inter alia, on the basis that the prosecution had failed to prove that money had been stolen and that if anything had been stolen, it was a chose in action. The prosecution submitted that the property was correctly described as money, but if that submission was wrong, then it would seek the Court's leave to amend all the theft charges to allege theft of a chose in action. The magistrate accepted the appellant's submission regarding the legal description of the property. However, under s 28 of the *Magistrates Court Act 1930* (ACT) (the MCA), the magistrate allowed each charge to be amended so that it referred to the property as a chose in action. The appellant was found guilty of 65 charges of theft and not guilty of five charges. An appeal to the Supreme Court pursuant to ss 208 and 214 of the MCA was allowed in part, with the Supreme Court quashing the convictions in relation to 17 charges and confirming the convictions in relation to the remaining 48 charges. The appellant then appealed from the orders of the Supreme Court relying on two grounds:

1. that the findings of guilt were unreasonable and could not be supported by the evidence except in relation to certain charges;
2. that the jurisdiction of the Magistrates Court to amend the information under s 28 of the MCA was not enlivened such that the amendments were not validly made and alternatively, that the court erred in finding

the amendments to the charges during the hearing were desirable or necessary to enable the real question to be decided and made without injustice to the appellant, for the purposes of s 28.

An issue arose as to the nature of the appeal, particularly as the first ground of appeal as drafted reflected the language used in s 37O(2)(a)(i) of the *Supreme Court Act 1933* (ACT) (the SCA).

Held, dismissing the appeal:

(1) This was an appeal against orders made by the Supreme Court by way of rehearing pursuant to s 37O(1) of the SCA and not an appeal against conviction under s 37O(2)(a)(i), alleging the verdict should be set aside on the ground that it is unreasonable, or could not be supported having regard to the evidence. [11]

(2) Where an appeal is by way of rehearing, generally an appellant may succeed only by demonstrating material error in the decision below, whether legal, factual, or discretionary. [13]

Allesch v Maunz [2000] HCA 40; (2000) 203 CLR 172, referred to.

(3) A court on an appeal by way of rehearing is required to conduct a real review of the evidence given at first instance and the judge's reasons for judgment and, while respecting any advantage that the judge enjoyed, should not shrink from giving effect to its own conclusion. [13]

Warren v Coombes [1979] HCA 9; (1979) 142 CLR 531; *Lee v Lee* [2019] HCA 28; (2019) 266 CLR 129, referred to.

(4) In contrast, when considering whether a verdict is unreasonable, the Court must ask itself "whether it thinks that upon the whole of the evidence it was open to the tribunal of fact to be satisfied beyond reasonable doubt that the accused was guilty". [13]

M v The Queen [1994] HCA 63; (1994) 181 CLR 487; *Dansie v The Queen* [2022] HCA 25; (2022) 274 CLR 651; *Lang v The Queen* [2023] HCA 29; (2023) 302 A Crim R 483, referred to.

(5) While an appeal under ss 208 and 214 of the MCA may be categorised as an appeal by way of rehearing, an appellant may succeed by demonstrating that the magistrate's finding was unreasonable; however, such a finding is not necessary for an appellant to succeed. Rather, it is sufficient for an appellant to demonstrate that there is a material legal, factual, or discretionary error in the magistrate's decision. Unreasonableness is a species of factual error which may, if established, justify the setting aside of the Supreme Court's orders pursuant to s 37O(1) of the SCA. [15]-[19]

Muench v McCue [2020] ACTCA 17; *KA v Linden* [2021] ACTCA 22; *Roberts v Rhodes* [2014] ACTCA 20; *McFarlane v Van Eyle* [2022] ACTCA 68, considered.

(6) If an appellant identifies the ground of appeal from the Magistrates Court as being that the verdict is unreasonable, the Court will proceed on the basis that the appellant challenges the magistrate's ultimate factual finding. If an appellant wishes to challenge any intermediate factual finding, such a challenge should be pleaded as a specific ground of appeal. [23]

(7) Under s 27 of the MCA, the description of any offence using the words of the law creating the offence is sufficient to comply with the requirement imposed by the MCA and accordingly the reference to "money" in the charges was unnecessary, it being a particular and not an element of the offence. It was accordingly unnecessary for the magistrate to amend the charges. [125], [148]

(8) Section 28(1) of the MCA makes the power to amend a charge contingent on any objection being taken to either a defect in the information, or variance between the evidence and the information. The word "object" does not need to be used for an objection to be made under the provision rather it is the substance of what is said or done that is important, not the form it takes. In this case an objection had clearly been taken by way of the no case to answer submission. [139]-[144]

Hudson v ACT Magistrates Court [2014] ACTSC 192; (2014) 9 ACTLR 295, referred to.

Cases Cited

Alexander v Bakes (2023) 376 FLR 424.

Allesch v Maunz (2000) 203 CLR 172.

Bakes v Alexander [2022] ACTMC 10.

Bakes v Alexander (No 2) [2022] ACTMC 19.

Barca v The Queen (1975) 133 CLR 82.

Borodin v The Queen [2006] NSWCCA 83.

Carroll v The Queen (2009) 83 ALJR 579.

Coughlan v The Queen (2020) 267 CLR 654.

Dansie v The Queen (2022) 274 CLR 651.

Fox v Percy (2003) 214 CLR 118.

Hudson v ACT Magistrates Court (2014) 9 ACTLR 295.

Immigration and Border Protection, Minister for v SZVFW (2018) 264 CLR 541.

John L Pty Ltd v Attorney-General (NSW) (1987) 163 CLR 508.

Johnson v Miller (1937) 59 CLR 467.

KA v Linden [2021] ACTCA 22.

Kingdon v Western Australia (2012) 223 A Crim R 449.

Lang v The Queen (2023) 302 A Crim R 483.

Lee v Lee (2019) 266 CLR 129.

Lukatela v Birch (2008) 223 FLR 1.

M v The Queen (1994) 181 CLR 487.

Martin v Purnell (1999) 93 FCR 181.

McFarlane v Van Eyle [2022] ACTCA 68.

McNab v Director of Public Prosecutions (NSW) (2021) 106 NSWLR 430.

Muench v McCue [2020] ACTCA 17.

Nudd v The Queen (2006) 80 ALJR 614.

R v Baden-Clay (2016) 258 CLR 308.

R v Dossi (1918) 13 Cr App R 158.

R v Hawcroft (2009) 234 FLR 339.

R v Hillier (2007) 228 CLR 618.

R v Hunt (1996) 88 A Crim R 307.

R v Liddy (2002) 81 SASR 22.

R v Pfitzner (1976) 15 SASR 171.

R v Ralston (2020) 285 A Crim R 159.

Roberts v Rhodes [2014] ACTCA 20.

Smith (a pseudonym) v The Queen (2021) 16 ACTLR 91.

Warren v Coombes (1979) 142 CLR 531.

Appeal

The appellant appealed against orders of the Supreme Court in relation to an appeal against convictions from the Magistrates Court.

K Ginges, for the appellant.

K McCann, for the respondent.

Cur adv vult

20 December 2023

The Court

Introduction

1 From about September 2016 until July 2018, the appellant was the president of the Gungahlin United Football Club, an organisation which supports and fields various children's and premier league football teams in Canberra. For some time during his tenure as president, the club operated without a treasurer and then with an interim treasurer. The appellant's role, particularly absent the treasurer, extended to paying the expenses of the club, being limited by the club's constitution to "normal running costs or other expenditure authorised by the executive committee". From September 2017 until June 2018, the appellant operated the club's main bank account, and at times, unilaterally operated that account. He also had possession of a debit card attached to a separate club account.

2 The club's constitution prohibited payments to members of the executive committee, other than for the purpose of reimbursing expenses reasonably made on behalf of the club. The prosecution alleged that the appellant made numerous transactions involving the club's funds for his personal benefit.

3 After a five-day trial in the Magistrates Court, the appellant was found guilty of 65 charges of theft contrary to s 308 of the *Criminal Code 2002* (ACT) (*Criminal Code*): *Bakes v Alexander (No 2)* [2022] ACTMC 19. He was found not guilty of five charges. An appeal to a single judge of this Court was allowed in part, with the appeal judge quashing the convictions in relation to 17 charges and confirming the convictions in relation to the remaining 48 charges: *Alexander v Bakes* [2023] ACTSC 103; (2023) 376 FLR 424 (Appeal Judgment or AJ). Annexure A to these reasons is the schedule attached to the Appeal Judgment, which sets out the magistrate's and the appeal judge's findings in respect of the guilt of the appellant.

4 This is an appeal from the orders made by the appeal judge.

Appeal grounds

5 The appellant filed an amended notice of appeal, which at the time of hearing alleged two grounds (two further grounds having been abandoned shortly before the hearing of the appeal).

6 First, that in determining the appeal, "his Honour's findings of guilt were unreasonable and could not be supported by the evidence except in relation to charges CC2021/4887-CC2021/4902". The uncontested charges relate to payments of the appellant's Macquarie Leasing account in relation to his private motor vehicle.

7 Second, that "[t]he jurisdiction of the Magistrates Court to amend the information under section 28 of the *Magistrates Court Act 1930* (ACT) was not enlivened such that the amendments were not validly made". Alternatively, "his Honour erred in finding the amendments to the charges during the hearing were 'desirable or necessary to enable the real question to be decided[']and 'made without injustice to the [appellant]', for the purposes of section 28". It is the primary aspect of this ground on which leave to amend is challenged. The respondent challenges the grant of leave, primarily on the basis that the matter is raised for the first time, and it has no merit. Given that it relates to the jurisdiction to enliven s 28, in our view it is appropriate that leave to amend be granted.

8 Five grounds were agitated before the appeal judge as described in the Appeal Judgment at [8]. The two grounds most relevant for these proceedings are as follows:

(1) The learned magistrate erred in accepting an amendment to all charges the subject of conviction (ground a); and

(2) The findings of guilt in respect of all charges except CC2021/4887 – 4902 are unreasonable and cannot be supported by the evidence (ground e).

9 Notably, although the appellant submitted before the appeal judge, and in the grounds of appeal and written submissions in chief in this Court, that the convictions erroneously relied on coincidence or tendency reasoning, that ground was abandoned before the hearing of the appeal in this Court. It follows there is no challenge to that aspect of the appeal judge's reasoning.

Ground 1: the verdicts were unreasonable and not supported by the evidence

Preliminary issue

10 An issue arose as to the nature of this appeal, particularly as this appeal ground as drafted reflected the language used in s 37O(2)(a)(i) of the *Supreme Court Act 1933* (ACT) (SC Act).

11 As apparent from the introduction above, the appellant appealed the magistrate's findings of guilt to the ACT Supreme Court. That appeal was pursuant to Div 3.10.2 of the *Magistrates Court Act 1930* (ACT) (MCA), relevantly, ss 208 and 214. This is an appeal from orders of that appeal judge, allowing the appeal from the magistrate's decision in part and thereby confirming a number of the magistrate's convictions. Accordingly, this is an

appeal against orders made by the appeal judge by way of rehearing pursuant to s 37O(1) of the SC Act, not an appeal against conviction, to which s 37O(2) is directed. In other words, this is not an appeal against a conviction alleging the verdict should be set aside on the ground that it is unreasonable, or cannot be supported having regard to the evidence, the language of s 37O(2)(a)(i).

12 That is not to suggest that an appeal on the basis the convictions were not supported by the evidence could not be sustained. Rather, it is to emphasise the importance of clarity about the nature of the appeal.

13 Where an appeal is by way of rehearing, generally an appellant may succeed only by demonstrating material error in the decision below, whether legal, factual or discretionary: *Allesch v Maunz* [2000] HCA 40; (2000) 203 CLR 172 (*Allesch*) at [23]. This is noting that a court on a rehearing is to conduct a real review of the evidence given at first instance and the judge's reasons for judgment and, while respecting any advantage that the primary judge enjoyed, should not shrink from giving effect to its own conclusion: *Warren v Coombes* [1979] HCA 9; (1979) 142 CLR 531 at 551, reinforced by the High Court in *Lee v Lee* [2019] HCA 28; (2019) 266 CLR 129 at [55]-[56].

14 In contrast, when considering whether a verdict is unreasonable, the Court must ask itself "whether it thinks that upon the whole of the evidence it was open to [the Tribunal of fact] to be satisfied beyond reasonable doubt that the accused was guilty": *M v The Queen* [1994] HCA 63; (1994) 181 CLR 487 at 492-495; and see *Dansie v The Queen* [2022] HCA 25; (2022) 274 CLR 651 (*Dansie*) at [7]-[8]; *Lang v The Queen* [2023] HCA 29; (2023) 302 A Crim R 483 (*Lang*) at [251].

15 During the hearing of the appeal, the appellant relied on observations in *Muench v McCue* [2020] ACTCA 17, submitting that the Court there approached an appeal of this nature applying the test enunciated in *M v The Queen*. The context was the same as this case, being an appeal pursuant to ss 208 and 214 of the MCA from the magistrate to the single appeal judge, and from the appeal judge to the Court of Appeal. The appeal was based, inter alia, on the verdict being unreasonable and not supported by the evidence (the language of s 37O(2) of the SC Act). The Court there observed at [93], that both parties misconceived the nature of the appeal. It is plain from that judgment that the Court received little assistance on that topic. Ultimately, it did not decide the basis on which the appeal was brought, as it considered the debate concerning s 37O(2) academic. Suffice to say the Court at [109] approached its task as if it was an appeal from a jury verdict alleged to be unreasonable, on the basis the same principles must apply when considering whether a finding of guilt by a magistrate or judge sitting alone was unreasonable. This also appears to have been the approach in *KA v Linden* [2021] ACTCA 22 at [65]-[70], in respect of a ss 208 and 214 appeal from the magistrate and subsequent appeal to this Court, although again this does not appear to have been the subject of debate. This is to be contrasted with *Roberts v Rhodes* [2014] ACTCA 20 at [10], where the Court approached the nature of the appeal as one of rehearing.

16 That there appears to be an issue with the nature of the appeals to a

single judge, and then to this Court is highlighted in *McFarlane v Van Eyle* [2022] ACTCA 68 (*McFarlane*), where this Court was divided as to which test should be applied to an appeal under s 214 of the MCA. Chief Justice McCallum noted the difference in statutory language between s 214 of the MCA and common form appeal provisions, and expressed doubt as to whether a verdict being "unreasonable" was a proper ground of appeal under s 214 of the MCA. Mossop J identified at [18]-[21] that the hearing before the appeal judge was a rehearing, requiring the establishment of error, but approached the matter on the basis that it had been argued, namely that an assertion that the verdict was unreasonable, in the sense described in *M v The Queen*, was an available ground of appeal. In a concurring judgment, at [94]-[96], Kennett J further elucidated this position:

> [94] Appeals are creatures of statute and, therefore, the circumstances in which an appeal court is required or permitted to set aside a conviction depend on the particular terms of the statute under which the appeal is brought.
>
> [95] *M v The Queen* involved an appeal from the verdict of a jury in the District Court of NSW, where s 6 of the *Criminal Appeal Act 1912* (NSW) as then in force empowered the Court of Criminal Appeal to set aside the conviction if it concluded that the conviction was "unsafe and unsatisfactory" or there was otherwise a "miscarriage of justice". In *Dansie v The Queen* [2022] HCA 25; 96 ALJR 728, the test enunciated in *M* was treated as applicable to an appeal from a judge alone; however, that appeal had come to the Court of Criminal Appeal of South Australia under s 158 of the *Criminal Procedure Act 1921* (SA), which is framed similarly to s 6 of the NSW statute (but using the more modern language of "unreasonable or cannot be supported by the evidence"). Section 37O(2) of the *Supreme Court Act 1933* (ACT), which applies to an appeal brought to this Court from a conviction entered in the Supreme Court, is also in similar terms. The test in *M* has thus been treated as applicable to appeals to this Court from convictions entered in the Supreme Court: eg *Smith (a pseudonym) v The Queen* [2021] ACTCA 16; 16 ACTLR 91, [149] (Murrell CJ), [225]-[226] (Loukas-Karlsson J), [271] (Charlesworth J).
>
> [96] Section 214 of the *Magistrates Court Act 1930* (ACT), which governed the appeal from the magistrate in this case, uses different language. It does not limit the power to set aside a conviction to cases where the verdict is unreasonable or involves a miscarriage of justice. Instead, it requires the Supreme Court to have regard to the evidence given below and empowers the Court to draw inferences of fact. It confers a qualified power to receive fresh evidence. This form of appeal can be placed within the category of appeals by way of rehearing (in that it is clearly neither a hearing *de novo* nor an appeal in the strict sense). That categorisation does not of itself answer questions as to the available grounds of appeal or the function to be performed by the Supreme Court (which must depend on construing the particular statutory language in its context), although it points to certain "ordinary incidents": *Minister for Immigration v SZVFW* [2018] HCA 30; 264 CLR 541, [29]-[31] (Gageler J). One such ordinary incident is that the appeal is a process for the correction of error. An appeal under s 214 has been held to be an appeal of that kind (*Lukatela v Birch* [2008] ACTSC 99 at [17]-[24]; assumed to be correct in *Roberts v Rhodes* [2014] ACTCA 20

> at [10]). The same view was reached, in relation to the comparable statute in New South Wales, in *McNab v Director of Public Prosecutions* [2021] NSWCA 298; 106 NSWLR 430 at [24]-[27] (Bell P), [89]-[90] Basten and McCallum JJA).

17 We agree with that description as to the nature of an appeal pursuant to s 214 of the MCA. Kennett J held at [97]-[98] that unreasonableness of the verdict is a "species of error" that will justify setting aside a verdict in an appeal governed by s 214, but that an appellant "does not need to make out a ground pitched at that level" in order to succeed. The Court did not address the provision under which an appeal is then brought to this Court from an appeal decision under s 214.

18 Accordingly, an appellant may succeed in an appeal under s 214 of the MCA by demonstrating that the magistrate's finding was unreasonable, but such a finding is not necessary for an appellant to succeed. Rather, it is sufficient for an appellant to demonstrate that there is a material legal, factual or discretionary error in the magistrate's decision.

19 It may also be accepted that unreasonableness is a species of factual error which may, if established, justify this Court setting aside the appeal judge's orders pursuant to s 37O(1) of the SC Act.

20 In determining whether there is a material legal, factual or discretionary error, the appellate court must observe the "natural limitations" of proceeding on the record, including, as observed in *Fox v Percy* [2003] HCA 22; (2003) 214 CLR 118 at [23]:

> … the disadvantage that the appellate court has when compared with the trial judge in respect of the evaluation of witness' credibility and of the "feeling" of a case which an appellate court, reading the transcript, cannot always fully share.

21 Consideration of whether the appellant has demonstrated error in the magistrate's decision must also take account of the pressures of the Magistrates Court.

22 It must always be borne in mind that the appeal is a "process for the correction of error": *McFarlane* at [96]. Two consequences flow from this. First, the onus is on the appellant to demonstrate that there is error in the decision below: *Allesch* at [23]; *Lukatela v Birch* [2008] ACTSC 99; (2008) 223 FLR 1 at [19]. Second, it is incumbent on the appellant to identify the alleged error in the magistrate's decision in their grounds of appeal: *Carroll v The Queen* [2009] HCA 13; (2009) 83 ALJR 579; 254 ALR 379 at [8]; *R v Ralston* [2020] ACTCA 47; (2020) 285 A Crim R 159 at [127].

23 If an appellant identifies the ground of appeal from the Magistrates Court as being that the verdict is unreasonable, the Court will proceed on the basis that the appellant challenges the magistrate's ultimate factual finding. If an appellant wishes to challenge any intermediate factual finding, such a challenge should be pleaded as a specific ground of appeal.

24 The parties made no submissions challenging the correctness of the approach taken by the appeal judge to resolution of this ground of appeal before him: AJ [81]-[83].

25 All that said, the principles relevant to properly assessing the evidence discussed in cases considering whether a verdict is unreasonable, are nonetheless relevant and applicable on the present rehearing, in which one of the grounds of appeal pleaded is that the verdict is unreasonable, and no challenge is made to any intermediate factual finding. It is appropriate to highlight, particular to this appeal, the following points.

26 In a case where the evidence is circumstantial, this means that the appeal court must weigh all the circumstances in deciding whether it was open to the tribunal of fact to draw the ultimate inference that guilt has been proved beyond reasonable doubt. That inference will not be open if the prosecution has failed to exclude an inference consistent with innocence that was reasonably open: *Coughlan v The Queen* [2020] HCA 15; (2020) 267 CLR 654 at [55]; and see *Lang* at [251].

27 In *R v Hillier* [2007] HCA 13; (2007) 228 CLR 618 (*Hillier*), in the oft-cited passage at [48], the High Court said:

> Often enough, in a circumstantial case, there will be evidence of matters which, looked at in isolation from other evidence, would yield an inference compatible with the innocence of the accused. But neither at trial, nor on appeal, is a circumstantial case to be considered piecemeal. …

28 In *R v Baden-Clay* [2016] HCA 35; (2016) 258 CLR 308 (*Baden-Clay*); the Court at [47], citing *Hillier* and *Barca v The Queen* [1975] HCA 42; (1975) 133 CLR 82 at 104, explained that:

> For an inference to be reasonable, it "must rest upon something more than *mere conjecture*. The bare possibility of innocence should not prevent a jury from finding the prisoner guilty, if the inference of guilt is the only inference open to reasonable men upon a consideration of all the facts in evidence" (emphasis added). Further, "in considering a circumstantial case, *all of the circumstances* established by the evidence are to be considered and weighed in deciding whether there is an inference consistent with innocence reasonably open on the evidence" (emphasis added). The evidence is not to be looked at in a piecemeal fashion, at trial or on appeal.

29 It has been said in relation to an appeal from a verdict on indictment by a trial judge sitting alone that the court "will be required to consider the arguments of the parties in the appeal and will be entitled to treat findings of fact made by the trial judge about which no issue is taken in the appeal as an accurate reflection of so much of the evidence as bore on those findings": *Dansie* at [16].

30 Here, this is an appeal from an appeal judgment. The appeal judge was entitled to approach his task in that manner, as is this Court on appeal.

31 As the Court in *Baden-Clay*, citing *Nudd v The Queen* [2006] HCA 9; (2006) 80 ALJR 614; 225 ALR 161 at [9], observed at [48]:

> … a criminal trial is accusatorial but also adversarial. Subject to well-defined

> exceptions, "parties are bound by the conduct of their counsel, who exercise a wide discretion in deciding what issues to contest, what witnesses to call, what evidence to lead or to seek to have excluded, and what lines of argument to pursue."

Consideration

32 As explained above, this is an appeal by way of rehearing. Given the first ground of appeal, the errors alleged are the factual findings of guilt in respect to the charges. To determine whether those conclusions were open to the appeal judge, it is necessary to assess the evidence. If, in relation to a charge it is established that the finding of guilt was not open, error has been established in relation to that charge.

33 The evidence relied on by the prosecution before the magistrate was documentary, in addition to calling witnesses. The appellant did tender exhibits, but otherwise did not call evidence.

34 It is appropriate at the outset to refer to the position of the appellant, the circumstances in which he joined the club and the evidence regarding the management of club funds.

35 The appellant was brought into the club because of his commercial experience. The appellant accepted as much in his interview with the police, where he described his commercial background, that he had owned two companies, and his immediate previous employment was as CEO of a publicly listed company.

36 When he commenced his position as president, there were other persons on the club's executive committee including a treasurer, Ms Hampson. Her evidence related to the proper use of club debit cards and funds and the club's financial procedures. When cardholders used their club debit cards they were required to produce a receipt to enable her to reconcile the transactions. She had conversations with the appellant on a number of occasions when he had not done so, seeking receipts for transactions on his club debit card. Prior to the club issuing the debit cards to cardholders, if any person used their own money for a club purchase, they were required to submit a form and receipt to the treasurer for reimbursement. That was also the position after the club ceased using the debit cards.

37 Ms Hampson explained that although there was no written policy, she explained to the whole executive committee that club cards should only be used for club business, primarily for the canteen, as larger transactions should come to the committee for approval. Her evidence was that the committee agreed.

38 Mr Tarnawskyj, committee member since 2016, gave evidence that today there are no cardholders and the process of submitting receipts for reimbursement is the same as at 2017 and 2018: all the receipts are stapled with a reimbursement form or a ledger usually done in Excel, the form is filled out, gets approved and gets paid. Even expenses clearly incurred for the club would not be reimbursed without a receipt.

39 Ms Hampson gave evidence that the executive committee required all online electronic transfers from the club's bank account to be entered by one person

and authorised by a second, so that there were two signatories to exercise good governance on the spending of public monies. When an issue arose in March 2017 that the appellant had not followed that process on one occasion, the appellant was instructed by the committee to ensure that there were two signatories on the account. As far as Ms Hampson was aware, that had not occurred.

40 Further, in relation to the electronic transfer of funds from the club bank account, on some occasions the appellant recorded the purpose or recipient of the payment, at least in general terms, as reflected in Annexure A. This reflects, inter alia, that he was aware of the importance and necessity of recording the purpose of transfers made using club money.

41 It can be readily inferred from the appellant's commercial background and his position as president of the club that he well understood he must properly account for his use of the club's money. Any submissions now advancing reasonable possibilities consistent with innocence in relation to each of the charges are to be considered in that context. This is noting that the appellant recorded no purpose in relation to a significant number of transfers, which account for most of the charges now under consideration.

42 It is also important to recall, as noted above, the club's constitution prohibited payments to members of the executive committee, other than for the purpose of reimbursing expenses reasonably made on behalf of the club.

43 As apparent from Annexure A, there were four categories of payments the subject of the charges. In this appeal, the Court is concerned with 6 charges in category 2, which involved the use of the appellant's club debit card, being three payments to Telstra and three to ACT Road User Service Dickson. The Court is also concerned with 33 charges in relation to category 3, being electronic transfers from the club bank account into the appellant's personal bank account. Those charges relevantly fall into two sub-categories: first, those where there is some description for the transfer (identified as "Defender deposit", "Tif samples", "Office 365", "Test 2", and "Towing"); and second, 28 transfers where there is no purpose or recipient recorded for the transfer, which are simply identified as "Linked Acc Trns".

44 It was accepted that the critical issue was whether the prosecution could establish each transaction the subject of a charge, representing an appropriation of property belonging to someone else, was dishonest according to ordinary standards, and known to the appellant to be dishonest.

45 The prosecution case was circumstantial. It relied upon a variety of circumstances to prove beyond reasonable doubt each transaction was relevantly dishonest and known to be dishonest. The respondent described that in relation to each category of charges, the circumstances surrounding each transaction were relevantly similar, including the amount of the transaction, description, evidence of (or absence of evidence of) the club's spending, and the appellant's role and knowledge of the club and its expenditure.

46 Before addressing the charges, it is appropriate to refer to some matters of more general application.

47 *First*, the respondent submitted that some of the arguments the appellant now

makes in relation to why findings were not open to the appeal judge, were not made below, and are advanced (at least in their current form) for the first time on this appeal. This was said to be relevant to considering whether error is established. This relates primarily to what are now suggested to be reasonable possibilities consistent with innocence not excluded by the evidence. Some of these submissions were made by the appellant for the first time in his written submission in reply.

48 The submissions will be addressed in considering the individual counts. Suffice to say at this stage that as a general proposition, this submission can be accepted. Although the new factual submissions can be made as this is a rehearing (and there is no prejudice arising, for example, as to how the case was presented below), the weight to be attached to them will depend on the circumstances of the charge under consideration. That they were not made either before the magistrate, or the appeal judge (and other submissions were advanced as to the reasonable possibilities consistent with innocence), may reflect on whether the current submission is reasonably open on the evidence. That is particularly so in this instance, where the appellant now puts the submission on the basis that the suggested conclusion is compelling. Moreover, as recognised in the passages from *Dansie* and *Baden-Clay* recited above at [29] and [31], the conduct of the parties below can impact on the assessment of the evidence.

49 *Second*, a general submission repeatedly advanced by the appellant, was that the prosecution did not lead certain evidence. Again, we will address that issue when considering the individual charges. However, as a general proposition, the magistrate, and the appeal judge were to determine the matter on the evidence before them. A party is entitled to a fair trial, not a perfect one. There is no suggestion this was not a fair trial. As illustrated below, there is no basis to speculate what may have been in certain documents, the absence of which the appellant relied upon. Depending on the circumstances, the absence of a document does not inevitably lead to a conclusion that the case cannot be proved, as contended for by the appellant. Although the prosecution must exclude any reasonable possibility consistent with innocence, this does not necessarily require leading or tendering all evidence that may be available to be obtained in relation to a particular charge. The issue remains throughout, whether the prosecution has proved its case beyond reasonable doubt.

50 *Third*, aligned with that previous matter, the appellant pointed in written submissions to the respondent's failure to tender a folder of receipts, emails, an assets register, the financial records of the club and the banking records in relation to his St George Bank account. All of these were said to potentially contain exculpatory evidence, the absence of which means a reasonable possibility consistent with innocence cannot be excluded. These submissions are to be considered in assessing the evidence. That said, the evidence is not necessarily as the appellant contends.

51 For example, the appellant relies on the folder of receipts that was not tendered for the possible existence of a receipt relevant to one of the charged transactions. The appellant's submission that the folder "had lots of loose

receipts" is misleading. This evidence was very limited. The informant in cross-examination gave evidence there was a folder of receipts, but said that they related mostly to service stations, to purchases of cigarettes and fruits items. There is no evidence of how many receipts, but he accepted more than two. The appellant during cross-examination of the informant, having heard the above answers, said that was not a "very important point", and turned to a separate line of questioning. Although that statement is not evidence, it reflects the appellant's view of the significance of this evidence at that time. The informant's description was not challenged, and the appellant did not seek to tender the documents, despite tendering others. It is also unclear what is said to be possibly in the folder of receipts, bearing in mind that most of the category 3 offences record no purpose for the transfer of funds.

52 We note that the appeal judge observed at [85]:

> It is apparent that Mr Chen's instructions contained nothing to suggest the relevance or importance of those receipts. After that evidence was given, he said "I'll move on. That's not a very important point, considering the time". Nor did he call for the production of the folder with loose receipts in it. There was no evidence to suggest that fruit or cigarettes would be purchased from service stations for club use. I will bear those circumstances in mind when I consider the submissions of Mr Chen which refer to that folder of receipts as being "potentially exculpatory material that was never tendered".

53 That approach was not challenged in this Court.

54 The above comments in relation to the receipts apply similarly to the submission that there was an "abundance of emails that may have contained receipts". Again, this evidence was no higher than the informant and Ms Hampson accepting in cross-examination the possibility there might be some emails containing receipts justifying transactions on the appellant's part.

55 Ms Hampson's evidence was that the club did not have an "asset register". Rather, there was a register of the actual sporting equipment held. It is entirely unclear how this, given the other evidence, is said to be relevant. Not surprisingly, it did not feature in the submissions before the magistrate. The absence of the financial records of the club were also said to be significant. We note that this submission runs counter to the appellant's submission that the financial management of the club was in chaos. In any event, again, in light of all the circumstances of the case, it is unclear how this evidence could be relevant.

56 As to the appellant's St George account records, this was raised for the first time in written submissions in reply. The informant agreed to the proposition put to him in cross-examination before the magistrate that there were "no transactions of interest" in the St George account. The appellant did not ask any further questions or challenge that answer in any way. Nor did he tender the documents (again, noting the appellant did tender some other documents in his case). This reflects the appellant's decisions in conducting the trial. The consequence is that the evidence that the St George account contained no transactions of interest is unchallenged. The appellant submitted that in failing to adduce those statements, the prosecution did not exclude the

possibility that the appellant's transfers into his NAB account were for reimbursement of club expenditure incurred using his St George account. That submission must be considered in the context of the unchallenged evidence about the St George account. This is so, noting also that this submission did not feature below.

57 That said, as explained above, the failure to provide some evidence may affect a Court's ability to be satisfied that an offence is proved. That is dependent on the facts of the given case. The matters relied on in this case, as explained above, are to be considered with all the evidence. In considering the appellant's submissions to this Court and the Court below focused on the absence of evidence, the Court is not entitled to speculate. Nor is the court to decide the case by asking the question of whether the prosecution could have called further evidence.

58 *Fourth*, insofar as the appellant submitted the evidence of the lay witnesses from the club was vague and unreliable, some examples relied upon said to illustrate this are not borne out by a proper reading of the evidence. For example, contrary to the submission that "Ms Hampson believed the Club debit cards were 'credit cards'", Ms Hampson confirmed her understanding the cards were debit cards, but they were referred to as "credit cards" across club. We do not accept the appellant's general characterisations. We have considered the evidence of each of the individual witnesses in the context of all the evidence in assessing this ground of appeal.

59 *Fifth*, the appellant did not direct any submission to some of the charges, particularly in relation to those in category 3, where there is a purpose entered. In relation to those counts, there is no submission or suggestion that the reasoning of the appeal judge, or the magistrate is erroneous in some manner. The onus is on the appellant to demonstrate error. Where there is no suggestion of any error in reasoning applied by the appeal judge in relation to a particular charge, it should not be for this Court to trawl through the evidence unaided in an attempt to determine if there is some error. In any event, we have considered all of the evidence. No error is established.

60 *Finally*, given the nature of the appellant's submissions, it is important to recall that whilst a possibility consistent with innocence must be a reasonable one, it must be based on more than mere conjecture or speculation.

61 We turn to consider the counts.

Category 2 charges involving the club debit card

62 In relation to the Category 2 transactions, the appellant specifically submitted before the appeal judge (and the magistrate) that there were two hypotheses consistent with innocence that could not be excluded on the evidence: namely, it was possible that someone else made the transactions using his club debit card, or that the appellant accidentally used the club debit card when intending to make personal purchases.

The Telstra payments

63 Three charges relate to payments to "Telstra Bill Paymnt Melbourne" using

the appellant's club debit card: on 9 March 2018 ($398.14); 10 May 2018 ($571.95); and 15 June 2018 ($354.05) (together the Telstra Payments).

64 The appellant submitted that: the prosecution did not adduce evidence of any Telstra invoices issued to the club or evidence from Telstra's business records and therefore no reliable or independent evidence as to the club's actual liability to Telstra; the appellant's club debit card had been used to pay $345.99 to Telstra on 8 December 2017, which was not the subject of any criminal charge; and in the absence of: (i) evidence demonstrating the relevant transactions were applied to an account in the appellant's name, and (ii) Telstra invoices issued to the club or Telstra business records tracing where those payments were directed, the appeal judge was wrong to find beyond reasonable doubt that the Telstra Payments could not have been made for the benefit of the club.

65 The bank statements reflect there was a direct debit payment of $100 per month from the club's NAB account to Telstra. It can readily be inferred that this regular payment related to the services Telstra provided to the club. The appellant submitted before the magistrate, although not before this Court, that the Telstra Payments could be for arrears owed to Telstra. That was rightly rejected by the magistrate as mere conjecture. There is nothing in the evidence to suggest any arrears were owed and these were very specific and different amounts, pointing against that explanation.

66 The appeal judge said at [65] that there was no error in the magistrate's consideration of whether the possibility of payment of arrears was a real one, including the magistrate's conclusion at [50]: "it defies logic that the defendant, as the sophisticated and experienced businessman he was, would attend to such arrears in such an ad hoc and piecemeal fashion".

67 The appeal judge at [127] concluded that the evidence established that those payments could not have been for the club's regular Telstra bill, which was $100 per month and the varying amounts suggested that the payments related to a particular Telstra bill, rather than paying off some arrears that the club owed to Telstra, there being no evidence of such arrears at all. That aspect of his Honour's reasoning was not challenged. That the appellant's payment to Telstra in December 2017 with his club debit card was not the subject of a charge does not give rise to a reasonable doubt establishing the appeal judge was in error in concluding he was satisfied of the appellant's guilt on the Telstra Payment charges. We note that submission appears to have been raised for the first time in this Court, and in the appellant's written submissions in reply. As noted above at [49], the absence of certain evidence does not inevitably lead to a conclusion of a reasonable possibility consistent with innocence. Having considered the totality of the evidence and the circumstances in which the transactions were made, including the context outlined above at [34]-[42], the appellant has not established any error in his Honour's conclusion.

68 No error is established in relation to those charges.

ACT Road User Service (ACTRUS) payments

69 These charges relate to three payments by the appellant using the club debit card made on 4 June 2018 for $303.00, $313.00 and $148.00 respectively.

70 In this Court, the appellant submitted that he purchased a trailer for the benefit of the Club, pointing to the Executive Special Meeting Minutes of 21 July 2018, which noted he had purchased for the Club a "Gator" all-terrain vehicle (ATV) and a trailer. He submitted that the evidence was the Club did run and operate a road registrable vehicle, being the trailer, and both the magistrate and the appeal judge were factually incorrect about that. It was also submitted that the payments on 4 June 2018 the subject of the charges were made on the same day that a payment to QBE Insurance for $419 was made (which was not the subject of a charge). The appellant was critical of the prosecution's failure to provide evidence of what the ACTRUS payments were for, evidence of registration of the trailer, whether use of that trailer had been the subject of any fines, taxes or fees or the purpose of the QBE Insurance payment. That failure, he submitted, left open the possibility the card payments were for club business. It was also submitted to be relevant that an invoice for the ATV was issued on 29 May 2018, only days before the ACTRUS payments and QBE Insurance payment. He submitted that once it is accepted that any one of the ACTRUS payments related to the Club's trailer, or even related to the ATV or to the uncontroversial QBE insurance payment, it must follow that the prosecution has not excluded all reasonable hypotheses inconsistent with guilt. Further, he submitted the appeal judge did not engage with that reasoning, and while accepting the magistrate's reasoning, did not expose any of his own independent reasoning processes.

71 The appellant was found guilty on these three charges, and the appeal judge at [130]-[131] recited and adopted the reasoning of the magistrate at [49]:

> I take judicial notice that payments to the ACT Road User Service involve the payment of motor vehicle related taxes, fees or fines. It was clear from the evidence that the club did not run or operate a registerable motor vehicle. It is also clear that the payment of personal taxes, fees or fines would not be legitimate club expenses.

72 The appeal judge noted at [126] the appellant's submission about the possibility of the relevant payments being personal payments made by mistake on the club card, which was not accepted.

73 It is significant to note that the appellant did not advance any submissions in relation to these three charges before the appeal judge, and therefore did not criticise the magistrate's reasoning. Accordingly, the appeal judge was faced with unchallenged reasoning supporting the convictions.

74 Further, the submissions now advanced were not those before the magistrate, where the submission as to the debit card counts were as explained above. Namely, that it was possible someone else made the transactions using the appellant's club debit card. The appellant did not submit that the trailer or the ATV were registrable vehicles. Rather, at its highest, the submission before the magistrate was that the prosecution had not proven "who was responsible for paying any registration fee associated with the trailer (if any)".

75 Although the appellant positively submitted in this Court that the club did run and operate a road registerable vehicle, being the trailer, that submission is not supported by any evidence. To the contrary, the evidence was that the club

never owned any vehicles for road use. The trailer was a club asset that stayed at the club and was used to transport equipment to the fields. The ATV was only used for transporting equipment on the fields and not for road related purposes. This evidence arose from acceptance of propositions put in cross-examination by the appellant, reflecting that he was not suggesting during the hearing that these vehicles were for road use. As the respondent correctly submitted, the highest the cross-examination in relation to the trailer and ATV reached was as to their purchase and use for the benefit of the club. The submissions now advanced are inconsistent with the conduct of the matter below, and speculative. The same is true of the submission that the existence of the payment to QBE Insurance raises a reasonable possibility that the ACTRUS payments were for the benefit of the club.

76 It may be accepted that the appeal judge's reasoning is an acceptance of the magistrate's reasoning. There is no reason to doubt that the appeal judge did his own assessment, as his Honour expressed. That does not bear upon this ground of appeal, given the conduct of the appellant's case below, with the magistrate's reasoning not being challenged. We also note that there is now no ground alleging inadequate reasons.

77 The appellant has not established any error with the primary judge's conclusion on these charges.

Category 3 charges involving electronic banking transfers

Transfers with no explanation recorded

78 As apparent from Annexure A, 28 counts relate to money from the club's NAB bank account to the appellant's personal NAB bank account with no explanation recorded. For those transfers the statements simply read "Linked Acc Trns".

79 Various explanations were postulated by the appellant, with the common theme that the transfers were reimbursement for moneys legitimately spent for club purposes.

80 When considering the individual charges, it is appropriate to consider the nature of the transfers and the context in which they occurred. These amounts were all round figures, ranging from $100 to $750, amounting to over $11,000 in six months. Some were on the same or consecutive days. For example, two transfers totalling $1000 were made on 27 December 2017. Transfers totalling $1250 were made on 28 March 2018 and the following day. There is no evidence of equivalent payments being made from the appellant's personal account that correlate to the transfers.

81 This is also in the context where, as described above, as club president he was plainly aware of the importance of maintaining records of transactions to enable club funds to be accounted for.

82 The appellant's submission emphasised the transfers could have been to repay the appellant for groceries purchased for the canteen. However, in so far as it was suggested that the evidence reflected the appellant frequently purchased large quantities of goods from Woolworths, Costco, and Coles for the

Club's canteen and other purposes, that is not borne out on a proper reading of the evidence. It is a submission advanced in more detail in this Court than previously made.

83 In support of the above submission, the appellant detailed purchases made by the canteen managers using their club debit cards. The appellant submitted that he made similar transactions with his personal account consistent with those expenses. The examples provided might be understood to be the high point in illustrating the submission. Notably, it is apparent that the figures transacted by the canteen managers are substantially less than the amounts regularly transferred by the appellant, and they are very specific amounts. The evidence is that the expenses incurred by the canteen managers were made using their club debit cards. As noted above at [38]-[39], the evidence also establishes that electronic transfers from the club's account were required to be entered by one person and approved by another. For committee members to be reimbursed for any expenditure using personal funds, they were required to provide documents or receipts so that the club money could be accounted for.

84 We note also for context, the appellant was the subject of criminal charges for transfers recorded as being for, inter alia, "Costco" and "Canteen", for which he was found not guilty.

85 The appellant's submission, based primarily on purchases of groceries and goods from retailers, is entirely speculative. The submission that his retail purchases are more than a single person would make (and therefore were made for the benefit of the club), is without foundation and does not assist his case. In any event, the examples of his purchases provided, again assuming the examples are the high point of the submission, are substantially lower than the transfer amounts the subject of the criminal charges.

86 The appellant also relied on the fact of the St George accounts not being tendered, submitting that the reimbursements could be for purchases from that account. The evidence in respect of the St George accounts was unchallenged. That submission is addressed above and is based on no more than speculation.

87 The appeal judge concluded at [90]-[93]:

> [90] Similar considerations apply to all of the electronic transfers where the appellant has failed to indicate a reason for the transfer. That is not to consider the question of the appellant's guilt on those charges in a global fashion, but it is to say that when the charges are individually considered, the evidence in relation to each charge demonstrates similar features, namely the transfer was for a round figure, there is no evidence of anything being bought for the club for the relevant amount at around the time of the transfer and if it was a legitimate reimbursement, one might have expected the appellant to have recorded what he was being reimbursed for.
>
> [91] I will elaborate on that last feature. It is difficult to understand why, if the transfer were a genuine reimbursement for monies paid by the appellant personally, the appellant would not have recorded in some way what he had spent his money on. On the other hand, there is a clear explanation for

why he would not do so if the transfer was not a legitimate one: providing an explanation for any transfer makes it easier for the legitimacy of the transfer to be investigated.

[92] I am satisfied beyond reasonable doubt that the appellant was responsible for each of those transactions which were dishonest according to the standards of ordinary people, the appellant knowing that to be the case.

[93] Accordingly, I am satisfied of the appellant's guilt on all charges concerning electronic funds transfer where they are described as "Linked Acc Trns".

88 That reasoning is entirely sound.

89 Having considered all of the evidence, no error is established.

"Towing" transfer

90 This charge relates to a transfer from the club's bank account to the appellant's personal account on 12 December 2017 of $450, recorded as "Towing". This is one of the charges that the appellant did not separately address in written or oral submissions in this Court. Below, the towing was submitted to relate to a caravan, intended to be used as a mobile canteen for the club. However, there was no evidence that the towing charge related to towing that van. The submission was entirely speculative. In any event, importantly, it was not a club van, but was purchased by the appellant and Mr Tarnawskyj, and was their personal property. Even if the transfer related to the van, there is no basis to infer there was any entitlement to reimbursement for the towing fee.

91 The primary judge's conclusion at [75]-[76], and [94] is plainly correct.

"Defender Deposit" transfer

92 This charge relates to a transfer from the club's bank account to the appellant's personal account on 4 May 2018 of $750, recorded as "Defender Deposit". As the appeal judge noted, the club did purchase an all-terrain vehicle described as a MY18 Defender on 29 May 2018.

93 It may be accepted, as the appellant submitted, there was an email from the Canberra Motorcycle Centre (CMC), dated 13 March 2018, relating to a deposit, but it was not "requesting a $500 deposit to secure a vehicle". Rather, it was a response from CMC confirming that the vehicle could be held with a deposit of $500. That was in reply to an email from the appellant saying that he was working with the club sponsor and the bank to find the best way to purchase or lease the vehicle, and inquiring whether the vehicle could be held with a deposit. The series of emails in that chain between the appellant and CMC which lead to the sale are not evidence that any deposit was actually paid. Moreover, as the appeal judge concluded, the invoice for the purchase, dated 29 May 2018, sets out the price of the vehicle and accessories, dealer delivery, an administration fee, and stamp duty. There is no entry for a deposit. It is apparent from the invoice that the price was reduced by a "dealer discount". The appellant's submission that it is unknown what is in the dealer discount, and that it could have included a deposit paid by the appellant, is implausible. A deposit is not a discount. In an otherwise detailed account, it would be expected that had a deposit been paid, it would have been itemised on the invoice. The

balance required for settlement is not reduced to account for any deposit. There is no reference in that invoice to a deposit having been paid: AJ [105]-[108]. In any event, although there is an entry in the appellant's personal bank statement for a payment to CMC on 4 May 2018 of $500, this charge relates to a transfer of $750 from the club account to the appellant. The suggestion that the difference in amount is explicable because the recorded description may not have been a comprehensive description of all the purposes for which the transfer was made is merely conjecture.

94 We note that before the appeal judge, the appellant submitted simply that the Court did not have the complete records of the appellant's dealings with CMC, and therefore it could not exclude the possibility of the transfer being for a transaction incurred for the club. No evidence was referred to in support of the submission.

95 No error is established in the appeal judge's conclusion that he was satisfied the appellant did not pay a deposit of $750 to CMC for the vehicle purchased by the club. The transfer of $750 from the club account to his personal account could not have been for reimbursement of such payment.

"Tif samples" transfer

96 This charge relates to a transfer from the club's account to the appellant's personal account on 15 January 2018 of $450, said to relate to "Tif samples".

97 This is a charge which the appellant did not separately address in this appeal, either in writing or orally. Consequently, there is no alleged error identified in the conclusion reached by the appeal judge.

98 In the Court below, the appellant submitted that this related to the club's uniform supplier, and that the respondent did not lead evidence explaining the contractual arrangements between the club and this supplier. Nor was a representative from the supplier called to give evidence. Therefore, it could not be excluded that the payment was for the club.

99 Despite the limited submissions below, it is plain the appeal judge considered all the evidence. His Honour concluded at [102]-[103]:

> [102] Charge 4934 relates to a transfer of $450 for "Tif samples". There was evidence at the hearing that this was a reference to the club's uniform supplier "This is Football" (T:289). Certainly, the purchase of uniforms was a legitimate club expense. However, unlike many of the purchases the subject of a charge, there was evidence as to how "This is Football" was paid. That evidence was "so we could either do an Internet transfer or raise a bank cheque depending on the amount that we were paying" (T:289.8). I understand that evidence to suggest that the internet transfer would be from the club's bank account and that where the amount to be paid exceeded the transaction limit, payment would be made by a bank cheque.
>
> [103] Given that evidence, it makes no sense for the appellant to have paid any money to "This is Football" from his own bank account and then to obtain reimbursement by transferring money from the club's account to his.

100 That reasoning was not challenged by the appellant. Having considered the evidence, no error in the appeal judge's conclusion is established.

"Office 365" transfer

101 This charge relates to a transfer from the club's account to the appellant's personal account on 8 January 2018 of $250, said to relate to "Office 365". Again, this is a count to which no submissions were made in this Court. The written submission below was simply that there was no investigation of a contractual relationship between the club and Microsoft Office, and therefore it could not be excluded the transfer was a legitimate payment for club purposes.

102 The appeal judge concluded it would not be surprising if the club used Office 365 and payment was required. However, his Honour went on to conclude at [100]:

> Even so, this is another transaction where it would have made more sense for the appellant to pay Microsoft directly from club accounts rather than use his own money and then need to reimburse himself. That is even more the case when, if this was a legitimate transaction, the software which is being paid for would be on a club computer with, presumably, access to the club bank accounts.

103 Again, this reasoning is not challenged. Having considered the evidence, the reasoning was plainly open. No error in the appeal judge's conclusion is established.

"Test 2" transfer

104 This charge relates to a transfer from the club's account to the appellant's account on 5 December 2017 of $100, for "Test 2".

105 Again, no submissions were made in this Court about this charge.

106 The appeal judge at [96]-[97] remarked that no submissions were advanced before him. He observed that:

> [96] Perhaps the most likely explanation for the description "Test 2" is that this was the second attempt by the appellant to test whether he could transfer money from the club's bank account to his. If so, it is notable that there is no entry whereby the appellant transfers $100 back from his account to the club's, indeed there is no such entry for any amount at any time.
>
> [97] It is possible to speculate on other reasons for the transaction, but I cannot think of any legitimate reason for that transaction, and none was suggested as a possibility by Mr Chen. It has features in common with the electronic transfers where no recorded reason was stated, especially the difficulty that anyone investigating the transaction would have in identifying what it was for. Once again, if $100 was being spent for club purposes, it is hard to understand why the payment would not have been made directly from the club's accounts rather than being made from the appellant's account with reimbursement being then required.

107 Again, this reasoning is not challenged. If the explanation is that it was a test, there is no corresponding return of the funds. Indeed, within days a further $500 was transferred with no explanation. Considering all of the evidence, the conclusion of the primary judge was plainly open. No submission suggested otherwise.

108 No error is established.

Conclusion

109 The appellant has not established the first ground of appeal in respect to any of the charges.

Ground 2: the amendment of the charges

110 Before summarising the appellant's submissions, it is helpful to set out the context in which the amendments were made, which is summarised at AJ [16]-[20].

111 In summary, the appellant was initially charged with 108 counts of obtaining property by deception. In those charges, the property was described as "money". These matters were to be heard on 10 May 2021, but when, in its opening address, the prosecution gave notice that it intended to rely on the statutory alternative charges of theft, the appellant complained that he had not been provided with adequate particulars. It was at this stage that the then presiding magistrate (Magistrate Lawton) suggested to the prosecution that the charges should allege a "chose in action" rather than "money". The prosecution did not agree, but the hearing was vacated so that particulars of the charges could be provided in writing.

112 On 7 February 2022 the matter was listed for a hearing before a different magistrate, Magistrate Theakston. Notwithstanding Magistrate Lawton's earlier suggestion, the charges continued to particularise the property which had been stolen as "money" rather than a "chose in action".

113 At the conclusion of the prosecution case, the appellant made a no case submission, inter alia, on the basis the prosecution had failed to prove that "money" had been stolen. The appellant submitted that if anything had been stolen, it was a "chose in action". The prosecution submitted that the property was correctly described as "money", but as a fallback position, if it was wrong then it would seek the Court's leave to amend all the theft charges to allege theft of a "chose in action".

114 The magistrate accepted the appellant's submission regarding the legal description of the property. However, under s 28 of the MCA, his Honour allowed each charge to be amended so that it referred to the property as a "chose in action". In *Bakes v Alexander* [2022] ACTMC 10 (No Case Reasons), his Honour held at [5] that while there is:

> … no evidence that actual money was stolen, there is evidence that an intangible right was appropriated. As this was what the prosecution opened on, I am satisfied there would be no injustice to the defendant, I will amend those charges to particularise the property accordingly.

115 The appellant submitted that the magistrate erred in allowing the amendment, and the appeal judge erred in upholding it.

116 Relying on *R v Hawcroft* [2009] ACTSC 145; (2009) 234 FLR 339 (*Hawcroft*), the appellant submitted that he was entitled to an acquittal, as the prosecution case wrongly particularised the property said to have been stolen as money, rather than a chose in action. He submitted that it was too late to allow an amendment which had the effect of fundamentally changing the case from one which he had successfully met to a completely different case. It was unjust

to the appellant and had the effect of negating or rendering nugatory a real issue in dispute to be decided in the case, being the identity of the property said to have been appropriated. Had the appellant remained silent and not made a no case submission, the conviction appeal would have been guaranteed. The appellant submitted that a prerequisite for jurisdiction under s 28 of the MCA is that an objection is taken, which did not occur in this case. Moreover, he submitted the appeal judge erred in requiring the appellant to demonstrate prejudice. Unless the court can be satisfied that the amendment would not be unjust, then the court must decline to allow the amendment.

117 The respondent accepted that the prosecution's application to amend the charges came as "late as it could have possibly come" and came after the prosecutor was on notice about the issue. It accepted that although this does not reflect well on the prosecution, the question was whether the amendment was necessary to determine the real dispute, and whether the amendment would occasion injustice. The respondent submitted that the appellant did not dispute the real issue in question was whether the transactions were dishonest and known by the appellant to be dishonest. The appellant clearly knew the case against him, and he knew what was alleged to have been stolen was the funds held in the club's bank account — a form of property. So much was conceded by the appellant's counsel. The only prejudice to the appellant was a loss of tactical advantage, that the hearing was determined on the merits and according to the real issue in dispute. The appeal judge correctly noted the comments of the Court of Criminal Appeal in *Borodin v The Queen* [2006] NSWCCA 83 at [25], that injustice does not result merely because a defendant loses a technical point based on the inconsistency between the statement in the charge and the evidence to support it. The nature of the property was not an issue in dispute but was merely subject of an incorrect description in the charge. The respondent challenged the appellants reliance on, inter alia, *Hawcroft*. The appellant failed to demonstrate any error on behalf of the magistrate in the proceedings below and has failed to point to any error in the appeal judge's approach in determination of the same.

Consideration

118 The power to amend is in s 28 of the MCA, which is as follows:

> **28 Power of court to amend information**
>
> (1) If at the hearing of any information or summons any objection is taken to an alleged defect in it in substance or form or if objection is taken to any variance between the information or summons and the evidence adduced at the hearing of it, the court may make any amendment in the information or summons that appears to it to be desirable or to be necessary to enable the real question in dispute to be decided.
>
> (2) The court must not make an amendment under subsection (1) if it considers that the amendment cannot be made without injustice to the defendant.

119 That provision is not to be considered in isolation. Section 27 addresses what is required to be included in a charge in relation to the description of a person or property and offences. It states:

> **27 Description of people and property and of offences**
>
> (1) Such description of people or things as would be sufficient in an indictment is sufficient in informations.
>
> (2) The description of any offence in the words of the Act, ordinance, law, order, by-law, regulation, or other instrument creating the offence, or in similar words, is sufficient in law.

120 The offence for which the appellant was convicted is s 308 of the *Criminal Code*:

> **308 Theft**
>
> A person commits an offence (theft) if the person dishonestly appropriates property belonging to someone else with the intention of permanently depriving the other person of the property.

121 The elements of the offence are not in contention and are as follows: (1) the defendant appropriated something and did so intentionally; (2) that appropriated was property and the defendant was at least reckless about that; (3) the property belonged to someone else and the defendant was at least reckless about that; (4) the obtaining was dishonest according to the standards of ordinary people and the defendant knew that (defined); and (5) the defendant intended to permanently deprive the other person of the property.

122 The charges were relevantly identical. Referring to charge 4887 as an example:

> That he, in the Australian Capital Territory, on 11 December 2017, dishonestly appropriated property, namely, money, to the value of $914.85, belonging to Gungahlin United Football Club with the intention of permanently depriving them of property.

123 The amendment deleted the reference to "money", replacing it with "chose in action".

124 In the above context, several observations can be made.

125 *First*, as can be seen from s 27 of the MCA, the description of any offence using the words of the law creating the offence is sufficient to comply with the requirement imposed by the MCA. It follows that the phrase "namely, money, to the value of $914.85" was superfluous to requirement. It was unnecessary, and without which the sufficiency of the charge could not have been challenged. For completeness we note that for the purpose of the *Criminal Code*, "property" includes "a thing in action": s 3 of the *Criminal Code*; s 2 of the *Legislation Act 2001* (ACT).

126 *Second*, that position accords with the nature of the elements of the offence. As correctly recognised by the appeal judge at [22], what the prosecution must prove are the elements of the offence. The description of the property is a particular not an element of the offence.

127 It is uncontroversial that an accused is entitled to be given sufficient details of a charge, and particulars of the act, matter or thing alleged to be the foundation of the charge so they know what case it is they have to meet: see for example *Johnson v Miller* [1937] HCA 77; (1937) 59 CLR 467 at 489; *John L Pty Ltd v*

Attorney-General (NSW) [1987] HCA 42; (1987) 163 CLR 508. However, it does not follow that all those particulars in an information or indictment are material to proof of the offence, such that failure to prove those particulars necessarily results in an acquittal. As described by Wells J in *R v Pfitzner* (1976) 15 SASR 171 (*Pfitzner*), "[p]articulars in an information tend to belie their own name. They are an aid, but can never be more than an aid, to determining what exactly the defence is called on to answer."

128 By way of example, it is well established that dates in the particulars of a charge are not a material matter unless an essential part of the offence: *R v Dossi* (1918) 13 Cr App R 158; *Pfitzner*; *R v Liddy* [2002] SASC 19; (2002) 81 SASR 22. The appeal judge at [23]-[24] provides other examples, which are unnecessary to repeat here. Suffice to say the appeal judge at [25] concluded that "it would be expected that the precise legal categorisation of property alleged to have been stolen would also be something which does not have to be proved beyond reasonable doubt for an accused to be found guilty". We agree in the circumstances of this case.

129 In determining whether a particular is material to a charge, regard is had not only to the terms of the information, but the manner the prosecution conducts its case at trial: *Pfitzner* at 185-186, 191-195, 215. Here, the appellant was well aware of the case he had to meet. As the appeal judge concluded at [34] "the appellant was under no misapprehension as to what it was he was said to have done". That finding is not challenged. This is not a question of inadequate particulars having been provided, but purely a technical question of the description of the legal character of the property. The prosecution was required to establish that property had been stolen. There was no dispute that it was property which was stolen. The type of property was not a material particular in the circumstances of this case. Accordingly, it did not require amendment.

130 *Third*, the appellant's argument was based on *Hawcroft*. There the accused was charged with the theft of money from trust funds held in her capacity as trustee for five beneficiaries. It was submitted that the charges could not be made out because if she used trust funds for her own purposes, she did not steal sums of money but rather choses in action. Marshall J accepted that submission at [18], concluding that "if the accused stole anything, it was a chose in action and not the actual $2,000". His Honour concluded at [22]:

> Charges must be framed with precision to identify correctly and allege properly the property to be stolen, in cases such as this one, in accordance with the principles of banking law …

131 Consequently, Marshall J directed an acquittal in relation to the charges.

132 *Hawcroft* has been referred to only once, and this was in *Kingdon v Western Australia* [2012] WASCA 74; (2012) 223 A Crim R 449. That reference was in relation to an argument which alleged that the evidence at trial was incapable of establishing the appellant had stolen money. As described at [1], there the appellant contended that their actions in transferring the funds from one bank account to another were incapable of constituting the offence of stealing, or alternatively, were incapable of constituting the offence of stealing with which the appellant was charged because the bank credits with which she dealt

were not "money", but choses in action, with the further consequence that the appellant could not have been guilty of engaging in a transaction that involved stolen money. There the charges were framed in terms that the person stole various specified amounts of money, the property of an identified person. Although the appellant relied on *Hawcroft*, the Court concluded at [19] it was distinguishable on the basis that the appellant was charged with stealing property of a certain value, not money. The Court, having considered the meaning of the term "money", concluded that the concept of money had a broad general construction, referring to cases including, inter alia, *R v Hunt* (1996) 88 A Crim R 307 (*Hunt*), which considered the term money in s 178A of the *Crimes Act 1900* (NSW). In considering that meaning, Smart J observed at 317:

> In general speech the sum of money entered in the books of the bank standing to the credit of a customer is described as money. Mainly, only lawyers and tax accountants speak or think of choses in action.

133 That observation may readily be accepted. After referring to *Hunt* and other authorities, the Court at [38] noted that none of the cases to which it had been referred, and which support a broader construction of the term "money" were referred to the court in *Hawcroft* or addressed in the reasons given.

134 We also note that in *Hawcroft*, there is no reference in the brief reasons to any consideration having been given to whether the property was an element of the offence, the nature of particulars or the materiality of a particular alleged in the charge. The assertion at [22] in *Hawcroft*, referred to above at [130], is very broad and does not find general support in the authorities concerning the sufficiency of indictments. The decisions referred to by Marshall J do not provide such support.

135 If it is suggested by the appellant that the result of *Hawcroft* is that unless property which is legally a chose in action is described in that language in a charge or indictment, (as opposed to, for example "money"), a charge cannot be proved, we do not agree. We do not agree with the reasoning contained therein.

136 *Fourth*, the real issue in the trial was whether the appellant had done the physical acts necessary to transfer the money from one account to another, use the debit card or to withdraw cash from the club's bank account, and if he had done these things, whether he did so dishonestly: AJ at [34]. There was no change in the prosecution case by the amendment being made. The suggestion made by the appellant in this Court that there was a real dispute about the identity of the property, cannot be accepted. It is not borne out by a consideration of the transcript of the proceeding below. As noted above, there was no dispute that it was property which was stolen and the appellant was well aware of the case he was required to meet.

137 Although the magistrate granted leave for the prosecution to amend the charges, in our view it was unnecessary to do so. In any event, no error has been demonstrated in his grant of leave to do so.

138 The appellant's submission that a prerequisite for jurisdiction under s 28 of the MCA is that an objection be taken and that it did not occur in this case, was

first raised in written submissions in reply in this Court. The appellant relied on *Hudson v ACT Magistrates Court* [2014] ACTSC 192; (2014) 9 ACTLR 295 (*Hudson*).

139 It can be accepted that the text of s 28(1) of the MCA makes the power of amendment contingent on any objection being made to either a defect in the information, or variance between the evidence and the information: see *Hudson* at [57].

140 An issue arises as to the meaning of "any objection" in the text of s 28, considered in context and given its purpose. It is a phrase that has been in the provision since 1930. The context in which that phrase appears is significant. The provision refers to "any objection" in relation to alternative circumstances, namely: (i) an alleged defect; or (ii) any variance between what was alleged in the information and the evidence adduced. Given the text of the provision, the power to amend also applies after the evidence has been adduced.

141 It was accepted by the appellant that the word "object" does not need to be used for an objection to be made under the provision. So much is plainly correct. It is a question of substance, not the form of what is raised. Given that the term "objection" as used in s 28 of the MCA relates to both circumstances described above, the latter being a variance in the evidence, the better reading of "objection" is to "raise an issue or disagreement with".

142 In *Hudson*, Mossop J at [67] refers to the process of amendment under s 28 of the MCA described in *Martin v Purnell* [1999] FCA 872; (1999) 93 FCR 181 at [31]:

> Section 28 in effect provides that fairness to the parties may require that, before the information is determined, the informant be given an opportunity by the Court to provide a further formulation of the offence charged or to provide particulars of the facts relied on or, where the charge as expressed is duplicitous, an election confining the charge to a single offence.

143 This reflects a broad construct of the provision.

144 The magistrate concluded at [41] of the No Case Reasons, that "clearly an objection has been taken between the information and the evidence adduced at the hearing, by way of the defendant's no case to answer submission". That being so, he was empowered to make an amendment, unless he considered that it could not be made without injustice to the defendant. The magistrate could do that on his own motion, or on the application of a party. The prosecution applied for such an amendment, albeit as a fallback position. That said, as explained above, the prosecution position that no amendment was required is correct. The amendments were only made to particulars of an offence, where the appellant was well aware of the case he had to meet.

145 The appeal judge concluded at [35]-[36]:

> [35] It is difficult to see how the amendment caused any relevant injustice to the appellant. Certainly, he was entitled to be disappointed that the legal point raised by his solicitor, whilst found to be a good one, did not ultimately lead to his acquittal. He was probably even entitled to be more disappointed than usual because the prosecution's application to amend the charges came as late as it could have possibly come.

> [36] Leave to amend charges laid against an accused should not be refused simply because those amendments would deprive an accused of an acquittal. In *Borodin v The Queen* [2006] NSWCCA 83, the accused was charged with robbery whilst armed with a knife. After the evidence of the Crown's principal witness had been given, the prosecution sought to amend the indictment to allege that the offensive weapon was a firearm. The trial judge allowed the amendment to be made. The Court of Criminal Appeal dismissed the appeal and observed at [25]:
>
> > Relevant injustice does not arise simply because the amendment of the charge deprives the accused of taking a technical point based upon an inconsistency between the statement of the charge and the evidence in support of it. Tactical decisions may have been made by the defence upon the basis of the wording of the charge, but it does not follow that the trial judge should refuse leave to amend the indictment simply because those tactical decisions will be rendered fruitless. It will only be in a case where the accused would be irreparably prejudiced in meeting the charge as amended that leave should be refused.

146 That reasoning is correct. Contrary to the appellant's submission, it is not impermissible to consider that the appellant has not identified any prejudice. That is not to reverse the onus of proof, but rather, to recognise that he is in the best position to do so. If there were particular prejudice if an amendment were to be made, he would identify it.

147 Further, the fact that the appellant could not identify any prejudice apart from what was identified at [38] of the Appeal Judgment (which was not accepted by the appeal judge), is relevant to the consideration. The magistrate considering the application, and the appeal judge, should not be left to speculate as to the prejudice that might be occasioned. The appeal judge concluded that even if he accepted the submission put by the appellant, being that he would have devoted more time to cross-examination, that having considered the transcript, his Honour failed to see any deficiencies in it. None were relied on.

148 The counts did not need to be amended, they complied with s 27 of the MCA, and any deficiency was only in particulars which were not material. In any event, the amendments having been made, there is no error established in respect of the application of s 28.

149 For the above reasons, the second ground of appeal is not established.

Conclusion

150 The appellant has not established either ground of appeal and accordingly the appeal is dismissed.

Appeal dismissed

Solicitors for the appellant: *Legal Aid ACT*.

Solicitors for the respondent: *ACT Director of Public Prosecutions*.

RICHARD DAVIES

Annexure A

Schedule

Charge	Date	Amount	Description	Recipient	Finding	Finding on Appeal
Macquarie leasing transactions						
4887	11/12/2017	$914.85	Internet BPAY	Macquarie Leasing	Guilty	Guilty
4895	15/12/2017	$914.85	Internet BPAY	Macquarie Leasing	Guilty	Guilty
4896	15/01/2018	$914.85	Internet BPAY	Macquarie Leasing	Guilty	Guilty
4897	15/02/2018	$914.85	Internet BPAY	Macquarie Leasing	Guilty	Guilty
4898	15/03/2018	$914.85	Internet BPAY	Macquarie Leasing	Guilty	Guilty
4899	16/04/2018	$914.85	Internet BPAY	Macquarie Leasing	Guilty	Guilty
4900	15/05/2018	$914.85	Internet BPAY	Macquarie Leasing	Guilty	Guilty
4901	15/06/2018	$914.85	Internet BPAY	Macquarie Leasing	Guilty	Guilty
4902	16/07/2018	$914.85	Internet BPAY	Macquarie Leasing	Guilty	Guilty
Debit card transactions						
4905	04/01/2018	$41.97	Debit card transaction	Just Jeans Belconnen	Guilty	Not guilty
4906	09/03/2018	$398.14	Debit card transaction	Telstra Bill Paymnt Melbourne	Guilty	Guilty
4907	12/03/2018	$170.10	Debit card transaction	Bstfrnds Gungahlin Gungahlin	Guilty	Not guilty
4908	28/03/2018	$324.43	Debit card transaction	Deadeye Darts Ourimbah	Not guilty	-
4910	10/05/2018	$571.95	Debit card transaction	Telstra Bill Paymnt Melbourne	Guilty	Guilty
4911	23/01/2018	$39.00	Debit card transaction	HOYTS Sydney	Guilty	Not guilty
4912	04/06/2018	$303.00	Debit card transaction	ACT Road User Service DICKSON	Guilty	Guilty
4913	04/06/2018	$313.00	Debit card transaction	ACT Road User Service DICKSON	Guilty	Guilty
4914	04/06/2018	$148.00	Debit card transaction	ACT Road User Service DICKSON	Guilty	Guilty

Annexure A — continued

4915	15/06/2018	$354.05	Debit card transaction	Telstra Bill Paymnt Melbourne	Guilty	Guilty
Electronic funds transfers						
4917	05/12/2017	$100.00	Transfer	Test 2	Guilty	Guilty
4920	11/12/2017	$500.00	Transfer	Linked Acc Trns	Guilty	Guilty
4922	12/12/2017	$450.00	Transfer	Towing	Guilty	Guilty
4925	14/12/2017	$200.00	Transfer	Linked Acc Trns	Guilty	Guilty
4926	27/12/2017	$500.00	Transfer	Linked Acc Trns	Guilty	Guilty
4927	27/12/2017	$500.00	Transfer	Linked Acc Trns	Guilty	Guilty
4928	02/01/2018	$100.00	Transfer	Linked Acc Trns	Guilty	Guilty
4929	02/01/2018	$500.00	Transfer	Linked Acc Trns	Guilty	Guilty
4930	02/01/2018	$600.00	Transfer	Linked Acc Trns	Guilty	Guilty
4932	08/01/2018	$250.00	Transfer	Office 365	Guilty	Guilty
4934	15/01/2018	$450.00	Transfer	Tif samples	Guilty	Guilty
4935	16/01/2018	$500.00	Transfer	Linked Acc Trns	Guilty	Guilty
4938	29/01/2018	$375.00	Transfer	Linked Acc Trns	Guilty	Guilty
4939	05/02/2018	$450.00	Transfer	Linked Acc Trns	Guilty	Guilty
4940	06/02/2018	$250.00	Transfer	Linked Acc Trns	Guilty	Guilty
4942	09/02/2018	$350.00	Transfer	bunnings	Guilty	Not guilty
4943	12/02/2018	$250.00	Transfer	Linked Acc Trns	Guilty	Guilty
4945	19/02/2018	$350.00	Transfer	Linked Acc Trns	Guilty	Guilty
4946	20/02/2018	$1,100.00	Transfer	Rego	Guilty	Not guilty
4948	27/02/2018	$500.00	Transfer	Marketing stickers	Guilty	Not guilty
4949	28/02/2018	$500.00	Transfer	Canteen	Guilty	Not guilty
4950	28/02/2018	$500.00	Transfer	Equipment deposit	Guilty	Not guilty
4952	07/03/2018	$500.00	Transfer	Managers deposit	Guilty	Not guilty
4954	12/03/2018	$750.00	Transfer	Bunnings	Guilty	Not guilty
4960	26/03/2018	$300.00	Transfer	Sponsor	Guilty	Not guilty

Annexure A — continued

4962	28/03/2018	$750.00	Transfer	Linked Acc Trns	Guilty	Guilty
4964	29/03/2018	$500.00	Transfer	Linked Acc Trns	Guilty	Guilty
4965	03/04/2018	$450.00	Transfer	Linked Acc Trns	Guilty	Guilty
4966	03/04/2018	$500.00	Transfer	bunnings	Guilty	Not guilty
4968	09/04/2018	$500.00	Transfer	Linked Acc Trns	Guilty	Guilty
4970	11/04/2018	$250.00	Transfer	Linked Acc Trns	Guilty	Guilty
4972	13/04/2018	$550.00	Transfer	Asic	Guilty	Not guilty
4973	16/04/2018	$250.00	Transfer	Costco	Guilty	Not guilty
4974	18/04/2018	$250.00	Transfer	Capital Football	Guilty	Not guilty
4975	23/04/2018	$250.00	Transfer	Linked Acc Trns	Guilty	Guilty
4976	24/04/2018	$500.00	Transfer	Linked Acc Trns	Guilty	Guilty
4977	30/04/2018	$750.00	Transfer	Bunnings	Guilty	Not guilty
4978	04/05/2018	$750.00	Transfer	Defender Deposit	Guilty	Guilty
4979	08/05/2018	$500.00	Transfer	Bunnings	Guilty	Not guilty
4981	14/05/2018	$450.00	Transfer	Linked Acc Trns	Guilty	Guilty
4982	15/05/2018	$750.00	Transfer	Linked Acc Trns	Guilty	Guilty
4986	28/05/2018	$250.00	Transfer	Linked Acc Trns	Guilty	Guilty
4987	01/06/2018	$250.00	Transfer	Linked Acc Trns	Guilty	Guilty
4988	05/06/2018	$300.00	Transfer	Linked Acc Trns	Guilty	Guilty
4989	08/06/2018	$450.00	Transfer	Linked Acc Trns	Guilty	Guilty
4990	14/06/2018	$250.00	Transfer	Linked Acc Trns	Guilty	Guilty
4991	18/06/2018	$250.00	Transfer	Linked Acc Trns	Guilty	Guilty
Cash withdrawals						
4996	01/02/2018	$3,500.00	Cash withdrawals		Not guilty	-
4997	14/02/2018	$3,500.00	Cash withdrawals		Not guilty	-
4999	23/03/2018	$4,600.00	Cash withdrawals		Not guilty	-

Annexure A — continued

5000	23/03/2018	$4,237.74	Cash withdrawals		Not guilty	-

SUPREME COURT OF THE AUSTRALIAN CAPITAL TERRITORY

Calatzis v Jones

[2024] ACTSC 42

Mossop J

13, 27 February 2024

Criminal Law — Appeal against sentence — Prosecution appeal from the ACT Magistrates Court — Act of indecency without consent — Error as to assessment of objective seriousness — No foundation to find a reduction in moral culpability — Whether residual discretion to decline to intervene should be exercised — Respondent resentenced — Magistrates Court Act 1930 (ACT), s 219F(5).

Criminal Law — Sentencing — Plea of guilty discount — Scope of discretion to allow a discount — Focus on timing and utilitarian value of plea — Significance of the entry of a plea of not guilty — Crimes (Sentencing) Act 2005 (ACT), s 35.

Criminal Law — Sentencing — Statutory interpretation — Whether good behaviour order can be imposed during the term of an existing sentence of full-time imprisonment — History of provision concerning combination sentences — Provision did not apply to sentencing exercise — Crimes (Sentencing) Act 2005 (ACT), ss 13, 29, 31(2).

Section 31 of the *Crimes (Sentencing) Act 2005* (ACT) provides:

31 Combination sentences — start and end

(1) For a combination sentence, a court may set the start or end of the period of any part of the sentence, or of any order forming part of the sentence, by reference to anything the court considers appropriate, including, for example —

(a) a stated date; or

(b) the lapse of a stated period of time; or

(c) whenever a stated event happens, or whenever the earlier or later of 2 or more stated events happens.

Example for par (c)

a 5-year combination sentence consisting of the following orders:

• an order for imprisonment for 3 years with a 2-year nonparole period

• a good behaviour order for 2 years stated to start at the end of the sentence of imprisonment

• a place restriction order for 1 year stated to start at the end of the sentence of imprisonment

(2) However, the court must not set the start of the period of any part of the sentence that is a good behaviour order on a day when the offender may be serving a period of full-time detention or may be on parole.

The respondent pleaded guilty to an offence of an act of indecency without consent, contrary to s 60(1) of the *Crimes Act 1900* (ACT). On 31 August 2023, he was convicted and sentenced by the sentencing magistrate to a good behaviour order for three years. At the time of the sentencing hearing, the respondent was serving a sentence of imprisonment for three years with a 15-month non-parole period imposed by the Supreme Court for separate sexual offences. The sentencing magistrate assessed the objective seriousness of the offence as a less serious example of an act of indecency and found that the respondent's moral culpability was reduced by reason of his degree of recklessness as to the victim's consent. The sentencing magistrate allowed a 25 percent discount for the respondent's plea of guilty.

The prosecution appealed against the sentence imposed by the Magistrates Court on a number of grounds including:

(a) The sentencing magistrate erred in the assessment of objective seriousness;

(b) The sentencing magistrate erred in allowing a discount of 25 percent for the respondent's plea of guilty; and

(c) The sentencing magistrate erred in contravening s 31(2) of the *Crimes (Sentencing) Act*.

Held, allowing the appeal and resentencing the respondent:

(1) There was no foundation to conclude that there were circumstances operating to reduce the respondent's moral culpability on the basis of his understanding of the victim's lack of consent. It was therefore incorrect to assess the objective seriousness of the offence by reference to that conclusion. [23]-[27]

(2) Despite uncertainty concerning the interpretation of the mandatory considerations in s 35(2) of the *Crimes (Sentencing) Act*, the Court of Appeal has determined predictable levels of discounts for pleas of guilty entered at particular stages of proceedings, primarily on the basis of the timing and utilitarian value of the plea. There may, however, be discretionary reasons to depart from those predictable discounts. [36]-[38]

Monfries v The Queen [2014] ACTCA 46; (2014) 19 ACTLR 99; *R v Toumo'ua* [2017] ACTCA 9; (2017) 12 ACTLR 103, referred to.

(3) Applying the primacy of timing and utilitarian value, the entry of a plea of not guilty and the attendant preparation of a full brief of evidence present a significant distinction to matters where a plea of not guilty is never entered. A full discount of 25 percent should therefore be reserved to the latter scenario. The negotiations as to charges in the present case did not entitle the magistrate to treat the plea as entered at the earliest possible opportunity. [40]-[42], [48]-[50]

R v Toumo'ua [2017] ACTCA 9; (2017) 12 ACTLR 103, applied.

(4) The words "the sentence" in s 31(2) of the *Crimes (Sentencing) Act* should be interpreted as referring to a combination sentence. That is, a sentence for

one offence comprised of two or more specified sentencing orders. The prohibition in s 31(2) should be read as only applying to the circumstance where a court imposes a combination sentence which includes a good behaviour order and the offender will be serving a period of full-time detention or on parole as a result of that sentence. This is consistent with the cases leading up to the enactment of s 31(2) which each dealt with combination sentences, the legislative purpose of the provision and the broader statutory context. The provision did not apply in the present case because the good behaviour order ran concurrently with a sentence of full-time imprisonment not imposed as part of a combination sentence. [89]-[96]

Peter v Wade [2017] ACTSC 122; (2017) 80 MVR 268; *Van Leeuwen v Hawke* [2012] ACTSC 8; (2012) 256 FLR 433; *R v Pumpa* [2015] ACTSC 177; *R v Lee* [2016] ACTCA 69, considered.

(5) Specific error having been established, it was unnecessary to consider the ground asserting manifest inadequacy. There was no appropriate basis to dismiss the appeal on the basis of the residual discretion. The respondent was resentenced. [97]-[98], [102]-[104], [107]

Cases Cited

Atanackovic v The Queen (2015) 45 VR 179.
Blundell v The Queen [2019] ACTCA 34.
Calatzis v Jones [2023] ACTMC 33.
Cranfield v The Queen [2018] ACTCA 3.
Harlovich v Sebbens (2023) 20 ACTLR 237.
Millard v Pomeroy [2022] ACTSC 319.
Miller v The Queen (2018) 273 A Crim R 27.
Monfries v The Queen (2014) 19 ACTLR 99.
Peter v Wade (2017) 80 MVR 268.
Public Prosecutions (ACT), Director of v Earle [2023] ACTSC 93.
Public Prosecutions (ACT), Director of v Jones (No 2) [2023] ACTSC 99.
Public Prosecutions (ACT), Director of v Robertson [2023] ACTSC 383.
R v Ali (No 4) [2020] ACTSC 350.
R v Lee [2016] ACTCA 69.
R v Miller (2019) 279 A Crim R 232.
R v Nicholas [2019] ACTCA 36.
R v Pumpa [2015] ACTSC 177.
R v Ralston (2020) 285 A Crim R 159.
R v Thomson (2000) 49 NSWLR 383.
R v Toumo'ua (2017) 12 ACTLR 103.
Szabo v MS [2018] ACTMC 9.
Van Leeuwen v Hawke (2012) 256 FLR 433.
Williams v The Queen (2018) 83 MVR 505.
Zhao v The Queen [2018] ACTCA 38.

Appeal

The prosecution brought an appeal against sentence.

T Hickey, for the appellant.

K Lee, for the respondent.

Cur adv vult

27 February 2024

Mossop J.

1 On 31 August 2023, a magistrate convicted and sentenced Liam Jones to a three-year good behaviour order for the offence of committing an act of indecency without consent. This appeal is brought by the informant, Paul Calatzis, against the order made by the magistrate. It is a review appeal brought pursuant to s 219B(1)(f) of the *Magistrates Court Act 1930* (ACT). The grounds of appeal assert, pursuant to s 219D(e), that the sentence or penalty was "manifestly inadequate or otherwise in error".

The decision below

2 The offence for which the respondent was to be sentenced was committing an act of indecency without consent, contrary to s 60(1) of the *Crimes Act 1900* (ACT). The maximum penalty for that offence was imprisonment for seven years. Because the matter was being dealt with in the Magistrates Court, the jurisdictional limit for any sentence was five years' imprisonment.

Magistrate's decision

3 The magistrate's reasons were delivered orally and subsequently published: *Calatzis v Jones* [2023] ACTMC 33.

4 Unfortunately, at the sentencing hearing the parties did not formally tender any document and no document was marked as an exhibit. Such a course was not appropriate. However, it appears from a review of the transcript that the magistrate had before her and treated as having been admitted into evidence:

(a) an agreed Statement of Facts;
(b) a criminal history for the respondent;
(c) a pre-sentence report;
(d) a victim impact statement; and
(e) a "defence bundle", including a letter from the respondent and a number of references.

5 The magistrate summarised the facts (at [2]-[7]) as follows:

> 2. The offence occurred against a background of friendship with the victim through their previous employment. That friendship extended to an earlier occasion of consensual touching, including cuddling and kissing in early 2020.
> 3. On 18 April 2021, after an evening with friends, the victim found herself alone in Civic. She checked her Instagram account and discovered that Mr Jones was also in the city. She messaged him and they agreed to meet. Both were intoxicated. They walked around the city talking and kissing consensually. It was cold; they agreed to go to the victim's home. She told him "you can come over but we are not having sex". He responded "yep, that's ok".

4. They travelled in an Uber hire car to her home in Campbell. The victim had a housemate; in order to avoid waking that person, they went to the victim's bedroom. The victim removed her clothing including a bra and stockings but left her underpants on. Mr Jones also removed his clothing leaving his underpants on. They got into bed together side by side. Mr Jones consensually "spooned" the victim, that is cuddled her from behind. She said goodnight to him.
5. Mr Jones then slid his hand inside the victim's underpants and rubbed her clitoris in a circular motion for about 10-20 seconds. The victim sat up and said "you can't handle being here". Mr Jones replied "I know".
6. The victim got out of bed and ordered Mr Jones an Uber hire car. Both got dressed and went outside to wait for the car. When it arrived, they hugged consensually. Mr Jones left in the car and the victim went back inside.
7. The following day, Mr Jones and the victim exchanged friendly messages.

6 The magistrate referred to the fact that, at the date of the offence, the respondent had no criminal convictions. However, at the time of sentencing in August 2023, the respondent was serving sentences for separate offences of sexual intercourse without consent and an act of indecency without consent. The aggregate sentence was three years' imprisonment with a non-parole period of 15 months, expiring on 3 August 2024. The magistrate made reference to a statement in the Chief Justice's sentencing decision (*Director of Public Prosecutions (ACT) v Jones (No 2)* [2023] ACTSC 99 at [2]), that the range of culpability in sexual offending was "extremely broad".

7 The magistrate then addressed the prosecutor's submission that the offence in the present case was of an act of indecency at "the more serious end", given the hand-to-genital contact. The reasons of the magistrate then continued as follows (at [16]-[22]):

16. In this case the victim had indicated to Mr Jones prior to them attending her home that they would not be having sex. There is no information before me as to why this comment was made but Mr Jones acknowledged and agreed with it so was certainly aware of the victim's state of mind at that time. Subsequently, they engaged in what might ordinarily be considered the precursors to consensual sex, that is they stripped to near naked, got into bed together and spooned. It is from that point that Mr Jones' conduct must be assessed. It is put on Mr Jones' behalf that his failure to consider consent at that point was reckless. It is on that basis that the plea was entered.
17. Whilst the incident occurred in the victim's home, not only was Mr Jones invited there, he was also invited into the victim's bed. The hand to genital contact is in itself a serious act but in circumstances where the pair were already in a consensual skin to skin intimate contact situation, the act must be characterised as an extension of that contact. The context is an important factor in assessing the level of moral culpability for this offence.
18. I do not accept the submission that the former employment relationship is an aggravating factor given that the employment relationship had ceased some time prior to the offending.

19. The incident was brief. Mr Jones stopped immediately [after] it was made clear to him that his advance was unwelcome. He complied immediately with the victim's implied request that he leave.
20. The prosecution submit that the victim's level of intoxication rendered her a vulnerable victim. However, the circumstances point to the contrary. She initiated contact with Mr Jones, she set the ground rules for that contact, and when from her perspective those ground rules were breached, she responded immediately to remove him. This speaks to a woman very much in control of the situation.
21. What of the earlier agreement that there would be no sex between the two that night? The prosecution does not cavil with the defence submission that Mr Jones was reckless as to whether the victim consented to his conduct. He accepts as much by his plea. I am satisfied that the landscape of the arrangement between them had changed markedly from the point at which the victim stated that there would be no sex to the point at which they got into bed together almost naked and spooned. Mr Jones was wrong; this did not mean that the victim consented to him touching her genitals. But his moral culpability must be assessed against the situation in which they found themselves at the time of the act, as well as having regard to what was said at some earlier point. This does not derogate from the need to be clear as to consent.
22. I assess the offending as a less serious example of an act of indecency.

8 The magistrate then went on to assess the subjective circumstances of the respondent. She referred to references given by his mother, his general practitioner and his current partner.

9 She referred briefly to his history of employment.

10 She then referred to his expressions of remorse and indicated that she accepted his genuine remorse, which extended to his regret in failing to appreciate the victim's position on consent and the impact of his offence upon her. She said that the recognition of the loss of friendship does not derogate from his broader expression of remorse.

11 She also referred to his plea of guilty as evidence of remorse. In that context, she referred to the submissions made as to the percentage discount that should be applied, recording the prosecution submission as that "the full 25% discount ought not be applied" and counsel for the respondent submitting that a "20-25% discount was appropriate". She then referred to the decision in *R v Toumo'ua* [2017] ACTCA 9; (2017) 12 ACTLR 103 concerning pleas after negotiations and concluded (at [31]) that: "I am satisfied that a 25% discount is properly applied".

12 She then made reference to other decisions to which she had been referred: *Director of Public Prosecutions (ACT) v Earle* [2023] ACTSC 93, *R v Ali (No 4)* [2020] ACTSC 350, *Szabo v MS* [2018] ACTMC 9 and the contents of the ACT Sentencing Database which indicated that over 60 percent of cases attracted a sentence of imprisonment in some form and approximately 40 percent were served by way of full-time custody.

13 She then made reference to the discussion of sentencing principles in *Earle* and *R v Miller* [2019] ACTCA 25; (2019) 279 A Crim R 232. She said that the

offence was "effectively the offender's first offence" and that, despite his subsequent offending, he had "excellent prospects for rehabilitation". She also indicated that she had to consider what sentence was practically available given his current incarceration and said that, had he been dealt with for this offence prior to his later offending, then "I am reasonably confident that the latter offending would not have occurred".

14 She indicated, despite the submissions of both the prosecutor and the defence, that she did not consider that the threshold in s 10 of the *Crimes (Sentencing) Act 2005* (ACT) (CS Act) had been crossed. She considered that a financial penalty was inappropriate and that community service could not be performed while he was in custody. She indicated that, had it not been for the later offending and the existing sentence, she would have imposed a lengthy good behaviour order with conditions to address any likelihood of further offending. However, she concluded (at [47]):

> Having regard to all of the circumstances, I consider that a good behaviour order is the most appropriate sentence as any breach, for example whilst Mr Jones is on parole in due course, leaves open the option of resentencing if my optimism as to [Mr Jones'] rehabilitation transpires to be ill-founded.

15 She therefore imposed a three-year good behaviour order with the core conditions only.

Grounds of appeal

16 The appellant seeks that the sentence be set aside and a new sentence be imposed. The grounds of appeal are:

(a) The sentencing magistrate erred in the assessment of objective seriousness.

(b) The sentencing magistrate erred in allowing a discount of 25 percent for the defendant's plea of guilty.

(c) The sentencing magistrate erred in contravening s 31(2) of the *Crimes (Sentencing) Act 2005* (ACT).

(d) The sentence imposed is manifestly inadequate.

Ground (a)

17 This ground asserts that the sentencing magistrate erred in the assessment of the objective seriousness of the offending. It is based upon the magistrate's assessment that the offending was "a less serious example of an act of indecency".

18 The submission of the appellant was essentially based upon the fact that the offending was skin-on-skin contact involving the respondent's fingers on the victim's clitoris. The appellant submitted that nothing had occurred between the statement "you can come over but we are not having sex" and the offending which would have given rise to any confusion on the respondent's part as to whether or not the previous statement continued to apply. There was therefore no basis upon which to reduce the moral culpability of the respondent due to any reduction in the level of awareness of the risk that the victim did not consent.

19 The respondent contended that an appeal court should be slow to substitute its own view for a sentencing judge's assessment of objective seriousness: *Millard v Pomeroy* [2022] ACTSC 319 at [30]. While accepting that there was hand-to-genital contact, the respondent submitted that the offending was spontaneous and reckless, the respondent was not in company, the contact was brief and ceased as soon as it became clear that it was unwanted, there was no violence or threat of violence, no weapon, no injuries, no additional humiliation or degradation and the victim was not particularly vulnerable. There were no other aggravating circumstances. Counsel emphasised the broad range of possible offending covered by the offence.

20 Counsel also placed emphasis on the finding by the magistrate (at [21]) that the:

> … landscape of the arrangement between them had changed markedly from the point at which the victim stated that there would be no sex to the point at which they got into bed together almost naked and spooned.

21 Counsel submitted that this conduct could not be ignored when assessing the respondent's moral culpability, referring to McCallum CJ's comment in *Earle* at [28] that "the issue of consent in sexual relations can be complex, changing, awkward and messy".

22 An offence against s 60(1) may be established by recklessness or knowledge of a lack of consent: s 60(5). The respondent pleaded guilty on the basis of recklessness as distinct from knowledge, a fact that was included in the agreed Statement of Facts. Apart from that, there was nothing in the Statement of Facts which casts light on the extent of recklessness or the reasons why he was reckless rather than having knowledge.

23 Central to the magistrate's assessment of the objective seriousness of the offending was the proposition that the "landscape … had changed markedly" between the statement that there was to be no sex and the semi-naked spooning in the bed. Against that, the appellant pointed out that there was nothing said expressly and nothing in the conduct of the victim that would give rise to a doubt about her continuing lack of consent. The appellant pointed in particular to the fact that the victim was facing away from the respondent, had said good night and lay still while trying to go to sleep. The total time from arrival at the house to the respondent's departure was only 20 to 30 minutes.

24 The Statement of Facts provides an agreed framework for sentencing but, not unusually, lacks subtle details which would shed light on the appropriate complexion of those facts. That makes it more difficult to resolve conflicts about the appropriate characterisation of the facts. In the present case, there is some additional information about the respondent's state of mind which comes from his letter of apology which was tendered. That letter, which was significant for the purposes of her Honour's assessment of his prospects of rehabilitation, included the following statement about the offending:

> I feel extremely shameful about my actions that occurred the night and early morning with [the victim]. Disgust is another emotion I feel, knowing that I took advantage of one of my closest friends at the time whilst both of us were under the influence of alcohol, knowing that despite [the victim] stating that we will not

> have sexual intercourse and myself accepting that, I still went back on my word and touched her. I feel anger at myself for putting a close friend, [the victim], through what she went through on that early morning, angry at myself for doing what I did.

25 What is significant about this statement is that there is no suggestion of any confusion or change in circumstances that could provide a foundation for a conclusion that there was a reduction in his moral culpability. That was consistent with the approach taken by counsel for the respondent before the magistrate, who did not submit that the "landscape … had changed markedly" between the victim's statement and the act of indecency. Had there been some evidence about the respondent's state of mind other than that which was contained in the agreed Statement of Facts, the characterisation of the circumstances reached by the magistrate may have been one which was available. However, having regard to the admissions in the letter from the respondent, such a characterisation is not available. The evidence in the letter as to his state of mind is inconsistent with a state of mind which is less culpable by reason of any change in circumstances.

26 In the absence of that reduction in moral culpability, the case is one of reckless skin-on-genital touching. It involves a significant betrayal of trust. It is correct to say that aggravating features such as premeditation, acting in company, an act that was other than brief, any threats of violence or the use of a weapon, any humiliation or degradation or the ignoring of warnings or protests by the victim were not present. However, the physical acts and the betrayal of trust involved in them mean that they were not appropriately characterised as "a less serious example of an act of indecency". Given the very broad range of conduct that an offence under s 60(1) may cover, the offending in this case could not be characterised as less than a mid-range offence. However, the specific label used to characterise the offence is less significant than the substantive point that it was incorrect to assess the objective seriousness by reference to there being a marked change in the landscape that would lessen the degree of recklessness and hence the respondent's moral culpability.

27 This ground of appeal is therefore established. While the establishment of this error is, subject to the question of residual discretion, sufficient to warrant a resentencing, it is, for reasons which are explained below, appropriate to say something about two of the other grounds of appeal.

Ground (b)

28 This ground asserts that the sentencing magistrate erred in allowing a discount of 25 percent for the respondent's plea of guilty. Having regard to the fact that the magistrate did not impose a custodial sentence, any error in assessing the extent of reduction of sentence pursuant to s 35 of the CS Act was of no consequence for the sentence ultimately imposed. The formulation of a percentage reduction that would have applied appears to be a redundancy which responded to submissions made to the magistrate by both parties in anticipation of a custodial sentence, but which played no numerical part in the determination of the sentence.

29 Having said that, the operation of s 35 may be relevant upon a resentencing of the respondent and, for that reason, it is appropriate to address the submission made by the appellant.

30 A series of authorities in the Court of Appeal have addressed how s 35 is to operate. In *Monfries v The Queen* [2014] ACTCA 46; (2014) 19 ACTLR 99, Murrell CJ (with whom Burns and Ross JJ agreed) made reference to percentage discounts that would usually be applied at particular stages of proceedings in the Supreme Court. There was then a series of cases between 2017 and 2019, in which Murrell CJ participated, which settled on the level of discounts that would usually be applied for pleas of guilty at different stages of proceedings.

31 *Toumo'ua* pointed out the differences between the equivalent statutory provision in New South Wales (NSW) and that in the Australian Capital Territory. It pointed to the fact that the NSW provision is firmly focused on rewarding offenders for the utilitarian value of the pleas of guilty. The decision attempted to explain the additional considerations which appear in s 35 of the CS Act. The court could discern a rationale for some provisions but not for others. Section 35(2)(c), which relates to negotiations between the prosecution and the defence, was explained by the content of the explanatory statement. It indicated to the court that an offender can benefit from either a substantial discount for the utilitarian value of an early plea, or from a lower sentence flowing from a lesser charge or fewer charges following negotiations, but should not usually benefit in both ways: *Toumo'ua* at [56].

32 In relation to the seriousness of the offence, referred to in s 35(2)(d), the court could not work out the significance of this factor or in which direction it should point when considering the extent of discount for a guilty plea: *Toumo'ua* at [57]-[61]. The position was the same in relation to victim impact, referred to in s 35(2)(e), the court concluding that "it is difficult to know what to make of s 35(2)(e)": *Toumo'ua* at [64].

33 So far as s 35(4) (which precludes a significant discount if the prosecution case is overwhelmingly strong) was concerned, while the court could work out its meaning, it could not work out the rationale for importing that consideration into s 35: *Toumo'ua* at [70].

34 By the time of *Cranfield v The Queen* [2018] ACTCA 3, the court concluded (at [38]) that:

> [t]he context and terms of s 35(2) of the *Crimes (Sentencing) Act 2005* (ACT) support the proposition that the primary policy consideration that determines the degree of discount for a plea of guilty is the utilitarian value of the plea, which will be largely determined by the timing of the plea.

35 In that case and the subsequent decisions in *Williams v The Queen* [2018] ACTCA 4; (2018) 83 MVR 505, *Miller v The Queen* [2018] ACTCA 21; (2018) 273 A Crim R 27, *Blundell v The Queen* [2019] ACTCA 34, and *R v Nicholas* [2019] ACTCA 36, the Court of Appeal established levels of discount which would usually be applied at different stages of proceedings in the Supreme Court. They were consistent with the approach indicated by Murrell CJ in *Monfries*, but also addressed the then newly established practice

of criminal case conferences. While the court professed that there was "no table of set discounts": *Williams* at [47], and no "mandated practice": *Blundell* at [8] (see also *Miller* at [77] per Wigney J), the approach taken by the court tended to indicate the opposite. The outcome of the cases is summarised in the table below. In each case, the level of discount was challenged, and the court reached the result indicated.

Timing	**Discount**
In the Supreme Court associated with a criminal case conference	"Almost always within the range of 15-20%": *Blundell v The Queen* [2019] ACTCA 34 at [12] "15 to 20 per cent": *R v Nicholas* [2019] ACTCA 36 at [52]
In the Supreme Court before trial date fixed	"At least 15 per cent" — 17% applied: *R v Toumo'ua* [2017] ACTCA 9; (2017) 12 ACTLR 103 at [81]
In the Supreme Court three months before trial	"Up to 20%": *Miller v The Queen* [2018] ACTCA 21; (2018) 273 A Crim R 27 at [12]
In the Supreme Court one week before trial	10%: *Cranfield v The Queen* [2018] ACTCA 3 at [39]; *Zhao v The Queen* [2018] ACTCA 38 at [30] "A little over 10 per cent": *R v Nicholas* [2019] ACTCA 36 at [36], [61], [131]

36 This indicates that, subject to the possibility of departing from the usual level of discount for a particular reason, the timing of the plea and thus its utilitarian value dictates a very predictable result. The predictability of such a result is a significant benefit for the administration of the criminal law, because it encourages resolution of matters at an early stage and that has benefits for police, prosecuting authorities, the court, victims and witnesses: *Cranfield* at [38]; *Nicholas* at [47]; *Blundell* at [13].

37 By this means, the Court of Appeal has effectively circumvented the apparently intractable problems of making sense of some of the mandatory discretionary considerations in circumstances where, as indicated in *Toumo'ua*, the policy intent behind their inclusion cannot be worked out. Since that decision, the Legislative Assembly has not made any attempt to clarify the legislative purpose of those provisions.

38 In a practical sense, the scope of discretion has been substantially narrowed by the focus upon utilitarian value and the decisions of the Court of Appeal as to the level of discount to be provided at particular stages. However, authorities in this court and in NSW have recognised a number of circumstances which may provide a discretionary reason for departure from those discounts. They include:

(a) rare cases involving exceptional complexity and trial duration which may justify a higher discount: *R v Thomson* [2000] NSWCCA 309; (2000) 49 NSWLR 383 at [156], cited with approval in *Toumo'ua* at [44];

(b) cases in which it is unreasonable to expect an accused to indicate a plea of guilty at the earliest possible stage, such as where fitness to plead needs to be determined: *Toumo'ua* at [47];

(c) exceptional cases in which the protection of the public or otherwise require that the maximum sentence without any discount be imposed notwithstanding the plea: *Toumo'ua* at [48];

(d) cases where the prosecution case is "very weak": *Nicholas* at [51]; and

(e) cases where there was an offer to plead guilty at an earlier stage, but that offer was only accepted by the prosecution sometime later: *Nicholas* at [51]; *Blundell* at [16].

39 A further category of cases is where the offending is very serious and warrants a very long sentence. In those circumstances, the application of a usual level of discount will, in turn, generate a very large discount. Although that generates a very strong incentive to plead guilty, it may be considered too great a discount to properly reflect the utilitarian value of the plea and to have the effect of reducing the sentence in a manner inconsistent with the purposes of sentencing. That may warrant the giving of less than the usual level of discount. An example of such a case appears to be *Director of Public Prosecutions (ACT) v Robertson* [2023] ACTSC 383 at [42].

40 The decisions referred to have addressed the extent of discount given for cases which are committed for trial or sentence in the Supreme Court. They have not addressed the circumstances of cases which are disposed of within the Magistrates Court. Within the Magistrates Court, it is usual to draw a distinction between those cases in which a guilty plea has been entered as the first plea of an accused (even if not necessarily on the first occasion the matter is before the court) and those cases in which a plea of not guilty is the first plea entered and there is a subsequent plea of guilty. That distinction is significant because it is the plea of not guilty which, as a practical matter, is a trigger for the police preparing a full brief of evidence. That trigger is significant to the assessment of utilitarian value because the preparation of a full brief of evidence will often require substantial further work by police. A plea of guilty where there has been no prior plea of not guilty will usually attract a discount of 25 percent, whereas where there has been an earlier plea of not guilty and, as a consequence, a brief of evidence has been prepared but the matter has not proceeded further, then a lesser discount of 20 percent is usually applied to reflect the lesser utilitarian value of the plea.

41 When matters are committed to the Supreme Court for sentence, it has not been uncommon for a 25 percent discount to be applied to any plea entered in the Magistrates Court prior to committal. Given that committals now rarely involve any substantial hearing, their avoidance is not a matter which is significant for assessing the utilitarian value of the plea and hence preparation of the brief of evidence will be the most significant factor in assessing the

utilitarian value of a plea. That has not been uniformly recognised in Supreme Court decisions, which have often treated any guilty plea in the Magistrates Court as warranting a 25 percent discount.

42 In light of the focus upon utilitarian value, there does not appear to be a good reason to ignore the burden of preparing a prosecution brief in the Magistrates Court when assessing the utilitarian value of a plea. Having regard to the decisions of the Court of Appeal summarised in the table at [35] above, it would make sense to reserve the 25 percent discount to those cases in which the burden of preparing a prosecution brief has been avoided by a plea of guilty in the first instance. A 20 percent discount for a plea of guilty in the Magistrates Court after the preparation of a prosecution brief is reasonably consistent with the availability of discount up to that level for pleas in the Supreme Court well in advance of trial.

43 So far as discounts for proceedings in the Magistrates Court which are able to be finalised in that court are concerned, those discounts may be worked out by reference to the discounts available for matters in the Supreme Court.

44 In the present case, the plea of guilty was entered in the Magistrates Court after preparation of the prosecution brief. The magistrate dealt with the question of discount as follows (at [30]-[31]):

> 30. His plea of guilty may also be characterised as evidence of remorse. He initially pleaded not guilty to two charges and a brief of evidence was prepared, the matter was resolved at the pre-hearing mention stage. The prosecutor submitted that as the plea of guilty to the offence was entered following negotiations resulting in withdrawal of a charge of sexual intercourse without consent, the full 25% discount ought not be applied. Mr Jones submitted that a 20-25% discount was appropriate, noting the utilitarian benefit of the plea.
>
> 31. I note the observations of the Court of Appeal in *R v Toumo'ua* [2017] ACTCA 9 to the effect that an offender may benefit from the utilitarian value of an early plea, or from a lower sentence or fewer charges following negotiations, but that they should not benefit from both. This case is not one in which two charges of differing severity could be applied to the same conduct. On the facts in this case, the charge of sexual intercourse without consent could not have been made out. It is an unfortunate reality that in the ACT, a defendant is often not provided with evidence of the case against them until they enter a not guilty plea meaning that fulsome legal advice cannot be given at an earlier stage. Here the guilty plea was entered on the first occasion after service of the full brief. I am satisfied that a 25% discount is properly applied.

45 The appellant submitted that this approach involved two errors. The first was treating the statement in *Toumo'ua* as only applying where the prosecution proceeds with a lesser charge in substitution for a more serious one. The appellant submitted that the principle in the case could not be limited in that way because *Toumo'ua* itself did not involve the substitution of a lesser charge for a more serious one, but instead involved dropping some charges and

agreeing that others would be "rolled up" charges. In the present case, there was no indication of a willingness to plead guilty to any charge at the earliest possible stage.

46 The second was distinguishing *Toumo'ua* on the basis that the sexual intercourse without consent charge could not have been made out. The submission was that there was no basis upon which that conclusion could have been reached.

47 The respondent submitted, correctly, that having regard to the sentence imposed, the issue of quantifying the level of discount did not arise. Counsel submitted that the issue was a discretionary one. He pointed to the availability of a 20 percent discount if the plea had been entered in the Supreme Court, whereas in the present case, the guilty plea was entered in the Magistrates Court on the first occasion after service of the prosecution brief. He submitted that a 25 percent discount was not reserved for the earliest possible plea, but may also be applied to an "early plea".

48 The magistrate's reasons indicate that it was significant for the decision as to the extent of discount that the charge of sexual intercourse without consent "could not have been made out". This appears to have been based upon the content of the agreed Statement of Facts. To rely upon the Statement of Facts that were agreed as part of the negotiated process for a guilty plea to the lesser of two charges in order to reach a conclusion as to what might have been proved had the matter gone to trial was erroneous. Given that there was no information before the court as to the content of the prosecution brief, it was not possible to reach a conclusion that, in effect, the more serious charge "could not have been made out".

49 The position is that the respondent did not enter a plea of guilty at the earliest possible stage. The utilitarian value of his plea was not as high as it would have been had he pleaded guilty to the act of indecency charge prior to entering a plea of not guilty and requiring the prosecution brief to be prepared. Consistently with *Toumo'ua*, a plea to a subset of the charges arrived at after negotiations is not to be treated as a plea at the earliest possible opportunity. There were no other circumstances which would warrant treating him as if he had pleaded guilty at the earliest possible opportunity, such as an indication of a willingness at that earliest stage to plead guilty to the charge that he ultimately did or some other reason making such a course appropriate.

50 In those circumstances, for the purposes of any resentence I would apply a reduction of 20 percent on account of the plea of guilty.

Ground (c)

Introduction

51 The appellant contended that the magistrate erred by contravening s 31(2) of the CS Act. Having regard to the fact that the error in ground (a) has already been established, it is strictly unnecessary to determine this ground of appeal. However, it is necessary to determine this ground of appeal if the respondent is to be resentenced. That is because if the appellant's submission is correct, it

would not be open to impose any sentence which involved a good behaviour order which overlapped with any part of the respondent's existing custodial sentence.

Submissions

52 The appellant contended that s 31(2) of the CS Act prevented the magistrate from imposing a good behaviour order in circumstances where the respondent was subject to a sentence of imprisonment. The contention was that s 31(2) precluded a good behaviour order being imposed in a way that overlapped with a sentence of imprisonment. The appellant submitted that, even though s 31(2) was contained within Pt 3.6 of the CS Act, which relates to "combination sentences", it was generally applicable, even where the sentences arose from different offences.

53 The respondent, on the other hand, submitted that s 31(2) had no application in the present circumstances because the sentence of imprisonment and the good behaviour order were imposed in relation to different offences. They did not, therefore, involve a "combination sentence" within the meaning of Pt 3.6 and a prohibition in s 31(2) had no wider application than to a combination sentence.

Statutory provisions

54 The power to make a good behaviour order is contained in s 13 of the CS Act, which provides, relevantly:

> **13 Good behaviour orders**
>
> (1) This section applies if an offender is convicted or found guilty of an offence.
>
> …
>
> (2) The court may make an order (a ***good behaviour order***) requiring the offender to sign or give an undertaking to comply with the offender's good behaviour obligations under the *Crimes (Sentence Administration) Act 2005* for a stated period.
>
> …
>
> (4) A good behaviour order may include 1 or more of the following conditions:
>
> …
>
> (5) If the offence is punishable by imprisonment, a good behaviour order —
>
> (a) may be made instead of imposing a sentence of imprisonment or as part of a combination sentence that includes imprisonment; and
>
> (b) may apply to all or part of the term of the sentence.
>
> (6) Subsection (5) does not, by implication, limit the sentences that a court may impose under this Act or another territory law.
>
> …
>
> (9) This section is subject to chapter 6 (Good behaviour orders).

55 The relevant provisions of Pt 3.6 are as follows:

> **Part 3.6 Combination sentences**
>
> **28 Application — pt 3.6**
>
> This part applies if an offender is convicted of an offence.

29 Combination sentences — offences punishable by imprisonment

(1) If the offence is punishable by imprisonment, the court sentencing the offender may impose a sentence (a ***combination sentence***) consisting of 2 or more of the following orders:

(a) an order sentencing the offender to imprisonment as full-time detention;

Note A sentence of imprisonment must be served by full-time detention at a correctional centre or detention place unless the court otherwise orders, or the offender is released from detention under this Act or another territory law (see s 10 (3) and s 133H).

(b) an intensive correction order (but not in combination with a sentence of full-time imprisonment, a suspended sentence of imprisonment or a good behaviour order);

(c) a suspended sentence order;

(d) a good behaviour order;

Note A good behaviour order may not be set to start at a time when the offender may be serving full-time detention or be on parole (see s 31 (2)).

(e) a fine order;

(f) a driver licence disqualification order;

(g) a reparation order;

(h) a non-association order;

(i) a place restriction order;

(j) an order (however described) imposing another penalty available under any other territory law.

Examples

The following are examples of sentences that might be imposed on an offender by a court who has been convicted of an offence punishable by imprisonment:

1 a sentence of 18 months as follows:

- an order for imprisonment for 1 year with no nonparole period
- a fine order directing payment of $500 by stated instalments
- a good behaviour order for 6 months (the remainder of the term of the sentence)
- a driver licence disqualification order for all of the sentence

2 a sentence of 3 years and 6 months as follows:

- an order for 3 years imprisonment with no nonparole period
- a good behaviour order for 6 months (the remainder of the term of the sentence) and a concurrent non-association order

(2) However, the court must not make an order that forms part of the combination sentence unless the court would have power to make the order otherwise than as part of a combination sentence.

30 Combination sentences — offences punishable by fine

…

31 Combination sentences — start and end

(1) For a combination sentence, a court may set the start or end of the period of any part of the sentence, or of any order forming part of the sentence, by reference to anything the court considers appropriate, including, for example —

(a) a stated day; or

(b) the lapse of a stated period of time; or

(c) whenever a stated event happens, or whenever the earlier or later of 2 or more stated events happens.

Example for par (c)

a 5-year combination sentence consisting of the following orders:

• an order for imprisonment for 3 years with a 2-year nonparole period

• a good behaviour order for 2 years stated to start at the end of the sentence of imprisonment

• a place restriction order for 1 year stated to start at the end of the sentence of imprisonment

(2) However, the court must not set the start of the period of any part of the sentence that is a good behaviour order on a day when the offender may be serving a period of full-time detention or may be on parole.

56 The purpose of Pt 3.6 is to ensure that sentencing courts have the power to impose a combination of different types of sentencing orders in a single sentence. That is, it avoids a submission that the imposition of two sentencing orders amounts to double punishment or is otherwise impermissible in the absence of an express statutory authority to do so: cf *Atanackovic v The Queen* [2015] VSCA 136; (2015) 45 VR 179 at [89]-[93].

Cases leading up to the enactment of s 31(2)

57 Section 31(2) was introduced following the decision of Murrell CJ in *Peter v Wade* [2017] ACTSC 122; (2017) 80 MVR 268. Before turning to that decision and the legislative response to it, it is useful to refer, in chronological order, to the decisions referred to in that case which provide the context for the decision.

58 In *Van Leeuwen v Hawke* [2012] ACTSC 8; (2012) 256 FLR 433, a sentence of periodic detention was imposed. At the same time, a good behaviour order was made in relation to the same offence, which commenced at the commencement of the period of periodic detention. A submission was made that s 29 of the CS Act, which relates to combination sentences, did not permit a good behaviour order to be imposed which commenced prior to the conclusion of the term of imprisonment. In other words, a good behaviour order could not operate concurrently with a term of imprisonment, however that term was to be served. The appellant pointed to the incongruity of two bodies, one judicial and one executive, having power to administer and supervise the sentence: *Van Leeuwen* at [10]. This argument was rejected. Burns J said that it was inconsistent with s 13(4) (now s 13(5)), which said that a good behaviour order

"may apply to all or part of the term of the sentence", and s 31, which allowed "any order forming part of the sentence" to start or end at any time that the court considers appropriate.

59 In *R v Pumpa* [2015] ACTSC 177, Penfold J dealt with an allegation of a breach of a good behaviour order that had been combined with a suspended sentence of imprisonment. The first 12 months of the sentence were to be served by periodic detention and the balance suspended. A good behaviour order had been made from the commencement of the sentence. The regime for periodic detention included within it a requirement to comply with core conditions and the capacity to impose additional conditions. The structure of the core and additional conditions was similar to that currently provided in relation to good behaviour orders.

60 The Crown submission was that s 12(3) (which related to good behaviour orders made as a condition of a suspended sentence) did not permit the court to make a good behaviour order that commenced before the suspension of the sentence took effect: *Pumpa* at [25]. This was said to be because there was no need for a good behaviour order to cover a periodic detention period and that it would avoid the potential for a resentencing following a breach of the good behaviour order to reverse the effect of a decision of the Sentence Administration Board to cancel an offender's periodic detention. The contrary argument pointed out that if good behaviour orders were limited in that way, then there would be only limited consequences that would flow from further offending committed prior to the suspension of the sentence.

61 Penfold J accepted the Crown submission, saying (at [32]):

> … there is no good reason to conclude that the *Crimes (Sentencing) Act* is intended to allow good behaviour orders attached to suspended sentences to commence before the suspension takes effect, and good reason to conclude that such an approach introduces unnecessary complexity, including arguably a constitutional uncertainty, into the sentencing process and accordingly should be rejected.

62 Her Honour exercised a power to correct her original sentence so that the good behaviour order did not overlap with the custodial part of the sentence and that meant that there was no breach of any good behaviour order.

63 Having regard to the statutory regime that was then in place, there was clearly a degree of administrative awkwardness in having two separate regimes that applied to a single sentence, one arising from the administration of the periodic detention order and the other arising from the administration of the good behaviour order. However, her Honour introduced a concept which, as will be seen, was relied upon in subsequent cases: "arguably a constitutional uncertainty".

64 It is not clear how something which is "arguably a constitutional uncertainty" could be a matter relevant to the interpretation of a statute. Arguable propositions are not propositions which may inform the interpretation of the law. If a proposition is to be one which informs the interpretation of the law, then it must be a legally or factually correct proposition. Similarly, "a constitutional uncertainty" is not, per se, a matter directly relevant to the

interpretation of the statute. If the constitutional issue has not been resolved, then some "uncertainty" may be relevant if it is relevant to "working out the meaning of an Act" under Pt 14.2 of the *Legislation Act 2001* (ACT). It might, for example, be something which the court would be prepared to infer that the Legislative Assembly wished to avoid. However, whether or not that is the case will be very much dependent upon the circumstances of the particular provision in question and it cannot be assumed in advance that "a constitutional uncertainty" was something which the Legislative Assembly intended to avoid.

65 If all that was meant by her Honour's comment was that there was the possibility of different entities exercising different powers in ways that might be inconsistent, then that would be an understandable concept. It could be examined, and the significance of any conflicts of authority or administrative inconvenience determined. However, it is not useful to elevate such problems by describing them as "a constitutional uncertainty".

66 *R v Lee* [2016] ACTCA 69 was an appeal from Burns J. His Honour had imposed a partially suspended sentence of imprisonment. The imprisonment was to be served by way of periodic detention. The good behaviour order commenced on the day that the sentence was imposed. The Court of Appeal (Murrell CJ, Refshauge and Rangiah JJ) was interpreting s 12(3) of the CS Act, which permits "a good behaviour order for the period during which the sentence is suspended or for any longer period that the court considers appropriate". The court held (at [32]) that the reference to "any longer period" in s 12(3) "refers to a period that starts on the date when the sentence is suspended but may extend for a period that is longer than the suspended portion of the sentence". The reasons of the court (at [31]) referred to the potential for the corrections authorities to be responsible for administering the periodic detention sentence, but the court to be responsible for dealing with any breach of the good behaviour order. The court said that this would create what Penfold J described as "constitutional uncertainty". It said that similar problems would arise if an offender was sentenced to full-time imprisonment and the sentencing court imposed a concurrent good behaviour order.

67 What the court understood by "constitutional uncertainty" was not made clear, but it was significant for the ultimate result, the court saying (at [32]):

> Taking a purposive approach and bearing in mind the need for constitutional certainty, we conclude that, where the expression "any longer period" is used in s 12(3) of the *Sentencing Act*, it refers to a period that starts on the date when the sentence is suspended but may extend for a period that is longer than the suspended portion of the sentence.

68 In *Peter*, Murrell CJ dealt with an appeal from the Magistrates Court. One ground of appeal was that the magistrate erred in imposing good behaviour orders which ran concurrently with the parole period applying to those offences. This was described as the "Constitutional uncertainty ground". Murrell CJ started with the text of ss 29 and 31, saying (at [18]) "it seems clear that the Magistrate was empowered to impose the sentence that her Honour imposed".

Nevertheless, her Honour said "a question arises as to whether the apparent meaning of ss 29 and 31 of the *Sentencing Act* should be read down to avoid 'constitutional uncertainty'". She said (at [20]):

> It is easy to see how embarrassing conflicts could arise. They could arise because parole conditions imposed by the Sentence Administration Board (SAB) conflicted directly with good behaviour conditions imposed by a court. Even if there was no direct conflict with court-imposed good behaviour conditions, SAB parole conditions could impose an additional burden on an offender that was oppressive.

69 Her Honour pointed to the possibility of a parolee being convicted of an offence punishable by imprisonment which would lead to an automatic cancellation of parole under s 149 of the *Crimes (Sentence Administration) Act 2005* (ACT) but in relation to which the relevant court may choose to take no further action. She then referred to the previous decisions in *Pumpa*, *Lee* and *Van Leeuwen*, saying (at [24]) "the general difficulty adverted to in *Pumpa* and *Lee* remains a very real one". She said that "[i]n this case, it is not necessary to determine whether there is 'constitutional uncertainty', or whether such uncertainty means that ss 29 and 31 should be read down". That was because the magistrate had failed to give any explanation for the decision to impose "an inherently problematic sentence" and this involved an error of law which required the appellant to be resentenced.

70 *Van Leeuwen* addressed the relationship between a good behaviour order made under s 13 of the CS Act and a sentence to be served by periodic detention. It did not involve a partially suspended sentence.

71 *Pumpa* addressed the relationship between a good behaviour order and a partially suspended sentence of imprisonment to be served by periodic detention.

72 *Lee* involved a partially suspended sentence of imprisonment to be served by periodic detention with a good behaviour order.

73 *Peter* involved good behaviour orders operating during the parole period for combination sentences imposed for two offences.

74 Each involved combination sentences, that is, sentences for a specific offence that included more than one type of penalty. None of the cases involved considering whether a sentence of imprisonment on the one charge affected or precluded the making of a good behaviour order when sentencing for a different charge.

75 It was in this context that a note to s 29(1)(d) and s 31(2) were inserted.

Explanatory statement and presentation speech

76 The explanatory statement for the *Crimes Legislation Amendment Bill 2017 (No 2)* (ACT) discussed both the addition of a note to s 29(1)(d) and the insertion of s 31(2). In relation to the new note to s 29(1)(d), it provided:

> This clause inserts a new note into section 29 of the Crimes (Sentencing) Act. Section 29 allows a sentencing court to create combination sentences, selecting from two or more of a list of options. The two relevant options for the purposes of these amendments are subsection (1)(a) "an order sentencing the offender to imprisonment", and subsection (1)(d) "a good behaviour order".

> The note being inserted summarises the changes made to section 31, clarifying that a good behaviour order may not be set to start when an offender may either be serving full-time detention or be on parole.

77 The explanatory statement in relation to the new s 31(2) provided:

> Section 31 gives the sentencing court the power to set the start and end dates of any part of the sentence. The clause inserts new section 31(2) which states that a sentencing court cannot commence a good behaviour order during a period when the offender may be serving a period of full-time imprisonment or be on parole.
>
> When an offender is given a sentence with a [non-parole] period, the offender can apply to be released from full-time imprisonment at the conclusion of the non-parole period. Applications for parole are made to the Sentence Administration Board (the SAB). If the SAB approves an application for parole, the offender is released subject to a parole order. Breaches of a parole order are heard by the SAB, while breaches of good behaviour orders are heard by the court. When a good behaviour order runs concurrently with a parole order, the offender is subject to two separate sets of conditions, some of which may be consistent across the two orders and some of which may not. In the case of *Peter v Wade* [2017] ACTSC 122, Chief Justice Murrell stated that where a good behaviour order runs concurrently with a parole order, there is potential for "… conflict between decisions made by the executive and the judiciary". This can lead to confusion and inefficiency in the sentence administration process.
>
> It is intended that if a sentencing court makes a good behaviour order, new section 31(2) will require the court to set the date of commencement for the good behaviour order to be at least at the end of any full sentence of imprisonment, including any period of possible parole.

78 In the Legislative Assembly, the Attorney-General, Mr Ramsey, said:

> This bill also responds to issues raised in our courts about the way court sentences interact with parole orders. In the case of *Peter v Wade* of 2017, Chief Justice Murrell of the Supreme Court stated that where a good behaviour order runs concurrently with a parole order, there is potential for "… conflict between decisions made by the executive and the judiciary". This can lead to confusion and inefficiency in the sentence administration process.
>
> Breaches of these orders are dealt with by different bodies. Parole orders are addressed by the Sentence Administration Board, whereas breaches of a good behaviour order are dealt with by the court. Further, an offender may be subject to two separate sets of conditions, some of which are consistent across the two orders and some of which are not. This bill will address these issues by ensuring that a good behaviour order and a parole order cannot be served concurrently.

Consideration and decision

Text and legislative context

79 The starting point for the interpretive exercise must be the text of s 31(2).

80 The two concepts within s 31(2) that must be understood are "any part of the sentence that is a good behaviour order" and "may be serving a period of full-time detention or may be on parole".

81 It is significant that the general prohibition in s 31(2) commences with the word "However", and refers to "the sentence". It is thereby clearly referring

back to an earlier provision, namely s 31(1), in order to describe what "the sentence" is and in order to work out what is being qualified by the use of the word "However". That direction in the text of s 31(2) is in addition to the general legislative command that, in working out the meaning of an Act, the provisions of the Act must be read in the context of the Act as a whole: *Legislation Act* s 140.

82 The opening words of s 31(1) clearly indicate that it is limited to a combination sentence ("For a combination sentence …"). Section 31(2) operates as a qualification on the power in s 31(1) to set the start or end of the period of "any part of ***the sentence***, or of any order forming part of ***the sentence***" by reference to anything the court considers appropriate. The emphasised references to "the sentence" are references back to the "combination sentence" referred to in the opening words of s 31(1). They also make clear that the reference to "the sentence" in s 31(2) is the combination sentence being described in s 31(1).

83 The reference to a "combination sentence" refers back to the definition of a combination sentence in s 29, namely, a sentence "consisting of 2 or more of the following orders", as set out in the balance of the subsection.

84 Further, s 29 only has any application in the circumstances defined by s 28, namely, "if an offender is convicted of an offence". Although, as a general matter, a reference to the singular "an offence" can include the plural (*Legislation Act* s 145), that is not a determinative provision, and hence it can be displaced by a contrary legislative intention: *Legislation Act* s 6(3). Having regard to the legislative purpose of combination sentences, namely, allowing sentencing orders of different types to be included within a sentence for a single offence, the context in which the reference to "an offence" appears in s 28 is such as to indicate that it can only be read in the singular.

85 Finally, regard must be had to the fact that combination sentences are dealt with in a discrete part of the Act, Pt 3.6. The court is obliged to have regard to the heading to the part (*Legislation Act* s 126(1)), but also to the structure of the Act, which deals with the topic of combination sentences discretely and separately from sentences which are not combination sentences.

The issue

86 All of these features indicate that s 31 addresses the circumstances of combination sentences and the reference to "the sentence" is a reference to a combination sentence. The issue then becomes whether the reference to "serving a period of full-time detention or may be on parole":

(a) is limited to periods of full-time detention or parole pursuant to the *combination sentence* referred to in the subsection; or

(b) extends to periods of full-time detention or parole being served pursuant to *other sentences* (which may or may not be combination sentences).

87 Put somewhat differently, do the references to periods of full-time detention or parole refer to such periods that exist outside an individual sentence imposed

pursuant to Pt 3.6, or do they extend to such periods imposed on other sentences, including other combination sentences imposed pursuant to Pt 3.6 as well as non-combination sentences?

88 A third articulation of the interpretive issue is to identify the question as being whether the subsection should be read as if it included the words at the end "as a result of that sentence", so as to confine its operation to orders made in relation to a single offence which is to be dealt with by a combination sentence.

Conclusion

89 For the following reasons, I reach the conclusion that the reference to serving a period of full-time detention or parole at the end of s 31(2) should be read as limited to serving that detention or parole pursuant to the combination sentence which incorporates the good behaviour order. In other words, I adopt option (a) at [86] above or read the provision as if it said, "as a result of that sentence".

90 First, to the extent that there was a problem, that problem did not clearly require a generally applicable prohibition on the overlap between good behaviour orders and sentences of full-time detention or parole. The difficulty that the cases prior to the enactment of s 31(2) raised was the potential for two separate bodies to be dealing with, and making potentially different decisions about, how to address breaches of orders relating to a single offence. It is only where the orders relate to a single offence that there is the potential for such a situation to arise. It could be illustrated by the situation in *Pumpa*, where the Sentence Administration Board was statutorily required to cancel a periodic detention order upon further offending and hence impose a period of full-time imprisonment, yet the court, in dealing with the same facts arising from a breach of a good behaviour order that was also imposed, may conclude that resentencing in the same terms as the original sentence, not involving full-time detention, would be appropriate.

91 Such a conflict would not arise where the good behaviour order was imposed on a sentence for a different offence from that involving full-time detention or parole. While there remains the potential for two different bodies to address the consequences of a breach of parole and a breach of a good behaviour order, respectively, where those breaches relate to sentences for different offences there is less potential for conflicting outcomes. For example, if a prison sentence with a non-parole period was imposed upon one charge and a good behaviour order imposed on another charge covering the same period as the prison sentence, then further offending during the parole period would constitute grounds for the revocation of parole by the Sentence Administration Board as well as for action in relation to the good behaviour order under s 108 of the *Crimes (Sentence Administration) Act*.

92 However, there remains the possibility of there being conflicting obligations under a good behaviour order and conditions of parole, which could exist in the circumstances postulated. This was something which appeared to concern Murrell CJ in *Peter* at [20]. However, it appears to be a theoretical rather than

actual problem. The problem was not manifested in any of the cases referred to earlier and there is no reference to any such problem having actually arisen in the explanatory statement or the remarks of the Attorney-General.

93 Second, the explanatory materials are not determinative. It is true to say that the explanatory statement and, even more so, the terms of the presentation speech, provided some support for a broader application of the prohibition in s 31(2). The statement of the Attorney-General that the bill would ensure "that a good behaviour order and a parole order cannot be served concurrently", if accepted at face value, would indicate a broad intention to rule out the possibility of overlap. However, as pointed out above, because the prohibition only applies to combination sentence good behaviour orders and not to other good behaviour orders, it is not as broad as the language of the Attorney-General would suggest. I treat the Attorney-General's statements as explaining the general nature of the perceived problem and not fully engaging with the actual language proposed to be enacted within a part of the CS Act dealing with combination sentences. It is that language, in the context in which it appears in the Act, which is ultimately of most significance.

94 Third, not all good behaviour orders would be covered by the provision. If s 31(2) was interpreted so as to preclude a good behaviour order in a combination sentence overlapping with a period of detention or parole in another sentence, then that would only cover a subset of the circumstances in which good behaviour orders would overlap with detention or parole. That is because good behaviour orders may be imposed on their own, not as part of a combination sentence, and there is no prohibition in s 31(2) or elsewhere on such a good behaviour order overlapping with detention or parole. If the legislative purpose was to prevent good behaviour orders overlapping with detention or parole on other sentences, then it would not make sense to limit the good behaviour orders that were covered to combination sentence good behaviour orders. Instead, the prohibition would be a general one in relation to good behaviour orders and included amongst the provisions that are applicable generally in relation to good behaviour orders, namely, s 13 and Ch 6.

95 Fourth, given that:

(a) the cases leading up to the enactment of s 31(2) each dealt with combination sentences;

(b) the provision is included in a part of the Act dealing only with combination sentences; and

(c) even if interpreted as applying to non-combination sentences involving full-time detention or parole, it would not avoid the potential for overlap between good behaviour orders and full-time detention or parole,

the legislative purpose of s 31(2) should be understood as being limited to individual combination sentences and not applying as between combination sentences involving good behaviour orders and sentences on other charges involving full-time detention or parole. Given that legislative purpose, s 31(2) should be interpreted in the manner indicated at [89] above.

The provision did not apply in any event

96 Even if my conclusion is wrong and the prohibition in s 31(2) extended to periods of full-time detention or parole imposed on other sentences, no error would have been disclosed by the magistrate's order in the present case. That is because s 31(2) would only govern the setting of a good behaviour order as part of a combination sentence. The good behaviour order in the present case was not part of a combination sentence. The sentence was just a good behaviour order simpliciter. Therefore s 31(2) would not have applied.

Ground (d)

97 This ground asserts that the sentence imposed was manifestly inadequate.

98 For the reasons given in relation to ground (a), specific error has been established. For the purposes of determining whether to resentence, it is not necessary, where specific error has been established, to also establish that the sentence imposed as a result of that error was manifestly inadequate: *R v Ralston* [2020] ACTCA 47; (2020) 285 A Crim R 159 at [84]-[88].

99 Therefore:

(a) it is unnecessary to consider ground (d) because specific error has already been established;

(b) it is unnecessary to be satisfied that the sentence imposed was manifestly inadequate in order to reach a conclusion that resentencing is appropriate; and

(c) as a consequence, it is not necessary to determine the manifest inadequacy issue.

Residual discretion

100 Counsel for the respondent pointed out that *Harlovich v Sebbens* [2023] ACTSCFC 3; (2023) 20 ACTLR 237 determined that it is open to this court to dismiss an appeal both pursuant to the residual discretion available in relation to prosecution appeals and on the basis that there has been "no substantial miscarriage of justice", referred to in s 219F(5) of the *Magistrates Court Act*.

101 Counsel relied upon evidence in an email dated 7 February 2024 indicating that, pursuant to the respondent's current sentence, he has completed the Sex Offender Preparatory Program and that it was likely that he would be a participant in a 22-week Sex Offender Program commencing later in February. Counsel submitted that there would not be much difference between the sentence imposed by the magistrate and any sentence on a resentence. He submitted that the prosecutor had accepted that the plea was an early one, even if he did submit that "the defendant would not receive the full discount".

102 I do not consider that this is a case in which the residual discretion or the discretion under s 219F(5) should result in the dismissal of the appeal.

103 So far as the residual discretion is concerned, there was no delay in the bringing of the appeal. The prosecution did not lead the magistrate into error or otherwise conduct itself in a way that might favour the dismissal of the appeal. I consider that the position adopted by counsel for the prosecution in relation to the level of discount was consistent with the way in which it approached the matter in this court. The evidence as to the respondent's rehabilitation since the

magistrate's decision whilst in custody on the earlier sentence is consistent with the proper administration of the earlier sentence, but not so significant as to warrant the dismissal of the appeal. For reasons explained below, I consider that the s 10 threshold has been passed and I consider that the change from a non-custodial to a custodial sentence is a significant one in terms of general deterrence, the denunciation of his conduct and recognition of harm done to the victim and the community. I consider this to be not so minor a change to the appropriate sentence that it would be merely "tinkering". Therefore, in my view, there is no appropriate basis upon which to dismiss the appeal notwithstanding that error has been established.

104 So far as s 219F(5) is concerned, the magistrate erred in her assessment of the objective seriousness of the matter in a way that had a substantial effect on the sentence, shifting it from what would otherwise be a custodial sentence to a completely non-custodial one. I do not consider that the circumstances are consistent with a conclusion that there has been "no substantial miscarriage of justice".

Resentence

105 The respondent had an uneventful upbringing. He has a supportive family. He has a supportive partner. He has a history of employment. He also has a history of depression. He has prosocial companions and no history of illicit substance use. He is currently serving a significant sentence of imprisonment for more serious offending committed subsequent to the offence currently before the court. As indicated in the evidence tendered in this court, that sentence will include a rehabilitation program for sex offenders.

106 Having regard to the subsequent offending, I would assess the respondent's prospects of rehabilitation only slightly less optimistically than the magistrate did. I would characterise him as having good prospects, rather than "excellent prospects", for rehabilitation.

107 In my view, largely because of my different characterisation of the objective circumstances of the offending, the s 10 threshold is passed, but not in a way which would preclude a wholly suspended sentence. In my view, the appropriate starting point is a sentence of imprisonment of five months reduced to four months on account of the plea of guilty. Having regard to the various ways in which that sentence could be served, it is appropriate, given that this was his first offending, that it be wholly suspended subject to a good behaviour order which operates for the balance of the period during which the previously imposed good behaviour order would operate.

108 In adopting this approach, I reject the submission made on behalf of the appellant that there would be an inadequacy if the good behaviour order associated with the sentence only extends for a limited period beyond the end of the existing sentence. Any breach of the order would expose him to imposition of the custodial penalty, pursuant to s 110 of the *Crimes (Sentence Administration) Act*. That there might be other consequences flowing from a breach of parole if the offending occurred during the parole period of the existing sentence does not affect the exposure that he has to further custodial punishment. It would be up to the court that was required to address any breach

of the good behaviour order associated with the suspended sentence to work out the appropriate relationship between the existing sentence and any sentence that was imposed by reason of the breach of the good behaviour order.

Orders

109 Orders will be made to give effect to the resentence that I have indicated. The respondent is entitled to have his costs of the appeal paid by the appellant pursuant to s 219F(8) of the *Magistrates Court Act*.

110 The orders of the Court are:

1. The appeal is allowed.
2. The sentence imposed by the Magistrates Court on 31 August 2023 is set aside and the respondent resentenced as follows:

   > On the count of act of indecency without consent (CAN 10730/2022), Liam Jones is sentenced to imprisonment for four months which sentence is wholly suspended forthwith upon him entering into a good behaviour order which commences on the date of this order and ends on 30 August 2026.

3. The appellant is to pay the respondent's costs of and incidental to the appeal.

Appeal allowed

Solicitors for the appellant: *ACT Director of Public Prosecutions*.

Solicitors for the respondent: *Armstrong Legal*.

EMMA ROFF

SUPREME COURT OF THE AUSTRALIAN CAPITAL TERRITORY

Bourke v Styche

[2024] ACTSC 62

McWilliam J

20 February, 12 March 2024

Criminal Law — Review appeal — Prosecution appeal against the dismissal of charges — Acts of indecency without consent — Adequacy of reasons — Error of law established — Whether residual discretion not to intervene should be exercised — Orders set aside and charges remitted for rehearing — Magistrates Court Act 1930 (ACT), s 219F.

Criminal Law — Right of appeal — Appeal from the ACT Magistrates Court — Nature of review appeal — Challenge to competence of appeal — Scope of ground of appeal under s 219D(c) — Appeal competent — Magistrates Court Act 1930 (ACT), ss 219B, 219D.

Section 219D of the *Magistrates Court Act 1930* (ACT) provides:

219D Grounds for review

The Supreme Court may review a decision of the Magistrates Court under this division on any 1 or more of the following grounds:

(a) that there was a prime facie case of error or mistake on the part of the Magistrates Court;

(b) that the Magistrates Court did not have jurisdiction or authority to make the decision;

(c) that the decision of the Magistrates Court should not in law have been made;

(d) for a decision mentioned in section 219B (1) (d) or (e) — that, in the circumstances of the case, the decision should not have been made;

(e) for a decision mentioned in section 219B (1) (f) — that the sentence or penalty was manifestly inadequate or otherwise in error.

The respondent was charged with a number of offences of committing an act of indecency without consent, contrary to s 60(1) of the *Crimes Act 1900* (ACT), against six separate complainants who each worked as sales assistants at various clothing stores. The respondent denied engaging in the indecent conduct. The primary magistrate found the respondent not guilty and dismissed each charge.

The prosecution brought a review appeal against the dismissal of 10 of the charges pursuant to s 219B(1)(a) of the *Magistrates Court Act*, on the basis that the decision should not in law have been made because the primary magistrate failed to provide adequate reasons for acquitting the respondent. This ground was framed in the language of s 219D(c). The respondent challenged the competency of the appeal on the ground that a failure to give reasons was not a species of error which fell within s 219D(c).

Held, allowing the review appeal:

(1) A review appeal brought pursuant to Div 3.10.3 of the *Magistrates Court Act* cannot be characterised as an appeal in the strict sense. While a review appeal is generally concerned with questions of law, the grounds of review available are not limited to the question of whether the decision at first instance was correct, there is a limited power to admit further evidence and the relief available extends to varying or amending the original decision and correcting any defect or error in the proceeding. The nature of a review appeal should therefore be understood by reference to the features of the statute, rather than established categories of appeals. [42], [45]-[47]

Mark v Henshaw (1998) 85 FCR 555; *May v Helicopter Resources Pty Ltd* [2022] ACTCA 15; (2022) 17 ACTLR 295, considered.

(2) Consideration of the text, context and history of s 219D(c) establishes that the provision is not limited to review for jurisdictional error. The ground requires the establishment of legal error. However, there is no express textual basis to limit such legal error to those which go to jurisdiction. The nature of the appeal as broader than an appeal *stricto sensu* means that there is no contextual reason to read the words of the provision down accordingly. Indeed, the use of the word "should" rather than "could" in reference to whether the decision should not in law have been made favours an interpretation which extends to legal error in the process by which the decision was made. The provision would be otiose if it was interpreted as confined to jurisdictional error, as an equivalent ground for review is already provided by s 219D(b). Finally, the history of the legislative scheme providing for review appeals — and particularly their availability to both a defendant and prosecutor — supports the broader interpretation of the provision. [48]-[54]

Harlovich v Sebbens [2023] ACTSCFC 3; (2023) 20 ACTLR 237, referred to.

(3) A failure to give reasons is an error of law which may be characterised as rendering the decision of the magistrate a decision that "should not in law have been made". The ground of appeal brought by the appellant therefore fell within the scope of s 219D(c) and the review appeal was competently brought. [56]-[59]

Fleming v The Queen [1998] HCA 68; (1998) 197 CLR 250; *Pettitt v Dunkley* [1971] 1 NSWLR 376, referred to.

(4) There is a well-established common law obligation on a judge or magistrate to give reasons for a decision. While the content of the obligation depends on the circumstances of the decision, it is necessary for the reasons to expose the reasoning process linking the legal principles and the factual findings. In the present case, the primary magistrate dealt with the evidence relating to the multiple complainants and charges in a global sense. It was therefore not possible to understand which aspects of the complainants' evidence were accepted. Nor was it possible to understand why the primary magistrate was unable to reject the respondent's account. Finally, the reasons did not resolve the critical factual

disputes, or the use of the tendency evidence. As a result, the reasons were inadequate such as to establish an error of law under s 219D(c). [114]-[124]

Fleming v The Queen [1998] HCA 68; (1998) 197 CLR 250; *AK v Western Australia* [2008] HCA 8; (2008) 232 CLR 438, referred to.

(5) To the extent that the remittal of a matter to the Magistrates Court following a successful review appeal constitutes an abrogation of the rule against double jeopardy, it is permitted by the statue. Double jeopardy considerations may, however, be taken into account in determining whether to exercise the residual discretion not to intervene. In the circumstances of this case, residual discretion considerations told in favour of the remittal of the matter. [129]-[140]

Myers v Claudianos (1990) 100 FLR 362; *Harlovich v Sebbens* [2023] ACTSCFC 3; (2023) 20 ACTLR 237; *R v Carroll* [2002] HCA 55; (2002) 213 CLR 635, referred to.

(6) The interests of justice required the matter to be remitted for rehearing to another magistrate. [141]-[144]

Cases Cited

Acuthan v Coates (1986) 6 NSWLR 472.

AK v Western Australia (2008) 232 CLR 438.

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Broken Hill Cobalt Project Pty Ltd v Lord (2022) 254 LGERA 274.

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DL v The Queen (2018) 266 CLR 1.

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Eastman v The Queen (2000) 203 CLR 1.

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Fox v Percy (2003) 214 CLR 118.

Garay v The Queen (No 3) [2023] ACTCA 2.

Gedeon v Commissioner of New South Wales Crime Commission (2008) 236 CLR 120.

Gibbons v Perkins [2021] ACTSC 254.

Greenwood v Barlee [2018] ACTSC 46.

Harlovich v Sebbens (2023) 20 ACTLR 237.

Hossain v Minister for Immigration and Border Protection (2018) 264 CLR 123.

Howard v Bondfield (1974) 3 ACTR 62.

Immigration, Citizenship, Migrant Services and Multicultural Affairs, Minister for v Moorcroft (2021) 273 CLR 21.

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Macks v Viscariello (2017) 130 SASR 1.

Mark v Henshaw (1998) 85 FCR 555.

May v Helicopter Resources Pty Ltd (2022) 17 ACTLR 295.

Milner v Anderson (1982) 42 ACTR 23.

Ming v Director of Public Prosecutions (NSW) (2022) 109 NSWLR 604.

Mkari v Meza [2005] NSWCA 136.

Myers v Claudianos (1990) 100 FLR 362.

New South Wales Police Force v Winter (2011) 10 DDCR 69.

O'Connell v McMennemin [2014] ACTSC 112.

Oakey Coal Action Alliance Inc v New Acland Coal Pty Ltd (2021) 272 CLR 33.

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Perkins v County Court (Vic) (2000) 2 VR 246.

Pettitt v Dunkley [1971] 1 NSWLR 376.

Pollard v RRR Corporation Pty Ltd [2009] NSWCA 110.

Priest v Cook (unreported, Supreme Court, ACT, Kelly J, 22 September 1982).

Project Blue Sky Inc v Australian Broadcasting Authority (1998) 194 CLR 355.

Public Prosecutions (NSW), Director of v Illawarra Cashmart Pty Ltd (2006) 67 NSWLR 402.

Public Service Board (NSW) v Osmond (1986) 159 CLR 656.

R v A2 (2019) 269 CLR 507.

R v Becirovic [2017] SASCFC 156.

R v BK [2022] NSWCCA 51.

R v Carroll (2002) 213 CLR 635.

R v Police Complaints Board; Ex parte Madden [1983] 1 WLR 447.

R v Sexton [2018] SASCFC 28.

Saunders v King (unreported, Supreme Court, ACT, Blackburn J, 16 September 1974).

Seltsam Pty Ltd v Ghaleb (2005) 3 DDCR 1.

Soulemezis v Dudley (Holdings) Pty Ltd (1987) 10 NSWLR 247.

Taylor v Armour & Company Pty Ltd [1962] VR 346.

Thorne v Kennedy (2017) 263 CLR 85.

Van Eyle v McFarlane [2024] ACTSC 50.

Willcoxson v Legal & General Insurance of Australia Ltd (1990) 101 FLR 1.

Wolter v Broomhall [2023] ACTSC 331.

Appeal

The prosecution brought a review appeal against the dismissal of charges.

A Williamson SC and *E Roff*, for the appellant.

J White SC, for the respondent.

Cur adv vult

12 March 2024

McWilliam J.

1 This appeal by the informant, Ms Bridget Bourke (**appellant**), concerns the dismissal on 13 December 2022 in the Magistrates Court of 10 out of 14 charges that were brought against the respondent, Mr Jordan Christopher Styche (**respondent**).

The charges

2 The charges appealed are all offences of committing an act of indecency without consent, contrary to s 60(1) of the *Crimes Act 1900* (ACT) (***Crimes Act***), punishable on conviction by imprisonment for up to 7 years. They carry the following reference numbers: CAN 14405/2020; CAN 14406/2020; CAN 14407/2020; CAN 14409/2020; CAN 14410/2020; CAN 14412/2020; CAN 1124/2022; CAN 14414/2020; CAN 14415/2020 and CAN 14417/2020.

3 There were two other charges of the same offence (CAN 1123/2022 and CAN 14411/2020) and two charges of stalking (CAN 14408/2020 and CAN 14413/2020) that were dismissed in the court below and are not the subject of this appeal.

4 The 10 charges related to conduct alleged to have occurred over five days in a six-day period in 2020 at several clothing stores in an outlet centre and a suburban shopping centre. The charges the subject of appeal involved 6 separate complainants, each of whom was a female sales assistant who assisted the respondent when he was trying on pants or tights in a changeroom. The alleged acts of indecency concerned the accused directing the attention of the sales assistant to his erect penis, or an object that looked like an erect penis, through various tactics. The details of the charges are set out further below.

Statutory basis on which the appeal is brought

5 The appeal is brought pursuant to Pt 3.10 (in particular, Div 3.10.3) of the *Magistrates Court Act 1930* (ACT) (**MC Act**).

6 The right of review by this Court is created by s 219B of the MC Act. It provides a list of decisions of the Magistrates Court, or the Childrens Court, from which an appeal by way of review (a "review appeal") may be made in accordance with Div 3.10.3.

7 Among those included in the list (and relevant to this appeal) is "an order dismissing an information dealt with" under s 375 of the *Crimes Act*: s 219B(1)(a)(iii)(B) of the MC Act. Section 375(1)(b)(ii) of the *Crimes Act* enables summary disposal of cases where an offence is punishable by imprisonment for a term that does not exceed 10 years. Section 375(1)(b)(ii) applies here as the acts of indecency charged here had a maximum term of imprisonment of seven years.

Grounds of appeal

8 The grounds on which a review appeal may be brought are set out in s 219D of the MC Act, which is in the following terms:

> **Grounds for review**
>
> The Supreme Court may review a decision of the Magistrates Court under this division on any 1 or more of the following grounds:
>
> (a) that there was a prima facie case of error or mistake on the part of the Magistrates Court;
>
> (b) that the Magistrates Court did not have jurisdiction or authority to make the decision;
>
> **(c) that the decision of the Magistrates Court should not in law have been made**;
>
> (d) for a decision mentioned in section 219B (1) (d) or (e) — that, in the circumstances of the case, the decision should not have been made;
>
> (e) for a decision mentioned in section 219B (1) (f) — that the sentence or penalty was manifestly inadequate or otherwise in error.

(Emphasis added.)

9 The references to s 219B(1)(d) or (e) are to a decision not to commit a person to the Supreme Court for sentence and a decision to dispose of a case summarily under certain sections of the *Crimes Act* respectively. Section 219B(1)(f) relates to appeals from sentences or penalties imposed under various sections of the MC Act or the *Crimes Act*.

10 Pursuant to r 5111(2) of the *Court Procedures Rules 2006* (ACT), leave was granted at the hearing on 20 February 2024 to file and rely upon an Amended Notice of Appeal. The appellant now brings the appeal solely on the ground emphasised above, namely that "the decision" should not "in law" have been made because the primary magistrate failed to provide adequate reasons for acquitting the respondent in respect of each of the 10 charges.

11 The relief sought is that each of the acquittal verdicts (the magistrate's decision to dismiss each of the 10 charges) referred to above be set aside and remitted to the Magistrates Court, differently constituted, for further hearing.

Issues on appeal

12 The primary issue formally for resolution on the appeal is whether there was a failure to provide adequate reasons. Given that this is an appeal by the prosecution, if error is established, a further question will arise as to what relief should follow — whether the Court on appeal should exercise its discretion to decline to intervene (as to which, see *Harlovich v Sebbens* [2023] ACTSCFC 3; (2023) 20 ACTLR 237 (*Harlovich*) at [2]-[5]), and if not, whether the matter should be remitted to a different magistrate for rehearing.

13 The respondent in written submissions and oral argument raised a question about the competency of the appeal. The argument was that a failure to give reasons did not fall within the review ground relied upon, and that no other ground was expressly relied upon in this appeal.

14 Notwithstanding that no formal application was filed, the appellant dealt with the argument and accordingly, that issue will be considered first.

15 There was no issue between the parties that the appellant should pay the costs of the review appeal, as that is what s 219F(8) of the MC Act requires. Because that section applies whether the Supreme Court dismisses the appeal or exercises any other power under s 219F of the MC Act, I made such an order at the hearing.

16 Accordingly, the issues remaining for consideration are:

(a) Is the appeal competent?

(b) If yes, is error established by a failure to give reasons?

(c) If yes, should the Court exercise its discretion to decline to intervene?

(d) If no, should the Court remit the proceeding to a different magistrate?

Summary of findings on appeal

17 For reasons explained below:

(a) The appeal is competent;

(b) The reasons given were inadequate and therefore a legal error is established;

(c) There is no basis to exercise the residual discretion declining to intervene; and

(d) The proceedings should be remitted to a different magistrate given the nature of the error and to avoid any apprehended bias arising from the fact that the magistrate had already expressed a concluded view on the facts.

Is the appeal competent?

Submissions of the parties

18 The respondent submitted that an appeal for a failure to give reasons based on this ground was misconceived and therefore incompetent. It was submitted (in summary) that:

(a) Review appeals under Div 3.10.3 are appeals *stricto sensu*, where the issue for the Court is limited to determining whether, upon the material before the court below, the conclusion which was reached was correct (relying on *Mark v Henshaw* (1998) 85 FCR 555 at 563 (*Mark*) and *May v Helicopter Resources Pty Ltd* [2022] ACTCA 15; (2022) 17 ACTLR 295 (*May*) at [109]).

(b) Section 219D(c) of the MC Act is confined to cases involving jurisdictional error and whether the ultimate decision was one that could not have been made in law.

(c) A failure to give reasons (if that were to be established):

(i) Does not amount to jurisdictional error (relying on *Ming v Director of Public Prosecutions (NSW)* [2022] NSWCA 209; (2022) 109 NSWLR 604 (*Ming*) at [45]); and

(ii) Does not impact upon whether the ultimate decision itself to dismiss the charges was one that "in law" should not have been made (relying on *Perkins v County Court (Vic)* [2000] VSCA 171; (2000) 2 VR 246).

(d) Here, the appellant did not identify any reason why the decision itself to dismiss each of the 10 charges was a decision that should not "in law" have been made.

19 In detailed written submissions prepared by Ms McCann for the appellant, and confirmed orally by the Acting Director at the hearing, the appellant argued:

(a) That a review appeal under Div 3.10.3 (and specifically s 219D) was not an appeal *stricto sensu*;

(b) The nature of the powers of the appeal court (contained in s 219F) is broader than the relief that would ordinarily be available on an appeal *stricto sensu*, and s 219F(1) makes clear that there is a power to receive further evidence, with leave. These indicia are more consistent with the appeal being in the nature of a rehearing.

(c) Section 219D(c) of the MC Act is not limited to errors of a jurisdictional kind. In any event, a failure to give reasons can amount to a constructive failure to exercise jurisdiction, which is what occurred in this case.

(d) A decision "in law" is one that is reached according to the correct application of legal principle to the facts. The text of s 219D(c) provides that a decision arrived at on an erroneous basis is a decision which "should not in law have been made".

20 The difference between the two submissions was, as put by the respondent, whether the subject review ground is to be interpreted narrowly or broadly:

(a) The narrow interpretation means that the ground is only available for arguments concerning a legal impediment in making the decision (that is, legal errors that are jurisdictional or that invalidate a decision).

(b) On the broader interpretation, the review ground is available to where the decision *could* have been made, but because of legal error in the process of forming the decision, it should not have been made.

Identifying jurisdictional error

21 The discussion that follows proceeds on assumed knowledge of jurisdictional error and the way it differs from other errors of law. An explanation was provided conveniently in the key authority addressed by the parties, *Ming*, by Kirk JA (with whom White and Mitchelmore JJA agreed) at [8]:

> Jurisdictional error has been described as "a failure to comply with one or more statutory preconditions or conditions to an extent which results in a decision which has been made in fact lacking characteristics necessary for it to be given force and effect by the statute pursuant to which the decision-maker purported to make it": *Hossain v Minister for Immigration and Border Protection* (2018) 264

> CLR 123; [2018] HCA 34 at [24] per Kiefel CJ, Gageler and Keane JJ. Put simply, it involves a decision-maker exceeding the authority to decide conferred on them, or failing to exercise that authority when required to do so. A failure by a non-superior court "to comply with a condition of its jurisdiction to perform a judicial function renders any judicial order it might make in the purported performance of that judicial function lacking in legal force": *Oakey Coal Action Alliance Inc v New Acland Coal Pty Ltd* (2021) 272 CLR 33; [2021] HCA 2 at [48] (*Oakey*).

22 In *Gedeon v Commissioner of the New South Wales Crime Commission* [2008] HCA 43; (2008) 236 CLR 120 at [43] the High Court adopted the formulation of a "criterion, satisfaction of which enlivens the power of the decision-maker".

23 In *Chase Oyster Bar Pty Ltd v Hamo Industries Pty Ltd* [2010] NSWCA 190; (2010) 78 NSWLR 393, Spigelman CJ said at [33] that "[t]here is no single test or theory or logical process by which the distinction between jurisdictional and non-jurisdictional error can be determined". That is consistent with the joint judgment in *Project Blue Sky Inc v Australian Broadcasting Authority* [1998] HCA 28; (1998) 194 CLR 355 (*Project Blue Sky*) at [91]-[92]:

> 91. **An act done in breach of a condition regulating the exercise of a statutory power is not necessarily invalid and of no effect. Whether it is depends upon whether there can be discerned a legislative purpose to invalidate any act that fails to comply with the condition**. The existence of the purpose is ascertained by reference to the language of the statute, its subject matter and objects, and the consequences for the parties of holding void every act done in breach of the condition. Unfortunately, a finding of purpose or no purpose in this context often reflects a contestable judgment. The cases show various factors that have proved decisive in various contexts, but they do no more than provide guidance in analogous circumstances. There is no decisive rule that can be applied; there is not even a ranking of relevant factors or categories to give guidance on the issue.
>
> 92. Traditionally, the courts have distinguished between **acts done in breach of an essential preliminary to the exercise of a statutory power or authority** and acts done in breach of a procedural condition for the exercise of a statutory power or authority. **Cases falling within the first category are regarded as going to the jurisdiction of the person or body exercising the power or authority**. Compliance with the condition is regarded as mandatory, and failure to comply with the condition will result in the invalidity of an act done in breach of the condition. Cases falling within the second category are traditionally classified as directory rather than mandatory. …

(References omitted, emphasis added.)

The proper construction of s 219D(c)

24 The principles of statutory interpretation are well-established. The task of construction begins with the text of the provision: *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue (NT)* [2009] HCA 41; (2009) 239 CLR 27 at [47]. In so doing, it takes account of its context and purpose: *Project Blue Sky*

at [69]-[70]; *Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v Moorcroft* [2021] HCA 19; (2021) 273 CLR 21 at [15]. Context is to be considered "at the first stage of the process of construction": *R v A2* [2019] HCA 35; (2019) 269 CLR 507 (*A2*) at [33] (Nettle and Gordon JJ agreeing at [148]). Context is to be understood in "its widest sense", as including "surrounding statutory provisions, what may be drawn from other aspects of the statute and the statute as a whole": *A2* at [33].

Historical context and purpose

25 Part of the context here includes the historical context as to how review appeals were created and the purpose of such appeals. In *Harlovich*, a detailed consideration of the history and structure of Pt 3.10 was set out at [45]-[69]. That case dealt with the scope of the residual discretion. The Full Court of the Supreme Court discussed the structure of Pt 3.10 of the MC Act, stating at [45] that the MC Act creates three different types of criminal appeals:

(a) Appeals in criminal matters (Div 3.10.2);

(b) Reference appeals (Div 3.10.2A); and

(c) Review appeals (Div 3.10.3).

26 It was noted at [46] of *Harlovich* that there was considerable overlap between appeals in criminal matters under Div 3.10.2 and appeals under Div 3.10.3, but importantly for the purpose of construction here:

> … Both Divisions provide for appeals to be brought against convictions and sentences imposed in the Magistrates Court.

27 That can be seen in s 219B, which creates the right to a "review appeal". In that section, there is a list of decisions from which an appeal by way of review may be made in accordance with Div 3.10.3. Among the list are the following decisions of the Magistrates Court:

(a) An order dismissing an information dealt with under ss 374, 375, 375AA of the *Crimes Act*; and

(b) A conviction, a sentence or a penalty imposed for an offence dealt with under those sections.

28 That is significant for the construction of the text of s 219D and the scope of the grounds for review, in that the section providing for review appeals is capable of being invoked by both the prosecution and the person charged.

29 The history to the review appeal provisions was set out in *Harlovich*, relevantly at [55]-[60]:

> 55. … the origin of the distinction between criminal appeals under Div 3.10.2 of the *Magistrates Court Act* and review appeals under Div 3.10.3 is found in amendments that were made to the *Court of Petty Sessions Ordinance 1930* (Cth) by ss 4 and 10 of the *Court of Petty Sessions Ordinance 1972* (Cth) ("the 1972 Ordinance").
>
> 56. The existing Div 2 of Part XI (ss 208-219), had, since the establishment of the Court of Petty Sessions (now the Magistrates Court) in 1930, provided for appeals from rulings, orders, convictions, and determinations of that Court (originally to the High Court, and later to the ACT Supreme Court). The 1972 Ordinance updated Div 2 by removing the requirement for leave

in criminal appeals and limiting appeals by way of rehearing in civil appeals; and **inserted the new Div 3 (ss 219A-219F) which created a procedure for appeals by way of orders *nisi* to review. In other words, Div 2, which by 1986 provided for statutory criminal appeals, was the predecessor of Div 3.10.2, whilst Div 3, which provided for appeals by way of orders *nisi*, was the predecessor of Div 3.10.3**.

57. In 1984, separate appeal procedures for civil actions were introduced into the *Magistrates Court (Civil Jurisdiction) Ordinance 1982* (ACT) by the *Court of Petty Sessions (Civil Jurisdiction) (Amendment) Ordinance 1984* (ACT), and in 1986, Division 2 of the *Magistrates Court Act* was amended by the *Magistrates Court (Amendment) Act 1990* (ACT) to provide exclusively for criminal appeals against convictions, sentence, bail and other orders.

58. As originally enacted in the 1972 Ordinance, s 219C provided that the available grounds of review included *prima facie* error, lack of jurisdiction, or where the decision should not in law have been made. Section 219F provided for the powers to be exercised by the Supreme Court in terms that are similar to the powers contained in the present s 219F. Subsection 219F(1) provided:

> (1) On the return of an order *nisi* to review a decision of the Court of Petty Sessions, the Supreme Court, on consideration of the evidence before the Court of Petty Sessions and any further evidence called by leave of the Supreme Court —
>
> (a) may, if satisfied that the decision of the Court of Petty Sessions should be confirmed, discharge the order *nisi*; or
>
> (b) may set aside or quash, in whole or in part, or otherwise vary or amend, the decision of the Court of Petty Sessions and —
>
> (i) may remit the matter to the Court of Petty Sessions for rehearing or for further hearing with or without directions of law; or
>
> (ii) may make such further order, including an order granting any relief that the Supreme Court is empowered to grant on certiorari, mandamus, prohibition or habeas corpus, as the Supreme Court thinks necessary to determine finally the matter.

59. As originally enacted, s 219F(3) was in similar terms to the present s 219F(5). Section 219F(3) provided:

> (3) The Supreme Court may, notwithstanding the ground or any of the grounds on which the order *nisi* to review a decision of the Court of Petty Sessions was granted has been established, discharge the order *nisi* if the Supreme Court is of the opinion that no substantial miscarriage of justice has occurred.

60. It is apparent both from the nature of the available grounds of review specified in s 219C and from the remedies specified in s 219F **that review appeals were intended to expand remedies that were previously available at common law on an application for judicial review**.

(Emphasis added.)

30 The Explanatory Memorandum to the *Court of Petty Sessions Ordinance 1972* (Cth) (**1972 Ordinance**) stated:

> …
>
> Section 10 of the Ordinance … inserts a new Part dealing with appeals to the Supreme Court. The more important effects of the new provisions are as follows:—
>
> (a) An appeal in a criminal case lies as of right in all cases and the existing requirement of leave in certain cases is abolished.
>
> (b) Under the existing provisions, the Supreme Court is required to hear afresh all cases in which appeals are brought. Under the new provisions, complete rehearings are limited to criminal cases. In civil cases, appeals will be determined on the evidence given in the Court of Petty Sessions together with such further evidence as may be given before the Supreme Court.
>
> (c) The new provisions introduce a procedure for appeal by way of order to review. This procedure is new to the Territory although it has been used in certain of the States for some years. Its use is largely confined to the criminal jurisdiction and it provides a convenient means whereby decisions of the Court of Petty Sessions on questions of law may be reviewed by the Supreme Court. The procedure is available to both prosecutor and defendant. For the first time in the Territory, it will be possible for a prosecutor to appeal against the dismissal of an information charging an offence but, in such a case, the defendant's costs of the appeal will be payable by the prosecutor whatever the outcome of the appeal.

31 The amendments to the 1972 Ordinance were also traced in *Harlovich* at [61]-[70]. They include the addition, in 1990, of a ground of review alleging that the sentence imposed was manifestly inadequate (what became s 219D(e) of the MC Act) and the removal in 2009 of the two-step process: where previously an *order nisi* was first required before the decision was reviewed, which was then discharged, confirmed or quashed in part or in whole by the Supreme Court. Now only a single notice of appeal is required.

32 What can be seen from the history and the way in which the review appeal provisions developed is that the section was intended to deal with review on questions of law, which inherently includes jurisdictional error. However, there is no suggestion that either the entire section or the individual paragraph 219D(c) of the MC Act was intended to be limited to cases involving jurisdictional error.

Text of s 219D(c) and context of the section

33 That result is evident in the language of s 219D of the MC Act itself, set out above. The plain words of the section evince a scheme for review that is not confined to jurisdictional error, nor grounds that accord with a review appeal in relation to the dismissal of a charge under s 375 of the *Crimes Act* being limited to an appeal in the strict sense (discussed separately below).

34 Dealing with each paragraph under the grounds of review pursuant to s 219D of the MC Act in turn, para (a) provides for review where there is a *prima facie* mistake or error. It is not clear whether the words "*prima facie*" are meant to

indicate obvious error or an error on the face of the record or something else. In *Saunders v King* (unreported, Supreme Court, ACT, Blackburn J, 16 September 1974) (*Saunders*) Blackburn J held at 71 that the type of "mistake" that was contemplated by this provision was an "error or mistake of law, or, possibly also, an error or mistake as to some material or undisputed fact", "so that there is a certainty or high degree of probability that if the error had not been made the result would have been different." However, for the present task, the important point is that the plain words of the ground make no distinction between legal or factual mistakes.

35 Paragraph (b) is specifically directed to jurisdictional error, namely "that the Magistrates Court did not have jurisdiction or authority to make the decision". It is significant here because it provides a separate ground of review for decisions made without jurisdiction. Whether the words of that paragraph extend to a constructive failure to exercise jurisdiction is a matter that it is unnecessary to decide, given this was not the ground relied upon in this appeal.

36 Paragraph (c) then deals with decisions that should not "in law" have been made. In that regard, language such as "in law", "of law" and "in point of law" are all permutations of legal error as distinguished from factual error. Here, the plain language distinguishes between the factual basis for a decision and the legal basis for the decision, although there may, of course, be factual findings that are themselves errors of law. Examples include where the factual finding is made in the absence of any supporting evidence, or where the fact itself is a jurisdictional fact.

37 Paragraphs (d) and (e) deal with specific categories of decisions. For those decisions, broader language is used. Thus, a decision whether to commit or dispose of a matter summarily may be reviewed on the basis that "in the circumstances of the case", it "should not have been made". Similarly, a sentence or penalty imposed in the circumstances referred to in s 219B(1)(f) may be reviewed on the basis that it is "manifestly inadequate" or "otherwise in error".

The "review appeal" creature: an appeal *stricto sensu*, by way of rehearing, or something else?

38 Part of the reason why the respondent viewed the ground as confined in the manner for which he contended was due to a perception that s 219B of the MC Act created an appeal *stricto sensu*. The respondent relied upon the following passage from the majority judgment of Gleeson CJ, Gummow and Kirby JJ in *Fox v Percy* [2003] HCA 22; (2003) 214 CLR 118 at [20], citing Mason J in *Builders Licensing Board v Sperway Constructions (Syd) Pty Ltd* (1976) 135 CLR 616 at 619-622:

> … Mason J distinguished between (i) an appeal *stricto sensu*, where the issue is whether the judgment below was right on the material before the trial court; (ii) an appeal by rehearing on the evidence before the trial court; (iii) an appeal by way of rehearing on that evidence supplemented by such further evidence as the appellate court admits under a statutory power to do so; and (iv) an appeal by way of a hearing de novo. There are different meanings to be attached to the word "rehearing". The distinction between an appeal by way of rehearing and a hearing

> de novo was further considered in *Allesch v Maunz*. Which of the meanings is that borne by the term "appeal", or whether there is some other meaning, is, in the absence of an express statement in the particular provision, a matter of statutory construction in each case.

(References omitted.)

39 In *Mark*, the Full Court of the Federal Court, on appeal from the ACT Supreme Court, stated at 563:

> …
>
> An appeal to the Supreme Court of the Australian Capital Territory by way of order to review pursuant to Part XI of the Act is not a rehearing. Nor is it an appeal on questions of fact. The error or mistake which has to be demonstrated pursuant to s 219C(1)(c) is confined to an error of law: *Saunders v King* (unreported, Supreme Court, ACT, Blackburn J, 16 September 1974); *Priest v Cook* (unreported, Supreme Court, ACT, Kelly J, 22 September 1982); *Dahlstrom v Low* (unreported, Supreme Court, ACT, Gallop J, 1 July 1996).
>
> …

40 None of the authorities referred to in that passage describe the right of review as an appeal in the strict sense (nor as being limited to jurisdictional error). They all construed an order for review as "concerned generally with questions of law": *Priest v Cook* (unreported, Supreme Court, ACT, Kelly J, 22 September 1982) (*Priest*) at 15.

41 The authorities referred to in *Mark* were picked up by the Court of Appeal in *May* at [109]:

> There is a line of authority which indicates that a review appeal under s 219B is limited to questions of law or, at least, such questions and only a limited category of factual matters. This is raised by the terms of the explanatory memorandum for the *Court of Petty Sessions Act 1972* (ACT) which introduced s 219B and explained the new provision as providing "a convenient means whereby decisions of the Court of Petty Sessions on questions of law may be reviewed by the Supreme Court". There were then a number of subsequent decisions of the Supreme Court and Federal Court which interpreted s 219B(1)(a) of the *Magistrates Court Act* as being confined to questions of law or possibly extending only to a limited category of facts: *Saunders v the King* (Unreported, Supreme Court of the Australian Capital Territory, Blackburn J, 16 September 1974); *Priest v Cook* (Unreported, Supreme Court of the Australian Capital Territory, Kelly J, 22 September 1982) at 15; *Dahlstrom v Low* (Unreported, Supreme Court of the Australian Capital Territory, Gallop J, 1 July 1996) at 8; *Mark v Henshaw* (1998) 85 FCR 555 at 563. These authorities are consistent with earlier Victorian authority based upon a similarly worded review appeal provision in s 155 of the *Justices Act 1958* (Vic): *Taylor v Armour & Co Pty Ltd* [1962] VR 346 at 351. None of these decisions were referred to in the parties' written submissions and their correctness or applicability was not the subject of submissions in this court.

42 Contrary to the submissions of the respondent, it does not follow from what was said in *Mark* that a review appeal is an appeal in the strict sense.

43 Caution has been expressed about using labels to describe an appeal in

circumstances where the statute itself does not use them. For example, in *Fleming v The Queen* [1998] HCA 68; (1998) 197 CLR 250 (*Fleming*) at [21]:

> The phrase "by way of rehearing" has been used to identify various characteristics of the appellate process and does not necessarily have a fixed or settled meaning. It is best used only when required by a statutory text. The phrase is not found in the legislation with which this appeal is concerned and does not immediately assist as a criterion of differentiation in identifying the incidents of the appellate process for which the legislation does provide.

44 In *Dwyer v Calco Timbers Pty Ltd* [2008] HCA 13; (2008) 234 CLR 124, the High Court made the point (at [2]) that I consider helpful to recall for the statute under consideration here:

> The issues which arise illustrate the proposition, emphasised in a number of decisions of this Court, that an "appeal" is not a procedure known to the common law, but, rather, always is **a creature of statute**. Further, **the term "appeal" may be used in a number of senses**. In *Fox v Percy*, Gleeson CJ, Gummow and Kirby JJ referred to the fourfold distinction drawn by Mason J in an earlier decision as follows:
>
> > (i) an appeal *stricto sensu*, where the issue is whether the judgment below was right on the material before the trial court; (ii) an appeal by rehearing on the evidence before the trial court; (iii) an appeal by way of rehearing on that evidence supplemented by such further evidence as the appellate court admits under a statutory power to do so; and (iv) an appeal by way of a hearing de novo.
>
> **But these categories cannot represent a closed class and particular legislative measures, such as those with which this appeal is concerned, may use the term "appeal" to identify a wholly novel procedure or one which is a variant of one or more of those just described**. It was in that vein that McHugh J pointed out in *Eastman v The Queen*:
>
> > Which of these meanings the term "appeal" has depends on the context of the term, the history of the legislation, the surrounding circumstances, and sometimes an express direction as to what the nature of the appeal is to be.
>
> **In short, it is the proper construction of the terms of any particular statutory grant of a right of appeal which determines its nature**.

(References omitted, emphasis added.)

45 What kind of creature, then, is the review appeal? The following features of the statute are relevant:

(a) The task on review is implicitly directed to the time the decision was made in the Magistrates Court, as there is no express power to draw inferences of fact, in contrast to other parts of the MC Act (ss 208 and 214(2)) where such a power is prescribed. In *Priest*, Kelly J stated at 15:

> > But the whole scheme of [what became Div 3.10] indicates that there is available to an appellant a general appeal or an appeal by way of order to review generally on questions of law. Accordingly, it seems to me that this Court is concerned in this case with the questions of law raised in the appeal and should not arrogate to itself (although I make

no definitive finding on that question) the authority to make findings of fact.

(b) There is a limited power to admit evidence. In *Saunders* at 73, Blackburn J suggested the purpose of the provision was to "provide for the exceptional case where additional evidence not called in the [c]ourt below may be relevant for the purpose of showing that one or more of the grounds" set out in the section was made out.

(c) The review grounds in s 219D discussed above are not limited to determining whether the decision was correct.

(d) The powers available to the Court to grant relief are also broader than what would be available under an appeal *stricto sensu*. For example, the Supreme Court may, under s 219F(1)(b), vary or amend the decision in the Magistrates Court and may, under s 219F(3), make amendments to the proceeding in the Magistrates Court to correct any defect or error *in the proceeding* or to enable the matter to be decided on the merits before the Magistrates Court.

46 For completeness, it may be noted that in *Saunders*, Blackburn J expressed a view at 70-72 about the scope of relief available and the inability to substitute a different sentence on a review appeal. However, those comments were made in *obiter*, were made before the additional grounds of review were added to s 219D in 1990 and in any event, the correctness of the view expressed does not need to be decided here.

47 With those features, a "review appeal" of the kind created by the MC Act does not conform entirely to either established category. A safer course is to eschew such labels and just accept that a review appeal takes its shape from the language of the statute, and its features are those created by Div 3.10.3. Otherwise, the use of traditional classes of appeal as a basis for construing the statute may at best divert, and at worst mislead, those engaged in the task of construction.

Conclusion on the proper construction of s 219D(c)

48 Within that general understanding of the review scheme, the proper construction of para (c) does not favour review being available only for jurisdictional error, for the following reasons.

49 First, the clear starting point from the plain words of the section is that the error or mistake which has to be demonstrated is confined to an error of law for this particular ground: *Mark* at 563.

50 Second, there is no express textual limitation confining that ground of review to a smaller class of legal error, that being legal error affecting the magistrate's jurisdiction or power to make the decision. The absence of any express words in the section itself means that the Court would have to have a proper basis to read down the words of the section. To the extent that the basis for doing so relied on a particular type or class of appeal (*stricto sensu*), that argument does not assist for the reasons given above.

51 Paragraph (c) uses the word "should" as opposed to "could", which is a textual indicator in favour of the broad interpretation. That is, a magistrate may

have the legal authority to determine the charges and either find them to be proven or dismiss them. However, if there is a legal error in the process by which that decision is made, then it is a decision that should not "in law" have been made.

52 Third, if para (c) were limited to jurisdictional errors of law, it would have no work to do, as it would merely be replicating the ground of review created by the previous paragraph, only in a different form of words. Such a construction, which would render para (c) "superfluous, void, or insignificant", is not to be preferred: *Project Blue Sky* at [71].

53 Fourth, the original historical purpose of the legislation referred to above was to provide for review for legal error, and in doing so, to create or expand the opportunities for review. The review appeal scheme has then further expanded beyond that initial purpose. Factual error is available under other grounds in the section although whether it is confined to a particular type of factual error does not need to be canvassed here. It is significant that the ground of review under consideration is available for all decisions listed in s 219B and may be utilised by the prosecution or the defendant to a charge. While not determinative, these matters provide context for why an interpretation of the ground that does not read down the language, or confine the operation of the review ground unnecessarily, should be preferred.

54 Drawing together the text of s 219D(c) itself, the statutory review scheme in which it is located, and the purpose behind the scheme, properly construed, the words "the decision should not in law have been made" means that review is available for decisions where error of law is established, with the consequence that the decision was not made in accordance with law. While that includes decisions that *could* not have been made due to jurisdictional error, it is not so limited to only that category of legal error.

A failure to give reasons is an error "in law"

55 It remains to consider whether a failure to give reasons falls within the ground of review so construed. In that regard, it is helpful to reason from first principles, with the High Court in *Fleming* explaining the point at [22]:

> Here one of the questions raised by the appellant turns upon the significance for an appeal of a failure to observe the requirements imposed by Pt 9 of the Criminal Procedure Act. The scope and purpose of that legislation is a matter of first importance. Some insight into those questions is provided by the decision of the New South Wales Court of Appeal in *Pettitt v Dunkley* [[1971] 1 NSWLR 376]. Section 142 of the *District Courts Act 1912* (NSW) provided for an appeal to the Court of Appeal by a party who was "**aggrieved by the ruling, order, direction, or decision of the judge in point of law**". It was held in *Pettitt v Dunkley* that **the failure of the trial judge, sitting without a jury, to give reasons for his decision made it impossible for the Court of Appeal to determine whether or not the verdict was based on an error of law, and this had the consequence that the failure to give reasons itself constituted an error of law** [at 381-382, 385, 388]. In *Public Service Board of NSW v Osmond* [(1986) 159 CLR 656 at 666], Gibbs CJ said that the decision in *Pettitt v Dunkley* "that the failure to give reasons was an error **in law** may have broken new ground". Even if that be so, and we should not be taken as acceding to the view that new ground was broken in

> *Pettitt v Dunkley*, **the reasoning of the Court of Appeal upon the construction of s 142 should be accepted**. Further, in the present case, the obligation to give reasons is specified in the statute itself, namely in the mandatory terms of s 33. Such a provision is an expression of legislative concern not only for the effective exercise by the Court of Criminal Appeal of its jurisdiction conferred by ss 5 and 6 of the Criminal Appeal Act. More fundamentally, s 33 **evinces a concern** that, in the operation of the new regime established by Pt 9 of the Criminal Procedure Act **whereby trial by jury is replaced in certain circumstances by trial by judge sitting alone, justice must not only be done but also be seen to be done**.

(References included in the body of the text, emphasis added.)

56 Plainly, the decisions in *Fleming* and in *Pettitt v Dunkley* [1971] 1 NSWLR 376 (*Pettitt*) were construing a different statute, where the words creating the appeal right were "a party aggrieved by the ruling, order, direction, or decision of the judge in point of law." However, in my view, the language in question is substantively similar to the words used in s 219D(c). I cannot see any material difference between "in law" and "in point of law". The reasoning remains applicable by analogy to the statute under consideration here, namely that a decision by a trial magistrate sitting alone, that fails to give adequate reasons, is not a decision that "in law" should have been made, simply because it falls short of justice being "seen to be done".

57 Whether a failure to give reasons will amount to a jurisdictional error depends on the circumstances of the case (including the statutory context). In *Ming* at [45], it was held that *ordinarily* the failure to fulfill the general duty to give reasons would not constitute jurisdictional error. However, it has also been held that in some cases the failure to give reasons will constitute a constructive failure to exercise jurisdiction: *Soulemezis v Dudley (Holdings) Pty Ltd* (1987) 10 NSWLR 247 (*Soulemezis*) at 277F-G.

58 In the present case, given s 219D(c) has been construed so as not to preclude errors of law which are not jurisdictional, it is not necessary for the appellant here to establish that the nature of the failure was jurisdictional.

59 For those reasons, the complaint made by the appellant properly falls within s 219D(c) of the MC Act. The review appeal is therefore competently brought.

Was there a failure to give reasons?

60 The appellant's complaint was that when considered as a whole, and as a matter of substance, the magistrate's reasons fell unacceptably short of the duty to provide reasons, and were, in the circumstances, so inadequate as to constitute reviewable error.

61 In addressing that complaint, it will be necessary to consider the reasons of the magistrate "fairly, as a whole" (see *Garay v The Queen (No 3)* [2023] ACTCA 2 (*Garay*) at [138]), with an understanding of the applicable principles and the issues that were in dispute.

Applicable principles — the common law obligation

62 Section 68C(2) of the *Supreme Court Act 1933* (ACT) deals with the requirements of a judge to give reasons for a verdict in criminal proceedings in the Supreme Court. There is no equivalent statutory obligation in the MC Act,

as seen from the power under s 54 of the MC Act, requiring the Court to "hear and decide" the information laid. Instead, the applicable principles are derived from the common law.

63 In that regard, it is well-settled that a judge or magistrate at first instance has an obligation to give reasons for the judgment given: *Pettitt* at 480-482; *Beale v Government Insurance Office (NSW)* (1997) 48 NSWLR 430 at 441. The reasons for such a duty were explained in *Ming* at [26]-[29]. Without repeating the detail of what was there set out (including detailed reference to the applicable authorities):

(a) The nature of the judicial power is that it resolves disputed issues of fact or law in a way that is reasoned;

(b) It facilitates the principle of open justice by ensuring that a losing party can understand why the decision did not go in their favour, a matter which goes to the legitimacy of judicial decisions.

(c) Where there is a right of appeal, adequate reasons are needed for a party to understand the basis for a decision and to exercise any appeal rights, and for an appellate court to discharge its statutory functions. Without adequate reasons, an appellate court is unable to determine whether the trial judge has approached their task correctly or engaged in some other form of appealable error.

(d) The requirement to give reasons which are open to scrutiny imposes a discipline which promotes better decision-making in grappling with the issues in dispute.

The content of the obligation — what constitutes "adequate reasons"?

64 The content of the judicial obligation to give adequate reasons depends on the circumstances of the matter being considered: *Thorne v Kennedy* [2017] HCA 49; (2017) 263 CLR 85 (*Thorne*) at [61].

65 It generally demands more than "a bare statement of the principles of law that the judge has applied and the findings of fact that the judge has made. There must be exposed the reasoning process linking them and justifying the latter and, ultimately, the verdict that is reached": *Fleming* at [28]. However, it is not necessarily the case that reasons be lengthy or elaborate in order to be adequate: *Thorne* at [61].

66 While the statement was made in the context of a statutory duty to give reasons, it has been held at appellate level elsewhere the obligation at common law is no less burdensome: *JGS v The Queen* [2020] SASCFC 48 (*JGS*) at [200], citing *R v Becirovic* [2017] SASCFC 156 at [267].

67 In *AK v Western Australia* [2008] HCA 8; (2008) 232 CLR 438 (*AK*), Heydon J stated at [85]:

> … Ordinarily it would be necessary for a trial judge to **summarise the crucial arguments** of the parties, **to formulate the issues for decision, to resolve any issues of law and fact which needed to be determined before the verdict could be arrived at**, in the course of that resolution to explain how competing arguments of the parties were to be dealt with and **why the resolution arrived at**

> **was arrived at**, to apply the law found to the facts found, and to explain how the verdict followed. …

(References omitted, emphasis added.)

68 The above passage was cited with approval in *DL v The Queen* [2018] HCA 26; (2018) 266 CLR 1 (*DL*) at [33]. The Court in *DL* had stated earlier (at [32]) that what constitutes "adequate" reasons is informed by the nature of the jurisdiction which the court is exercising and the particular matter that is the subject of the decision.

69 In *Garay*, McCallum CJ (with whom Collier J agreed), referred to the above observation in *AK* and *DL* in making the following important points at [141]-[142]:

> 141. Those remarks [in *AK*] were cited with approval by a majority of the High Court in *DL v The Queen* [2018] HCA 26; 266 CLR 1 at [33] (Kiefel CJ, Keane and Edelman JJ). That was an appeal from a jurisdiction that has no statutory provision of the kind found in s 68C. The content of a duty to give reasons may well be the same whether founded in the common law or a provision in the terms of s 68C but it is always prudent to bear such distinctions in mind.
>
> 142. It was observed in the same passage in *DL* that "not every failure to resolve a dispute will render reasons for decision inadequate to justify a verdict". That observation implicitly acknowledges the need for the appellate court to assess the adequacy of the reasons by reference to the materiality of the particular intermediate finding in respect of which the mandatory requirement is said not to have been met. As Heydon J said in *AK* in the passage cited above, it may be difficult in that context to distinguish between an unconvincing factual finding (which would not fall foul of the requirement) and a failure to make a finding of fact or expose the "reasoning process linking" the principles of law to the findings of fact (which would).

70 The adequacy of reasons is not to be judged against a standard of perfection, but the question is whether they "attained the minimum acceptable standard": *Alexandria Landfill Pty Ltd v Transport for NSW* [2020] NSWCA 165; (2020) 103 NSWLR 479 at [316] (although the pinpoint paragraph does not appear in the published judgment). An application for special leave to appeal that decision was refused: see *Alexandria Landfill Pty Ltd v Transport for NSW* [2020] HCASL 271.

71 The relative test of "adequacy" depends on the nature of the issues in the case: *DL* at [33]. The adequacy of reasons given in a judge-alone trial will be a question of degree, depending on the circumstances of the case: *R v BK* [2022] NSWCCA 51 (*BK*) at [270] (and the authorities there-cited).

72 Consideration was given to what may constitute the minimum standard for "adequate" reasons in the Magistrates Court by Refshauge J in *O'Connell v McMennemin* [2014] ACTSC 112 (*O'Connell*) at [70]-[80]. His Honour found there is an obligation on a magistrate, as part of the exercise of his or her judicial office, to adequately state the findings of fact and reasons for decision, for the purpose of enabling a proper understanding of the basis upon which the findings of guilt were reached (citing *Pettitt* at 382).

73 In a summary jurisdiction, the reasons must articulate the essential ground or grounds on which the decision rests, although a detailed explanation is not always required: *O'Connell* at [77]. Similarly in *Greenwood v Barlee* [2018] ACTSC 46 at [4], Mossop J stated:

> The reasons given by the magistrate need to be understood having regard to the realities of the work of that court and the pressures under which magistrates operate. Regard must be had to the substance of the reasons: *Acuthan v Coates* (1986) 6 NSWLR 472 at 479; *DPP (NSW) v Illawarra Cashmart Pty Ltd* [2006] NSWSC 343; 67 NSWLR 402 at [15].

74 Three further points are relevant to the arguments here. First, in *Garay*, McCallum CJ (with whom Collier J agreed) stated at [138]:

> It will be a rare case in which the adequacy of the reasons can be determined by reference to the structure of the judgment alone. **The provision is concerned not with the quality of the writing but with the quality of the reasoning, which must necessarily be informed by the issues in the case**. The statute does not impose a requirement that the judgment be reasoned beautifully; only that the reasoning process be exposed. It is trite that, in determining whether that has occurred, **the appellate court must read the judgment fairly, as a whole**.

(Emphasis added.)

75 Second, when assessing the quality of the reasoning and whether it meets a minimum acceptable level, it is important not to conflate inadequate reasons with inadequate reasoning (which is an error more in the nature of the trial judge's reasoning not supporting the verdict returned). Inadequate reasons deal with where it is not possible to discern how the decision-maker rationally arrived at the determinative conclusions. Inadequate reasoning is where the reasoning is exposed, but flawed: see the discussion in *JGS* at [205]-[209] and *Garay* at [142]. Admittedly, the line between the two may be faint (an observation also made in cases such as *R v Sexton* [2018] SASCFC 28 at [178]).

76 Third, as to what constitutes "exposing" the reasons, the following passage from *Macks v Viscariello* [2017] SASCFC 172; (2017) 130 SASR 1 at [523] aptly describes the requirement:

> Reasons are not necessarily adequate because they reveal a chain of reasoning leading to a conclusion. A conclusion is not to be drawn from a collection of convenient facts that lead inevitably to that particular result. What is required is a careful assessment of all of the relevant facts, and where necessary, an explanation as to how the "inconvenient" facts can be put to one side or given little weight. As has often been said a fact does not cease to exist because it is ignored.

The allegations comprising the charges

77 Because an assessment of the adequacy of the reasons requires an understanding of the issues of fact and law that required resolution, it is necessary in this case to first have an appreciation of the particulars of the allegations charged against the respondent.

78 For CAN 14405/2020 and CAN 14406/2020, it was alleged that on 28 October 2020, the complainant was working in a women's activewear store in an outlet centre, where the respondent asked to try on some fluoro tights and

went to the changeroom. He then opened the changeroom curtain and asked the complainant to come and look. When the complainant saw the respondent, she noticed he had what she perceived to be an erection:

> … an extremely large — almost dildo or toy type prosthetic, even. It was almost down to his knee and quite unnaturally veiny … it was bulging through the tights, and yeah, quite round, and the size.

79 The respondent said to the complainant "does this look okay?" The respondent then came out of the changeroom. He walked towards the complainant and she noticed he still had an erection. It was alleged that while holding his penis with one hand in a half grip, he asked the complainant whether it was "too tight" or if it "looked good".

80 For CAN 14407/2020, a second complainant working at a different clothing store in the same outlet centre said that on either 28 or 29 October 2020 the respondent asked to try on some pants. After the complainant handed him several options, he asked for a smaller size to try on. He asked the complainant to come into the changeroom to see how the pants fit him. She told him she would not come into the changeroom but advised that there was a mirror outside the cubicle he was in for him to have a look. The respondent then asked for pants in an even smaller size. He tried them on and stepped out of the changeroom. He faced the complainant and the complainant could see that the respondent's penis was obviously erect. The respondent was touching and grabbing his penis and said, "Oh I think they're too tight". He also said "sorry" whilst stroking, rubbing and grabbing his penis. This occurred for about 5 to 10 seconds before the complainant said that she could not assist him any further, walking away feeling uncomfortable.

81 For CAN 14409/2020, a third complainant at another clothing store at the same outlet centre, stated that on 30 October 2020, the respondent told the complainant he was looking for a women's costume for a party and asked for a pair of women's leather pants to try on in the changeroom. Whilst inside the changeroom, he asked the complainant, "is it too big", while pointing his fingers towards his penis. The complainant stated that the pants were very tight and the complainant described the respondent as "definitely" having an erection. She described the respondent as grabbing at his penis, saying "sorry", as if he was trying to cover it, but at the same time she felt he wanted her to see it because he was pointing to it and grabbing it.

82 For CAN 14410/2020, CAN 14412/2020 and CAN 1124/2022 a fourth complainant, working at the same women's activewear store as the first complainant but on 30 October 2020, said that the respondent told her he needed a pair of tights for an 80's themed party. He wanted the tights to be very tight and colourful. The respondent came out of the changeroom wearing a pair of tights, saw one of the other staff working there who had come into the store and seemed embarrassed. The fourth complainant said the respondent was covering his groin as if he was embarrassed but was making it obvious that he was covering himself. She saw that the respondent had what looked like an

erect penis which could be seen through the tights. The respondent came back out and asked the complainant for a tighter pair of tights "because there was a lot of room".

83 The fourth complainant then found a smaller pair of tights for the respondent to try on. She said to another member of staff that she could not continue to serve the respondent. The respondent came back out of the changeroom wearing the tights. He asked whether he should put shorts on. The respondent still had an erect penis and both the complainant and the other staff member said he should put shorts on.

84 The other member of staff took over assisting the respondent and the complainant went to the back of the store. She grabbed some boxes of stock and took them to the shop floor which was just near the changerooms. She was crouched down sorting items of clothing when the respondent approached her from the changeroom. He was still wearing the tights. She said that he stood over her with his erect penis "right in [her] face". The respondent asked her if "it" was making her uncomfortable and whether "it" was obvious and if she could see "it". The complainant understood the respondent to be referring to his penis. The respondent commented on his penis being big and asked her what it looked like. He referred to it being veiny. The respondent was stroking, rubbing and touching his penis the entire time. He said that he could see that he was making her uncomfortable and smirked. The respondent then returned to the changeroom and continued to look at the complainant through the open curtain.

85 A short time later, the complainant said that the respondent exited the changeroom and approached the counter to be served by her. He had changed back into his clothes. He told the complainant that he would be back on Saturday and asked if she would be there. She said that she was not going to be there, and the respondent replied that it would be a "shame" to "miss another show".

86 For CAN 14414/2020 and CAN 14415/2020, it was alleged that the fifth complainant was working in a clothing store in the Canberra Centre on 2 November 2020. The respondent said he was looking for a pair of pants, asking specifically for lighter colours. The complainant gave some to him and he went into the changeroom. The complainant went to the changeroom to enquire how the respondent was going. The respondent opened the curtain, and the complainant observed the respondent wearing the pants she had given him and could see a very clear erection through them. She stated that she could see a clear bulge shaped like a penis, and she could see "veins". The respondent looked at her and said, "I'm so sorry, I can't help it". He "would put his hand over his crotch to almost cover it, but then also clench his hand a little bit, like, tensing around it a little bit".

87 The complainant gave the respondent a number of other pairs of paints and each time the respondent asked the complainant to come back to the changeroom to have a look. On one of those occasions, the respondent said to her, "Can you see it?" and "Can you see it more now or is it less noticeable?", in an attempt to get the complainant to look at the respondent's penis. He then

said, "Would you let you boyfriend go out looking like this?" and words to the effect of "it's not even hard right now. It's a lot bigger when it's hard."

88 The complainant's evidence was that the respondent asked the complainant questions about her boyfriend, told her she was "cute" and "very pretty", had earlier asked for her telephone number and texted her a week later.

89 For CAN 14417/2020, a sixth complainant on 2 November 2020 served the respondent at a women's activewear store in a shopping centre in Greenway. The respondent asked to try on some tights for an 1980's themed party. The complainant picked out a few pairs of tights and showed him to the changerooms. The respondent opened the curtain to the changeroom, and the complainant noticed the respondent was wearing a pair of shorts with tights underneath. He asked for the complainant's opinion on his outfit, to which the complainant responded by offering to bring him more items to try on. The complainant gave the respondent a pair of pink tights and the respondent went back to the changeroom. When he opened the curtain again, wearing the tights, the complainant saw "clearly" that he had an erection or dildo in his pants which she described as being "like a good forearm size" shaped like a penis, very large, with veins. The respondent then asked her, "what about these", and "what do you think of these?", holding his shirt out of the way, which made his crotch more visible. The respondent was standing with one leg in front of the other in an open stance. The phone rang and the complainant spoke to her manager. Security arrived and asked the respondent to leave the store.

The critical issues in dispute

90 The elements of an act of indecency are uncontroversial. As stated recently in *Van Eyle v McFarlane* [2024] ACTSC 50 at [10], they comprise the following elements:

(a) That a person commits an act on another person;

(b) That the act is indecent according to the standards of morality and decency held by ordinary members of the community;

(c) That the other person does not consent to the act; and

(d) That the person was reckless as to whether that other person consented.

91 As can be seen from the above summary, the conduct for each of the alleged acts of indecency included both physical conduct and spoken words. The respondent denied that he had an erection or used any device such as a dildo on any occasion. He also denied saying the words attributed to him.

92 For the last incident, the respondent said that the curtain to the changeroom was closed the whole time and that the complainant did not see him in the tights at any stage.

Reasons of the magistrate

93 The magistrate's reasons extend over 6 pages of transcript. The reasons commenced with the magistrate setting out the directions that he was to follow. Among other directions (about which no complaint is made) was a direction "commonly known as the *Liberato* direction". The magistrate stated:

> In that regard, the direction I give myself is first, if I believe the evidence of the accused then I must acquit. Secondly, if I have difficulty in accepting the evidence

> of the accused but think that it might be true, then I must also acquit. Thirdly, if I do not believe the accused then I should put his testimony to one side. The question will remain has the prosecution, upon the evidence that I do accept, proved the guilt of the accused beyond reasonable doubt?

94 The magistrate deliberately avoided setting out the particulars of each charge individually, stating:

> I do not propose to recite the particulars of each allegation nor do I propose to summarise the extensive evidence in respect to each matter. Rather, the upshot of most of the act[s] of indecency allegations is that the defendant approached a number of female clothing stores, discussed with the female complainants … who worked in the stores that he was intending to create a costume for an 80s themed party.
>
> He then tried on tight fitting leggings or pants and then in the process of seeking feedback from the complainants, all salespersons as I have mentioned, allegedly revealed his erect penis as covered by the garments he was trying on. … **The issues for me to determine are whether or not, in fact, I could be satisfied beyond reasonable doubt that the defendant's penis was erect in these interactions and further whether, in fact, he touched his penis in a sexual manner or in the alternative he touched it in a covering manner**.
>
> The former would support the charges, the latter would not. **A further issue is that the prosecution alleged in the alternative that if the penis of the defendant was not erect during these interactions, that he had inserted some sort of dildo into his pants before seeking feedback of each complainant**. The prosecution made two preliminary applications. The first was a coincidence application. In brief, the prosecution submitted that as each complainant had asserted that the defendant's penis was erect during the interaction with him that it could not simply be a coincidence and I could use that as evidence to satisfy me beyond reasonable doubt that his penis was, in fact, erect.

(Emphasis added.)

95 The magistrate discussed the prosecution's application to use coincidence evidence a little further and then said:

> … one of the troubling aspects of the evidence was the variety of descriptions of the defendant's penis given by the complainants.
>
> Some asserted that it was erect and pointing down towards his knee under leggings whilst others described it as pointing upwards and into the right-hand side pressing against the fabric of the leggings. The length of the penis as observed also dramatically varied although all complainants remarked that it was large. **I make some general observations about each of the complainants. They all impressed me as honest witnesses doing their best to recall what had occurred with each of their interactions with the defendant over that five day period**.

(Emphasis added.)

96 The magistrate then referred to submissions made by counsel for the defendant, which his Honour described as "pertinent". They included:

(a) The complainant in the last matter was aware of complaints made by other complainants. A number of complainants had not gone directly to police but rather had responded to inquiries made by police during the course of investigating some of the complaints.

(b) The informant only became aware of the allegations while investigating a different matter.

97 The magistrate then stated:

> I also note a number of the complainants remarked that they did not [make a police report after the incident occurred] — they believed the defendant may have been suffering from [some] sort of medical condition and did not draw attention to what they perceived to be his erect penis. Most of them observed that the questions he asked were general to the effect of, "Are these too tight?" and although some suggested that he pointed towards his genitals, **a competing inference is that he was simply pointing to the clothing area generally**.
>
> Each complainant agreed that in their role as a salesperson they are often asked by customers to give feedback on how a particular garment fitted or, indeed, looked on the customer. **Several of the complainants also conceded, either in evidence-in-chief or in cross-examination, that the defendant may have been attempting to cover his penis rather than grab it while seeking their feedback**. In terms of the submission by the prosecution that the defendant inserted some sort of dildo into his pants before leaving or before seeking feedback, I do not find that that is supported by the CCTV footage that was played in respect of many of the interactions and showing the defendant moving around the various shopping centres between entering stores.
>
> It simply seems implausible to me that the defendant could have such a large item and it not be revealed at some point throughout his wanderings around the shopping centres.

(Emphasis added.)

98 His Honour then confirmed that he had already made some observations about some of the reservations he had on the basis of the prosecution case alone. The magistrate turned to the tendency application, recording that the use was:

> … to attend clothing stores and seek assistance from female staff working there to help him find tight pants, to try on tight pants in the changeroom and then draw the attention of the female staff to his crotch and that he had the intention to do so essentially was the third and fourth aspects of the tendency.

99 The magistrate then explained the difficulty he had with the tendency use:

> Again, some of the difficulty I have with this tendency is that the tendency is entirely consistent with a customer seeking feedback about the clothing they are trying on and it does not seem to me, bringing my own common life experience to it, that it is unusual for a customer to point to areas which are otherwise considered sexual such as their genital area or, indeed, perhaps in the case of a female customer, towards their breasts. Often feedback is sought that, "Is this too tight?" "Is it too loose?" and the issue is that the defendant effectively did not dispute that, for the purposes of these charges, he was doing that so the tendency evidence, as such, in my view, has limited assistance in circumstances where it was part of the normal process.

100 The magistrate then moved to what he had earlier identified as the issue for him to determine:

> The more fundamental aspect, as I mentioned initially, is whether or not I could be satisfied that the defendant's erect penis was erect during these interactions. As I have said, a more fundamental issue is the fact that the defendant gave evidence. He described all of the interactions were to do with his intention to create a costume for an 80s themed party that a work colleague was hosting in the near future, or if they were not — the interactions were not to do with that, to simply purchase clothes for himself and seek feedback on their appearance.
>
> It is with this in mind that he approach[ed] each of the stores and discussed with the various complainants what he had in mind. He also tried on pants that did not form part of the costume at some stores and purchased a shirt on one occasion. He described himself as a fussy shopper when it came to clothing and this was borne out on pretty much all of the occasions where he took some time to try on several different types of leggings or pants. His evidence was that he was conscious that the leggings and other pants he tried on were very revealing.
>
> He gave evidence that he took steps to conceal his genitals by covering them. He was certain that his penis was not at any stage erect during any of the interactions. When I suggested to him that he may have made some attempt at lighthearted remarks to dispel the awkwardness of having his genitals more exposed than normal due to the tight fitting nature of the garments, he did not accept that that may have been the case. What I also found compelling was evidence that in between some of these allegations at the South.Point Centre the defendant was also observed when entering another store by the name of Tarocash in the South.Point centre and spent a considerable amount of [time] trying on pants of a chino style.

101 The magistrate then referred to the CCTV footage of the assistant on a number of occasions bringing a number of different sizes and styles to the defendant in one of the changing rooms, which the magistrate considered to support the defendant's assertion that he was fussy when it came to clothing. The magistrate continued:

> … Further, the defendant asked one of the complainants for their number and communicated with them via text a week later. He was also identified through the fact that he gave his membership number during one of the transactions.
>
> This strikes me as consistent with his account that he was simply shopping for clothing rather than having any sort of nefarious intention. What was also of note that during the last incident he did notice a distinct change in the demeanour of the complainant when he described his costume concept. Yet despite that change he continued to try on items. It strikes me that had he had the intention to expose himself deliberately, that he would have aborted the attempted exposure on the basis of the change in demeanour of the complainant.
>
> I note that it was unusual that following the last incident at the South.Point Centre he appeared to flee [from] the centre and run all the way to where his car was parked. However, he explained that he had freaked out when being told to leave the store by the security guard and was worried about being escorted through the shopping centre and so instead ran to where his car was parked. I can't reject his explanation for his running. His evidence was that he ultimately did not attend the party with the 80s theme having lost some enthusiasm after his

last incident and further having some issues with his girlfriend at the time.

I was also impressed by the fact that he came forward and identified himself to police following images from CCTV being on social media. Ultimately, though as I have noted **I found each complainant honest and reliable** and I do not wish to diminish for a moment particularly some of the complainants who were clearly affected by what they had observed in their interactions with the defendant. **Nonetheless, it ultimately, it seems to me, that whilst I have difficulty in accepting some of the defendant's evidence**, for example the fact that he may not have made the lighthearted remarks reported by some complainants in an attempt to dispel embarrassment, **when I looked at the totality of the evidence, including the CCTV footage, his account of each incident and, indeed, some of the concessions made by the complainants, I am unable to reject his account of events**.

As I have noted, this seems to me, also has an impact on whether I could use the tendency argument as submitted by the prosecution. **It seems to me fundamentally that I can't be satisfied beyond reasonable doubt of any particular incident as described by any particular complainant when I look at the totality of the evidence**. I am therefore unable to continue to the next step of tendency for the purpose of using one incident for establishing the tendency in respect to others. Similarly, given the observations I have made about the varying descriptions of the defendant's genitals and their position and being unable to reject his evidence, I am not able to reach a conclusion that the defendant's penis was erect during any of these interactions.

(Emphasis added.)

102 The magistrate then went on to deal with matters that are not the subject of appeal before stating "in respect of all the charges there will be verdicts of not guilty."

The appellant's submissions

103 The appellant submitted that the reasons of the magistrate did not meet the minimum standard required in the following respects:

(a) They failed to identify the issues for determination in fact and law;

(b) They failed to deal with the evidence relevant to each charge, instead combining all the complainants and incidents together as a homogenous group;

(c) That approach meant that the magistrate failed to resolve the critical areas of contest between the parties. As part of that failure, there was a failure to resolve the material factual disputes that were required to be resolved before the verdict could be arrived at;

(d) The lack of such analysis meant that the reasoning process then failed to appreciate the impact of the tendency evidence and as a result, failed to deal adequately with the tendency evidence;

(e) There was a failure to engage in any analysis of the coincidence reasoning with respect to each incident and how the evidence featured in the determination of the prosecution case for each charge; and

(f) Separately to the failure to make factual findings that resolved the key factual conflict, the magistrate failed to explain how the competing arguments of the parties were dealt with and why the magistrate arrived

> at the resolution he did. A number of examples were given, including the lack of reasons explaining why the magistrate was not satisfied that the respondent had an erect penis in respect of each charge, where the magistrate had accepted each of the complainants as both credible and reliable and there was a concession of the implausibility of each complainant being mistaken.

104 The appellant submitted that it was not possible from the reasons given to understand what specifically the magistrate had a reasonable doubt about, or why he had such a doubt. The appellant argued that the reasons fell short of what was stated by Nettle J in *DL* at [131]:

> **Since parties must be able to see the extent to which their cases have been understood and accepted, a trial judge will ordinarily be expected to expose his or her reasoning on points critical to the contest between the parties. This applies both to evidence and to argument**. If a party relies on relevant and cogent evidence which the judge rejects, the judge should provide a reasoned explanation for the rejection of that evidence. If the parties advance conflicting evidence on a matter significant to the outcome, both sets of evidence should be referred to and reasons provided for why the judge prefers one set of evidence to the other. Similarly, while a judge is not required to deal with every argument and issue that might arise in the course of a trial, if a party raises a substantial argument which the judge rejects, the judge should refer to it and assign reasons for its rejection. And in providing reasons, the judge is required to make apparent the steps he or she has taken in reaching the conclusion expressed, for reasons are not intelligible if they leave the reader to speculate as to which of a number of possible paths of reasoning the judge may have taken to that conclusion. **Failure sufficiently to expose the path of reasoning is therefore an error of law**.

(References omitted, emphasis added.)

105 The appellant argued that the duty to give reasons was not satisfied by providing bare, unexplained conclusions that the respondent's evidence could not be rejected. It was not sufficient for the magistrate to say that he was unable to reject the respondent's account of events in circumstances where there was no explanation of why, having found each complainant to be both credible and reliable in their accounts, he could not reject the respondent's account as being reasonably true. The most the magistrate appears to have done is simply considered the respondent's evidence alone and asked himself whether it was plausible.

106 This was not a case where reasons were given immediately following the hearing. The magistrate reserved for over a month before delivering reasons. There was no criticism of that course. The appellant argued the nature and seriousness of the case required that to be done, in order to provide the detailed reasons explaining the findings for what were indictable offences, heard by the magistrate at the election of the respondent. The appellant complained that the large gaps in the reasoning of the magistrate "cannot be filled by a benevolent construction of the reasons or by attempting to draw inferences as to what his Honour took into account", relying on *BK* at [142].

Respondent's submissions

107 The respondent argued that the magistrate did give "comprehensive reasons" why he was unable to reject the respondent's evidence:

> These reasons were:
>
> - the respondent gave evidence that he was shopping for an 80s themed party or else shopping for clothing (this is consistent with the prosecution witnesses);
> - he described himself as a fussy shopper and this was confirmed by the evidence in relation to each incident and CCTV footage of his attendance in Tarocash;
> - the items he tried on were very revealing;
> - he gave evidence that he took steps to conceal his genitals;
> - he provided his phone number to one complainant and entered his membership details at another store. He was making no attempt to conceal his identity and this was consistent with his account that he was shopping for clothing, rather than having any nefarious intention;
> - during the final incident, he noticed a change in demeanour of the complainant when he described the costume he wanted to wear, nevertheless [he] continued to try on clothing;
> - he came forward and identified himself to police;
> - there were concessions made by the complainants.

108 The respondent also pointed to the magistrate relying on CCTV footage which the magistrate said indicated there was nothing of the size (described as a good forearm size, or shoulder width) described by some of the witnesses, as well as the magistrate noting that the description of the penis varied dramatically between witnesses.

109 The respondent argued that it was not a requirement to set out each and every piece of evidence of each complainant or provide any description of each incident. The respondent submitted that the statement "I can't be satisfied of any particular incident" followed an analysis of the respondent's evidence and was made in the context of the tendency use.

110 The respondent's submissions argued that the respondent gave an innocent explanation in relation to each individual incident. If the respondent's evidence could not be rejected, then acquittal was inevitable.

111 The respondent argued that the magistrate dealt with the tendency evidence and stated that he could not be satisfied beyond a reasonable doubt of any of the incidents relied upon to found the tendencies. That being the case, the foundation for the tendencies alleged by the prosecution was not established.

112 The respondent also argued that the requirement for a magistrate to provide reasons in a summary hearing must be considered in light of s 219E of the MC Act, which provides that a court can require a magistrate to provide a report "setting out the reasons for the decision of the Magistrates Court and any facts or matters that in the view of the magistrate were relevant to the decision".

113 However, in oral argument, neither the respondent nor the prosecution indicated that would be an appropriate course to take here, where reasons had been given.

Determination — the reasons were inadequate

114 Applying the authorities set out above as to the flexible or relative minimum standard (in the sense of being dependent on jurisdiction, the nature of the case and the materiality of issues), a fair reading of the reasons as a whole includes having regard to the fact that this case was heard summarily in the Magistrates Court. However, the nature of the matter remained complex and serious and was reserved for over a month. This was not a case where the review concerns a magistrate's unedited *ex tempore* remarks (cf *Gibbons v Perkins* [2021] ACTSC 254 at [55]). Relevant to the review appeal, there were 10 charges with six complainants and the maximum penalty available for an act of indecency indicates a degree of seriousness for the offence. The realities of the work of magistrates do not overcome the requirement to provide reasons in factually complex matters that at least expose an understanding of the facts comprising the charge that has been brought, and how the magistrate has resolved a material factual conflict for an element of that charge.

115 Given the number of charges and their similarity, it is understandable why an approach which grouped the conduct and complainants together may have seemed attractive, but in this case, it has been the undoing of the reasons in terms of their quality and the exposition of the reasoning.

116 For each charge there was a direct and intractable conflict between the evidence of the particular complainant, as to what she saw and heard, and the evidence of the respondent. The magistrate found that each complainant was not only honest, but reliable.

117 Because of the approach taken by the magistrate, the reasons do not include any specific reference to what the conduct alleged was for each charge. While that of itself may not amount to inadequate reasons, the global approach means that it is unable to be discerned from the reasons what conduct the magistrate accepted each complainant was honest and reliable about.

118 It is no answer to say that counsel had addressed on the specific incidents and the prosecutor had handed up particulars of each incident. These were not immaterial intermediate factual findings subsumed in a greater finding of generality; they were fundamental findings issues critical to resolving the first element of each charge. It is essential to expose the reasoning on a point critical to the contest between the parties: *Soulemezis* at 259D-E; cited in *Pollard v RRR Corporation Pty Ltd* [2009] NSWCA 110 at [58].

119 This had a flow on effect for all the findings that followed. The magistrate recorded the issue as being to determine whether the respondent's penis was erect, and whether he touched his penis in a sexual manner. That was only part of the conduct alleged and resulted in the magistrate not directing his attention to the totality of the conduct that was the subject of each charge.

120 The global approach meant that the magistrate discussed the variety of descriptions of the respondent's penis as being a difficulty he perceived in the case, without any discussion of the fact that the conduct that each described occurred on different days, in different stores, in different clothing, and the fact that not all accounts included the allegation that the respondent had used a phallic device.

121 The magistrate then determined that he was "unable to reject" the respondent's "account of events". Again, it is not discernible from the global approach taken what that meant in circumstances where each complainant had been found to be credible and reliable.

122 The inadequacy of the reasons in resolving the critical factual conflicts between the respondent and each complainant is perhaps revealed most tellingly by looking down the list of dot points relied upon by the respondent as exposing the reasoning, set out in [107] above. None of the matters relied upon as evidence of reasoning were factually in dispute. The "comprehensive reasons" do not grapple with any factual conflict between the parties at all.

123 The rolled-up approach also affected how the magistrate dealt with the four tendency uses alleged. None of the tendency uses relied upon by the prosecution related to whether the accused's penis was erect or whether he used a phallic device at any point. I accept the appellant's submission that the magistrate simply failed to appreciate the import of the tendency evidence, which meant that although there were reasons purportedly given about why the tendency evidence was rejected, such reasons did not in fact provide a transparent pathway or disclose that the tendency evidence that was actually before the court below had been taken into account. That of itself is an error with respect to a critical matter amounting to a failure to give reasons: see *BK* at [146], [276].

124 These matters are sufficient to establish that the reasons in this case did not adequately state the findings of fact or expose the reasons for decision, so as to enable a proper understanding of the basis upon which the findings of guilt were reached. An error of law under s 219D(c) has thus been established.

Relief under s 219F — should the Court exercise the residual discretion?

125 The respondent argued that remitting the proceeding for further hearing (s 219F(2)(d) of the MC Act) would be an abuse of process because it would expose the respondent to double jeopardy. It was submitted that ordering a rehearing would impeach the earlier acquittal won by the respondent, relying on *R v Carroll* [2002] HCA 55; (2002) 213 CLR 635 (*Carroll*) at [99].

126 "Double jeopardy, properly understood, is best described in the phrase 'no person should be tried twice for the same offence'": *Davern v Messel* (1984) 155 CLR 21 at 30 per Gibbs CJ quoting McNeill J in *R v Police Complaints Board; Ex parte Madden* [1983] 1 WLR 447 at 463; [1983] 2 All ER 353 at 367. However, the expression may take on different meanings and may be used at different stages of the process — prosecution, conviction and punishment: *Island Maritime Ltd v Filipowski* [2006] HCA 30; (2006) 226 CLR 328 (*Island Maritime*) at [41]; *Pearce v The Queen* [1998] HCA 57; (1998) 194 CLR 610 (*Pearce*) at [9].

127 In this Territory, the right is contained in s 24 of the *Human Rights Act 2004* (ACT) (**HR Act**):

> No-one may be tried or punished again for an offence for which they have already been **finally** convicted or acquitted **in accordance with law**.

(Emphasis added.)

128 Here, the acquittal in the Magistrates Court has been found not to have been administered in accordance with law. I accept that is not a complete answer as s 7 of the HR Act provides that the rights specified in that statute are not exhaustive of other rights a person may have in domestic or international law. This includes the common law protection against double jeopardy, which may extend beyond the words provided for in the HR Act.

129 However, the abrogation of the rule is here authorised by Div 3.10.3 of the MC Act. In *Myers v Claudianos* (1990) 100 FLR 362, Miles CJ considered the application of the rule against double jeopardy in the circumstances of a review appeal under Div 3 of Pt XI of the *Magistrates Court Ordinance 1930* (ACT) (which became Div 3.10.3 of the MC Act as set out in the extract from *Harlovich* above). The Chief Justice stated at 372-373:

> There is a discretion in this Court whether, despite error on the part of the Magistrate, the case should be remitted to him or to another member of the Magistrates Court. This Court should not lightly remit a matter to a Magistrates Court for rehearing or for further hearing when there has been a dismissal of an information, amounting in the context of proceedings without jury, to an acquittal, and when there has been no absence or excess of jurisdiction. **I do not doubt that such a step may be taken in appropriate circumstances with the possible eventual result that the setting aside of the acquittal will result in a conviction. The order to review procedure established under Division 3 of Part XI of the Magistrates Court Ordinance 1930 clearly authorises that course**. In this Court an order setting aside the dismissal of an information and remitting the matter for further hearing to the then Court of Petty Sessions was made in *Howard v Bondfield* (1974) 3 ACTR 62, and a similar order was made in *Milner v Anderson* (1982) 42 ACTR 23. The Director of Public Prosecutions supplied a helpful and comprehensive list of relevant authorities in other parts of Australia which shows that the order to review procedure has in many instances resulted in the remittal of the case to a Magistrates Court for rehearing or further hearing after the dismissal of an information. **Nonetheless, a court should take into account the rule against double jeopardy when exercising a discretion whether or not to remit**. …

(Emphasis added.)

130 In *Willcoxson v Legal & General Insurance of Australia Ltd* (1990) 101 FLR 1 at 7, Miles CJ repeated that the course of remittal on a successful review appeal from a dismissal of a charge (akin to an acquittal) was:

> plainly open according to the terms of s 219F of the *Magistrates Court Act*. However, to make an order remitting the case to the Magistrates Court involves an invasion of the rule against double jeopardy and is not to be lightly taken.

131 More recently, in *Harlovich*, the Full Court discussed the interaction between the common law protection and legislative appeals at [30]-[37] in the context of considering the application of the residual discretion under s 219F of the MC Act. Double jeopardy principles may be excluded by legislation, and have been in the Territory with regard to both federal and state sentencing legislation: see *Harlovich* at [36] and the cases there-cited, including *Bui v Director of Public Prosecutions (Cth)* [2012] HCA 1; (2012) 244 CLR 638 at [19]-[20], [25] and [29].

132 Applying the above authorities, which were themselves founded upon a considerable body of earlier authority, I do not consider that a remittal of the proceeding following the successful challenge by the prosecution pursuant to s 219B of the MC Act, following an acquittal in the Magistrates Court, would be an abuse of process due to an infringement of the principle of double jeopardy. The remittal authorised by statute for the purpose of further hearing according to law could not be described as "vexatious or oppressive or for an improper … purpose", to use the language of *Pearce* at [31].

133 However, it may equally be seen that double jeopardy considerations remain part of the residual discretion either conferred or retained under s 219F(1) and 219F(5) of the MC Act, as they pertain to the underlying considerations of fairness and justice: *Harlovich* at [75]. Those provisions direct attention both to whether any substantial miscarriage of justice has occurred and to the wider considerations discussed in *Harlovich* at [2], [82]-[85].

134 The respondent sought to draw upon what was said by Callinan J in *Island Maritime* at [96], where the prosecution "chose the wrong charge initially" and "were almost inexcusably belated" in commencing with an additional charge. In the course of finding that there was no abuse of process, Callinan J commented on broader considerations about the impact of a trial, stating at [96]:

> … It is all very well to say that the appellants were not, in the first proceedings, at "risk of a valid conviction", but they still had all the anxiety, inconvenience, expense and pain of what must have seemed to them a real trial in which they were in jeopardy. …

135 The respondent also relied upon a passage from *Carroll* at [84] and [86], where the High Court was dealing with an attempt to prosecute a charge for perjury following an acquittal for murder, where the perjury alleged was constituted by the evidence given at the murder trial.

136 The respondent submitted that there was unfairness in him having gone into evidence and thus giving up his right to silence. However, the mere fact that the respondent made a forensic choice to give evidence is not of itself unfair. The respondent's evidence at trial has not given rise to any further charge, as was the case in *Carroll*. But in any event, anything I have said about double jeopardy in the context of whether to exercise the residual discretion does not foreclose the respondent from raising the issue on remittal. For example, if the prosecution sought to supplement the case on remittal, or amend the charges or add further charges, the exercise of the discretion with regard to double jeopardy considerations lies with the Magistrates Court and not with this Court.

137 Otherwise, neither of the cases relied upon by the respondent assists him in the circumstances under consideration here. The prosecution has not contributed to the error established in any way and these are not proceedings involving a different charge based on the same facts. The concept of injustice applies equally to the prosecution as to the respondent. Public confidence in the justice system requires that minimum standards for transparency in reasoning be maintained. That objective would not be achieved by the Court on review declining to intervene here.

138 Finally, in the event that the review appeal succeeded, the respondent invited the Court to embark upon the ultimate merits of the decision, providing what he described was a comprehensive analysis of the evidence in the case.

139 I note what was said in *Wolter v Broomhall* [2023] ACTSC 331 (*Wolter*) at [87]:

> Where an appeal is by way of rehearing, a finding of a failure to give reasons will not usually result in the setting aside of the decision below if the appellate court is otherwise satisfied that the decision of the court below was correct: *New South Wales Police Force v Winter* [2011] NSWCA 330 at [89]-[90]. …

140 By contrast, this was a review appeal. The residual discretion does provide for consideration of the merits of the case, but it is a step too far as part of that exercise on a review appeal for error of law for the Court to proceed to review the evidence in the matter. It would require the drawing of inferences of fact with a view to ascertaining whether the same result would have been inevitable, and thus no miscarriage of justice occurred. The confined nature of the review and the nature of the error is such that the matter should be remitted for further hearing and factual findings to be made in the Magistrates Court. This is not a case where it is appropriate to exercise the discretion.

Should the matter be remitted to a different magistrate?

141 In *Broken Hill Cobalt Project Pty Ltd v Lord* [2022] NSWCA 271; (2022) 254 LGERA 274 (*Broken Hill*) at [159]-[168], the NSW Court of Appeal (Ward P, with Mitchelmore and Kirk JJA agreeing) discussed the power to remit a matter to a different judicial officer where the error established was a failure to give reasons. It is to be exercised sparingly, by reference to the interests of justice in the particular case, which include the appearance of justice: *Broken Hill* at [159].

142 At [160], Ward P quoted *Minister for Immigration and Multicultural Affairs v Wang* [2003] HCA 11; (2003) 215 CLR 518, where Kirby J addressed the question of whether to direct remittal to a fresh decision-maker. His Honour stated (at 556):

> Such a direction is not uncommon in the exercise of appellate or judicial review jurisdiction where a conclusion is reached that a rehearing by the same decision-maker would be *unlawful* (where the decision is set aside for reasons of actual or apparent bias) or otherwise *undesirable* (in the interests of justice).

143 Ward P went on at [161] to address considerations bearing upon the exercise of the broad discretion, by reference to *Seltsam Pty Ltd v Ghaleb* [2005] NSWCA 208; (2005) 3 DDCR 1 (*Seltsam*) at [12]-[16] per Mason P. The point which I consider has application in the present case is contained in the reasoning in *Seltsam* at [13]:

> There can be cases where a complicated process of fact-finding has miscarried through a combination of factors. The interests of justice, including its appearance, may require that the new trial take place before a differently constituted court or tribunal. This is particularly so where, as in the present case, the first trial resulted in a judgment turning upon credibility-based findings. To remit the matter for a new trial before a similarly constituted tribunal of fact would almost inevitably

trigger an application that the judge recuse in light of the principles in *Australian National Industries Ltd v Spedley Securities Ltd (in liq)* (1992) 26 NSWLR 411. Instances where this Court has given a direction designed to avoid this possibility include *Curnuck v Nitschke* [2001] NSWCA 176 and *Mkari v Meza* [2005] NSWCA 136.

144 In *Wolter* at [89], Baker J also referred to the fact that in some cases, "redetermination according to law will require the proceedings to be reheard and determined by a different decision maker". Given the nature of the competing evidence between the complainants and the respondent, and the findings already expressed by the magistrate about credit, this is a case where such an order is appropriate, so as to avoid any perception of apprehended bias.

Orders

145 For the above reasons, the following orders are made:

(1) The review appeal is allowed.

(2) Pursuant to s 219F(1) of the *Magistrates Court Act 1930* (ACT) (**MC Act**), the Orders made in the Magistrates Court on 13 December 2022 are set aside in relation to the following proceedings: CAN 14405/2020; CAN 14406/2020; CAN 14407/2020; CAN 14409/2020; CAN 14410/2020; CAN 14412/2020; CAN 14414/2020; CAN 14415/2020; CAN 14417/2020; CAN 1124/2022.

(3) Each of the proceedings referred to in Order 2 are remitted to the Magistrates Court, differently constituted, for further hearing according to law.

NOTE: The appellant has already been ordered to pay the respondent's costs of and incidental to the appeal pursuant to s 219F(8) of the MC Act.

Appeal allowed

Solicitors for the appellant: *ACT Director of Public Prosecutions*.

Solicitors for the respondent: *Kamy Saeedi Law*.

EMMA ROFF

SUPREME COURT OF THE AUSTRALIAN CAPITAL TERRITORY
(COURT OF APPEAL)

Porter v The Queen

[2024] ACTCA 9

Mossop, Baker and Bromwich JJ

16 May 2023, 15 March 2024

Criminal Law — Sentencing — Disputed facts hearing — Reasons for judgment — Adequacy of reasons — Whether reasons vitiated by unattributed copying of prosecution's submissions.

The appellant pleaded guilty in the Supreme Court to four offences of a sexual nature relating to conduct that he engaged in when a volunteer coach of Australian Rules Football. The facts in respect of counts 1, 3 and 4 were agreed, however, there was a dispute between the prosecution and the appellant in respect of the facts giving rise to count 2. Following a disputed facts hearing in relation to that count, the sentencing judge accepted the facts put forward by the prosecution, and sentenced the appellant on that basis.

The appellant appealed against the sentences imposed on three grounds: first, that the sentencing judge's reasons relating to the disputed facts were inadequate because the reasons were largely a "direct recitation" of the prosecution's written submissions; second, that it was not reasonably open to the primary judge to make the findings concerning the disputed facts beyond reasonable doubt; and third, that the sentence imposed for count 3 was manifestly excessive.

In the disputed facts judgment, the sentencing judge had summarised the appellant's submissions at length, but did not summarise the submissions made on behalf of the prosecutor. The sentencing judge's findings were substantially identical to various paragraphs contain in the prosecutor's written submissions and submissions in reply. Those paragraphs were not attributed to the prosecutor. However, the sentencing judge also accurately summarised all of the evidence that had been given in the disputed facts hearing, addressed a number of the appellant's submissions in the course of her summary of those submissions and reiterated her final conclusions as to the credibility of the appellant and the victim.

Held, allowing the appeal in relation to the second and third grounds of appeal, but dismissing the first ground of appeal:

(1) Although there is no statutory requirement for a judge to give reasons for a decision on sentence, the common law requires that such reasons be given. The purpose of this requirement is so that justice may be seen to be done (both by the

parties and the wider public), and to enable an appellate court to ascertain the reasoning on which the decision is based for the purpose of determining any appeal against the decision. [29]

Wainohu v New South Wales [2011] HCA 24; (2011) 243 CLR 181; *R v Thomson* [2000] NSWCCA 309; (2000) 49 NSWLR 383, referred to.

(2) The extent of the reasons which will be required will vary according to the nature of the jurisdiction which the court is exercising and the particular matter the subject of the decision. The reasons given do not need to be elaborate. [30]

DL v The Queen [2018] HCA 26; (2018) 266 CLR 1; *IFTC Broking Services Ltd v Federal Commissioner of Taxation* [2010] FCAFC 22; *Housing Commission (NSW) v Tatmar Pastoral Company Pty Ltd* [1983] 3 NSWLR 378; *Beale v Government Insurance Office (NSW)* (1997) 48 NSWLR 430, referred to.

(3) The reasons should demonstrate that the judge engaged with the case presented, exposed his or her reasoning on points critical to the contest between the parties, made findings as to material questions of fact, and explained why evidence or material had been rejected. [31]

Amaca Pty Ltd v Werfel [2020] SASCFC 125; (2020) 138 SASR 295, applied.

Whalan v Kogarah Municipal Council [2007] NSWCA 5; *DL v The Queen* [2018] HCA 26; (2018) 266 CLR 1; *Beale v Government Insurance Office (NSW)* (1997) 48 NSWLR 430; *Soulemezis v Dudley (Holdings) Pty Ltd* (1987) 10 NSWLR 247, referred to.

(4) Courts have disapproved of reasons which simply adopt a party's submissions as the Court's judgment, as this raises a fundamental concern with the integrity of the judicial process, in particular. that the judge has not independently considered the evidence or reached their own independent conclusions of fact or law. [33]-[34]

Amaca Pty Ltd v Werfel [2020] SASCFC 125; (2020) 138 SASR 295; *Ultimate Vision Inventions Pty Ltd v Innovation and Science Australia* [2023] FCAFC 23; (2023) 297 FCR 143; *Cojocaru v British Columbia Women's Hospital and Health Centre* [2013] SCC 30; [2013] 2 SCR 357, referred to.

(5) Such copying will not, of itself, vitiate a court's reasons, however reasons will be inadequate where, when objectively assessed as a whole, they do not demonstrate that the judge gave independent and impartial consideration to the evidence and the issues. [35]-[42], [51], [78]-[79]

Amaca Pty Ltd v Werfel [2020] SASCFC 125; (2020) 138 SASR 295; *Li v Attorney-General (NSW)* [2019] NSWCA 95; (2019) 99 NSWLR 630; *Alexandria Landfill Pty Ltd v Transport for NSW* [2020] NSWCA 165; (2020) 103 NSWLR 479, referred to.

(6) When read as a whole, and particularly in light of the sentencing judge's extensive analysis of the evidence, engagement with the offender's submissions and reiteration of her conclusions, the reasons sufficiently demonstrated that the sentencing judge gave independent and impartial consideration to the evidence and the issues. [90]

(7) The appellant demonstrated an error in reasoning, namely that the sentencing judge should have considered the appellant's reliability as well as his credibility. This complaint was properly addressed under ground 2, rather than ground 1. [89], [102]

Cases Cited

Adamson v The Queen (2015) 47 VR 268.

Alexandria Landfill Pty Ltd v Transport for NSW (2020) 103 NSWLR 479.

Alvares v The Queen (2011) 209 A Crim R 297.

Amaca Pty Ltd v Werfel (2020) 138 SASR 295.

Beale v Government Insurance Office (NSW) (1997) 48 NSWLR 430.

Benn v The King [2023] NSWCCA 24.

Butters v The Queen [2010] NSWCCA 1.

Cojocaru v British Columbia Women's Hospital and Health Centre [2013] 2 SCR 357.

DL v The Queen (2018) 266 CLR 1.

Fusimalohi v The Queen [2012] ACTCA 49.

Garay v The Queen (No 3) [2023] ACTCA 2.

Hawker v The Queen [2020] ACTCA 40.

Hili v The Queen (2010) 242 CLR 520.

Housing Commission (NSW) v Tatmar Pastoral Company Pty Ltd [1983] 3 NSWLR 378.

IFTC Broking Services Ltd v Federal Commissioner of Taxation [2010] FCAFC 22.

Imbornone v The Queen [2017] NSWCCA 144.

Johnson v Johnson (2000) 201 CLR 488.

Li v Attorney-General (NSW) (2019) 99 NSWLR 630.

Liberato v The Queen (1985) 159 CLR 507.

Lowndes v The Queen (1999) 195 CLR 665.

Markarian v The Queen (2005) 228 CLR 357.

Mun v The Queen [2015] NSWCCA 234.

O'Brien v The Queen (2015) 19 ACTLR 244.

Public Prosecutions (Vic), Director of v DDJ (2009) 22 VR 444.

R v Gommeson (2014) 243 A Crim R 534.

R v Harrison (2001) 121 A Crim R 380.

R v Johnston [2020] ACTSC 46.

R v Mumberson [2011] NSWCCA 54.

R v Porter (No 2) [2022] ACTSC 50.

R v Porter (No 3) [2022] ACTSC 236.

R v Ruwhiu [2023] ACTCA 18.

R v Thomson (2000) 49 NSWLR 383.

R v Toumo'ua (2017) 12 ACTLR 103.

R v Verdins (2007) 16 VR 269.

Soulemezis v Dudley (Holdings) Pty Ltd (1987) 10 NSWLR 247.

Stott v The Queen [2021] ACTCA 18.

Sun Alliance Insurance Ltd v Massoud [1989] VR 8.

Tracey v The Queen [2020] ACTCA 51.

Ultimate Vision Inventions Pty Ltd v Innovation and Science Australia (2023) 297 FCR 143.

Van Zwam v The Queen [2017] NSWCCA 127.

Wainohu v New South Wales (2011) 243 CLR 181.

Whalan v Kogarah Municipal Council [2007] NSWCA 5.

Wong v The Queen (2001) 207 CLR 584.

Appeal

The appellant appealed against sentences imposed in the Supreme Court.

T Game SC with *R El-Choufani*, for the appellant.

K McCann with *C Diggins*, for the respondent.

Cur adv vult

15 March 2024

The Court

Introduction

1 On 2 September 2021, the appellant, Mr Stephen Porter, pleaded guilty to the following four charges:

(a) **Count 1** (CAN2020/11987): using a child under 12 years of age to produce child exploitation material, contrary to s 64(1) of the *Crimes Act 1900* (ACT). The maximum penalty for this offence is 15 years' imprisonment, a fine of $240,000, or both.

(b) **Count 2** (CAN2020/7714): engaging in a sexual relationship with a child under special care, contrary to s 56(1) of the *Crimes Act*. The maximum penalty for this offence is 25 years' imprisonment.

(c) **Count 3** (CAN2020/13262): grooming a young person, contrary to s 66(1)(b) of the *Crimes Act*. The maximum penalty for this offence is 7 years' imprisonment.

(d) **Count 4** (CAN2020/11989): possessing child exploitation material contrary to s 65(1) of the *Crimes Act*. The maximum penalty for this offence is 7 years' imprisonment, a fine of $112,000, or both.

2 The facts in respect of counts 1, 3 and 4 were agreed. However, there was a dispute between the prosecution and the appellant as to the facts giving rise to Count 2 (in particular, the frequency and nature of the sexual offending). Following a disputed facts hearing in relation to Count 2, the primary judge accepted the facts put forward by the prosecution concerning the number of occasions and the form of sexual abuse: *R v Porter (No 2)* [2022] ACTSC 50.

3 On 1 September 2022, the appellant was sentenced to a total effective sentence of 20 years' imprisonment for the four offences, with a non-parole period of 12 years and 6 months' imprisonment: *R v Porter (No 3)* [2022] ACTSC 236 at [318]. The individual sentences (after discounts for the appellant's pleas of guilty) were as follows:

(a) Count 2 (CC2020/7714): 13 years and 6 months' imprisonment commencing on 18 November 2021 and expiring on 17 May 2035.

(b) Count 1 (CC2020/11987): 3 years and 4 months' imprisonment commencing on 18 August 2034 and expiring on 17 December 2037.

(c) Count 3 (CC2020/13262): 3 years' imprisonment commencing on 18 April 2037 and expiring on 17 April 2040.

(d) Count 4 (CC2020/11989): 2 years' imprisonment commencing on 18 November 2039 and expiring on 17 November 2041.

4 The appellant now appeals from these sentences on the following grounds:

Ground 1: The primary judge's reasons in respect of the disputed facts (Count 2) were inadequate, because the reasons were largely a "direct recitation" of the prosecution's written submissions;

Ground 2: It was "not reasonably open" to the primary judge to find beyond reasonable doubt that there had been 35 separate occasions of sexual activity in relation to Count 2 (the sexual relationship offence); and

Ground 3: The sentence imposed for Count 3 (the grooming offence) is manifestly excessive or plainly unreasonable or unjust.

5 For the reasons set out below, the appeal is allowed. Ground 1 should be dismissed, but grounds 2 and 3 are established. The appeal is allowed and the appellant resentenced to a total effective sentence of 17 years' imprisonment for the four offences, with a non-parole period of 11 years, made up of the following individual sentences:

(a) **Count 2** (CC2020/7714) — 11 years, 10 months and 23 days' imprisonment, commencing on 18 November 2021 and expiring on 10 October 2033.

(b) **Count 1** (CC2020/11987) — 3 years and 4 months' imprisonment, commencing on 11 January 2033 and expiring on 10 May 2036.

(c) **Count 3** (CC2020/13262) — 1 year, 7 months and 6 days' imprisonment, commencing on 12 September 2035 and expiring on 17 April 2037.

(d) **Count 4** (CC2020/11989) — 2 years' imprisonment, commencing on 18 November 2036 and expiring on 17 November 2038.

The non-parole period will commence on 18 November 2021 and expire on 17 November 2032.

Background

The offending

6 The offending occurred between 2009 and 2020, while the appellant was engaged as a volunteer coach of Australian Rules Football (AFL) at the Belconnen Magpies Football Club and Ainslie Football Club. The appellant coached several teams of various age groups, and offered private coaching to select young players.

7 Each of the victims of the offending have been given pseudonyms.

Count 1: Using a child under 12 years of age to produce child exploitation material

8 The offending which is the subject of Count 1 occurred between January 2009 and September 2011. The victim was Alexander Goodwin, who was between 9 years old and 12 years old during the relevant time period.

9 It was additionally agreed that the sentencing in relation to Count 1 would take into account an offence of using a child over 12 years of age to produce child exploitation material, contrary to s 64(3) of the *Crimes Act*, in relation to child exploitation material of Alexander Goodwin produced between September 2011 and November 2011, while Alexander was 12 to 13 years old.

10 Over the charged period, Alexander was attending the appellant's house three to four times per week. While there, he and the appellant would participate in recreational activities such as swimming in the appellant's swimming pool, kicking a football, playing darts or pool, and watching videos.

11 The appellant made several videos of Alexander while "playing with Nerf toy guns … dressing up as zombies and playing hide and seek games". Alexander was often in his swimwear in these videos. Alexander was aware that these videos were being made.

12 The appellant also covertly recorded further videos of Alexander engaging in recreational activities at his house, including videos of Alexander in his swimwear, which focused on his buttocks and genital areas. Alexander was not aware that these videos were being made.

13 The appellant also placed a camera in a bedroom in his house, which covertly recorded Alexander removing his clothes and changing into swimwear. These videos included footage of Alexander's naked body, including his buttocks and genitals. Alexander was not aware that these videos were being made.

Count 2: Engaging in a sexual relationship with a child under special care

14 Count 2 relates to the appellant engaging in a sexual relationship with a child in special care, namely Wesley Mason, between 1 September 2015 and 31 September 2018 while Wesley was between 12 and 15 years old.

15 Count 2 was the subject of the disputed facts hearing. The appellant accepted that he sexually abused Wesley, but disputed the number of occasions that he sexually abused Wesley, and also the number of occasions that penile-anal intercourse was engaged in. The prosecution contended that the appellant had sexually abused Wesley on 35 to 45 separate occasions, and that anal intercourse occurred on every occasion except the first occasion. The appellant's case was that he sexually abused Wesley on no more than 15 occasions, and that anal intercourse occurred on two occasions.

16 Following the disputed facts hearing, the sentencing judge delivered a judgment in which she found that the appellant had sexually abused Wesley on at least 35 separate occasions and that anal intercourse had occurred on each occasion except the first occasion. These findings are the subject of appeal grounds 1 and 2. The evidence in relation to Count 2 is set out in more detail below in considering these grounds of appeal.

Count 3: Grooming a young person

17 The offending which is the subject of Count 3 relates to the grooming of Riley Priestley during 2020. In March 2020, the appellant offered private coaching sessions to Riley, which his parents accepted. The private sessions initially occurred once per week for one hour, subsequently increasing to twice per week for around two hours.

18 The appellant informed Riley's parents that they could not tell anyone about the coaching because of COVID-19 restrictions. The training commenced on the main oval of the football grounds at which they trained, but subsequently moved to a more discreet oval that was not visible from the road.

19 Over time, the appellant became friendlier with Riley and their relationship became more personal. They often had personal conversations and the appellant would send Riley messages via Heja (a messaging app).

20 The appellant invited Riley to his house. However, Riley's parents declined these invitations. In June 2020, Riley attended the appellant's house with other members of the under 14's football team and engaged in recreational activities.

21 Over a number of months, the appellant sent messages to a friend which "demonstrated that the appellant was interested in Riley Priestley and was seeking to utilise his time with Riley to groom him for potential sexual conduct". These messages included comparisons of his sessions with Riley with his sessions with the victims of Counts 1 and 2; referring to himself as "falling so hard for" Riley; descriptions of Riley's "butt"; describing their relationship as "mov[ing] beyond that coach/player thing"; and the statement "who the hell knows where this one ends up but right now its baby steps."

22 In November 2020 (after the appellant's arrest for other offending), Riley's father identified an image that the appellant had sent to this friend as being an image of Riley that was taken at a triathlon in 2018 or 2019. Riley's parents had not provided the photograph to the appellant.

Count 4: Possessing child exploitation material

23 Count 4 relates to the possession of child exploitation material, consisting of over 1,500 videos and images depicting male children (including infant, prepubescent, and postpubescent children) engaging in forced and unforced sexual activities with adult males and other male children.

24 This material was contained on several devices, including a phone belonging to the appellant which contained non-sexual images and videos of infants and male children. Wesley Mason was depicted in one of these images. One video depicted a child who was later identified as the child of a family whom the appellant had visited in Queensland on two occasions with a friend. That video was of the child getting changed, and depicted the child's genitals.

Ground 1: Inadequate reasons

Introduction

25 The appellant submits that the primary judge's reasons for her decision

in relation to the disputed facts (*Porter (No 2)*) were inadequate, as her Honour's conclusions largely consisted of "a direct recitation of the Crown written submissions".

26 The Director of Public Prosecutions ("the Director"), whilst acknowledging that that there had been "extensive copying" in the primary judge's reasons, contended that the reasons were nonetheless adequate — in particular, because the primary judge had expressly addressed the appellant's submissions, and had expressed her final conclusions in her own words.

27 It is convenient to first consider the authorities where it has been alleged that a decision maker's reasons were inadequate by reason of undue copying of a party's submissions. We will then briefly summarise the evidence on the disputed facts hearing, before turning to assess the adequacy of the reasons that were provided by the primary judge in the disputed facts judgment.

Judicial copying of submissions

Relevant authorities

28 As both parties submitted, the starting point for consideration of the first ground of appeal is with the duty of a judge to provide reasons for their decision.

29 Although there is no statutory requirement for a judge to give reasons for a decision on sentence (cf s 68C(2) of the *Supreme Court Act 1933* (ACT)), the common law requires that such reasons be given. The purpose of this requirement is so that justice may be seen to be done (both by the parties and the wider public), and to enable an appellate court to ascertain the reasoning on which the decision is based for the purpose of determining any appeal against the decision: *Wainohu v New South Wales* [2011] HCA 24; (2011) 243 CLR 181 at [54]-[58]; *R v Thomson* [2000] NSWCCA 309; (2000) 49 NSWLR 383 at [42].

30 The extent of the reasons which will be required varies "according to the nature of the jurisdiction which the court is exercising and the particular matter the subject of the decision": *DL v The Queen* [2018] HCA 26; (2018) 266 CLR 1 at [32]. The reasons given do not need to be elaborate: *IFTC Broking Services Ltd v Federal Commissioner of Taxation* [2010] FCAFC 22 at [4] quoting *Housing Commission (NSW) v Tatmar Pastoral Company Pty Ltd* [1983] 3 NSWLR 378 at 386; *Beale v Government Insurance Office (NSW)* (1997) 48 NSWLR 430 at 443.

31 However, it is necessary for the reasons to demonstrate that the judge "engage[d] with the case presented", "expose[d] his or her reasoning on points critical to the contest between the parties", "[made] findings as to material questions of fact", and "explain[ed] why evidence or material has been rejected": *Amaca Pty Ltd v Werfel* [2020] SASCFC 125; (2020) 138 SASR 295 at [20], citing *inter alia*, *Whalan v Kogarah Municipal Council* [2007] NSWCA 5 at [40], *DL* at [130]-[131], *Beale* at 431 and *Soulemezis v Dudley (Holdings) Pty Ltd* (1987) 10 NSWLR 247 at 257-258.

32 In the present case, the appellant did not contend that the primary judge had failed to address material evidence or submissions. Rather, he submitted that the

primary judge's reasons were deficient because they contained substantial extracts copied from the prosecutor's submissions, without attribution. A complaint of this nature raises concerns of a different complexion to cases in which it is alleged that the reasons are deficient because relevant evidence or submissions were not addressed by the primary judge.

33 A fundamental concern that is raised when there is extensive copying of a party's submissions in a judge's reasons for decision is with the integrity of the judicial process. Such a practice raises the spectre that the judge has not independently considered the evidence or reached their own independent conclusions of fact or law.

34 For this reason, courts in both Australia and overseas disapprove of reasons which simply adopt a party's submissions as the Court's judgment: see, for example, *Amaca* at [16] ("as a general rule, it is most unwise to engage in wholesale copying of submissions without attribution"); *Ultimate Vision Inventions Pty Ltd v Innovation and Science Australia* [2023] FCAFC 23; (2023) 297 FCR 143 at [6] ("Irrespective of the legal consequences of such copying, it should not happen. It is damaging to public confidence in the Tribunal"); and *Cojocaru v British Columbia Women's Hospital and Health Centre* [2013] SCC 30; [2013] 2 SCR 357 at [35] ("The concern about copying in the judicial context is not that the judge is taking credit for someone else's prose, but rather that it may be evidence that the reasons for judgment do not reflect the judge's thinking … Avoiding this impression is a good reason for discouraging extensive copying").

35 Nonetheless, it is well established that such copying will not, of itself, vitiate a court's reasons. As the Full Court of the South Australian Supreme Court held in *Amaca* (at [17]):

> … we are not prepared to find that where there is extensive copying without attribution, then, without more, the reasons are thereby inadequate and the resulting decision necessarily vitiated. Much depends on what has been copied and whether, nevertheless, the decision-maker has performed the task of engaging with the case of each party and making decisions on what divides the parties, whether they be matters going to evidence, or matters referable to legal principles and the proper application of those to the evidence before the court.

(Citations omitted.)

36 Similarly, in *Li v Attorney-General (NSW)* [2019] NSWCA 95; (2019) 99 NSWLR 630 at [122], Brereton JA, after reviewing a number of authorities concerning judicial and administrative decisions in which the submissions of a party were adopted as the reasons for decision, concluded that that "it is not necessarily impermissible for a judge to incorporate, even extensively, with or without attribution, the submissions of one or both parties". His Honour continued (at [132]):

> It is clear that extensive replication, whether or not attributed, of the submissions of one or both parties will not of itself amount to error, so long as the reasons sufficiently reveal that the decision-maker gave independent consideration to the relevant issues.

37 Justice Brereton was in dissent in *Li*, but not in respect of the propositions outlined above. His Honour would have allowed the appeal in that case on the basis that the primary judge's reasons there:

> … [left] an impression that arguments have been embraced without serious consideration having been given either to the contrary point of view, or to the application of an independent point of view, as will be the case where reasons which substantially incorporate, reproduce and/or adopt the submissions of one party do not contain indicia, beyond mere formulaic and stylistic changes, that they are the product of the active application of an independent and impartial mind …

38 The majority (Basten and White JJA) dismissed the appeal. Justice Basten held that it had not been demonstrated that the primary judge had failed to take into account any material evidence or submissions. His Honour also held that it could not be inferred that the judge did not apply an impartial and independent mind to the issues raised by the application. Central to his Honour's decision in *Li* was the nature of the proceedings and the role of the Attorney-General (whose submissions had been adopted). The proceedings in question related to an application for an inquiry under Pt 7 of the *Crimes (Appeal and Review) Act 2001* (NSW). Rather than being an "adversary proceeding" in which both sides provided "conflicting evidence and submissions", the Attorney-General's submissions set out, in neutral terms, both the arguments of the applicant and the responses to those arguments: *Li* at [48].

39 Justice White agreed with Basten JA, but emphasised that the reasons of the primary judge would not have been adequate if the judge were acting judicially to decide a controversy between the parties: *Li* at [73].

40 One issue which divided the Court in *Li* was whether there was an independent requirement that "justice be seen to be done". After reviewing various authorities, Brereton JA concluded (at [116]) that:

> (1) Reasons will be inadequate not only if it is not possible to discern from them the reasoning upon which the decision is based, but also if justice is not seen to be done; and
>
> (2) Justice will not be seen to have been done if the "reasons" are such as to leave a reasonable person in the position of the unsuccessful party with a justifiable sense of grievance at the appearance that the decision maker has not addressed attention adequately, or at all, to the arguments of the parties, and understood the unsuccessful party's arguments and either accepted them, or, if rejected, that the rejection was based on a clear and rational process of reasoning.

(Emphasis added.)

41 In contrast, Basten JA rejected the contention that the need for "justice to be seen to be done" constitutes a "free-standing legal principle": *Li* at [59]. His Honour held that this "aphorism … encapsulates a value or underlying rationale, not an applicable legal rule or legal principle": *Li* at [58]. His Honour also rejected the formulation of the issue as whether the applicant, "or a reasonable person in his position, would have a legitimate sense of grievance" arising from the adoption of his opponent's submissions as the substance of the judge's

reasons for finding against him: *Li* at [78]. His Honour considered that the focus should instead be on whether "it should be found as a fact that the judge did not bring his own independent and impartial mind to bear on the issues": *Li* at [78].

42 In *Alexandria Landfill Pty Ltd v Transport for NSW* [2020] NSWCA 165; (2020) 103 NSWLR 479 at [32]-[34], Basten JA referred to the decision in *Li* and reiterated that the adage that "justice must not only be done, but be seen to be done" identified the obligation to give reasons as an aspect of the principle of open justice, but that it did not otherwise provide assistance in identifying the standard to be applied. His Honour noted that this aspect of Brereton JA's dissent was rejected by the majority in *Li* and concluded that the adequacy of reasons is not to be undertaken by reference to a reasonable person in the position of the unsuccessful party: *Alexandria Landfill* at [34].

43 In his written submissions, the appellant made a number of observations concerning Basten JA's decision in *Alexandria Landfill*. First, the appellant observed that the decision in *Alexandria Landfill* did not involve unattributed judicial copying of a party's submissions. Second, the appellant noted that although White JA had agreed with Basten JA that the primary judge's findings in *Li* were adequate for an administrative decision, White JA further held that those reasons would have been inadequate if the judge had been acting judicially. Third, the appellant observed that Basten JA's rejection of the phrase "justice must be seen to be done" as a criterion of validity appeared to be at odds with earlier authority, including *Sun Alliance Insurance Ltd v Massoud* [1989] VR 8.

44 However, the appellant did not contend that the need for "justice to be seen to be done" should be applied as a criterion for the assessment of the adequacy of reasons in this case. Rather, the appellant submitted that it was "unnecessary for this Court to resolve the divergent approaches adopted by Basten JA and Brereton JA". In particular, the appellant noted that the authorities considered by Brereton JA in *Li* indicate that the question of "whether judicial copying of a party's submissions warrants appellate intervention will depend on the circumstances".

45 In her written submissions in reply, counsel for the Director submitted that the need for "'justice to be seen to be done' is not a criterion for the determination as to adequacy [of a judge's reasons], but is a principle that founds the rationale of the duty". In particular, she drew a distinction between "the determination as to adequacy (which turns on questions of degree in light of the nature of the issues) and the conclusionary statement that justice has not been seen to be done". She also emphasised that the obligation to provide reasons does not "require that the reasons be cogently argued, nor even correct". Rather, the reasons will be adequate "if the critical issues have been determined and the party can discern the basis on which they were decided".

46 There is force in the Director's submissions on this issue. The need for reasons to ensure that "justice is seen to be done" provides limited guidance in determining the adequacy of the reasons. It may also be apt to mislead.

Viewed out of context, the phrase may wrongly suggest that an assessment of the adequacy of the reasons for the decision should encompass consideration of the correctness, logic or rationality of the reasons.

47 In this respect, it may also be observed that the authorities which have considered allegations of copying (both in judicial and administrative contexts) since *Li* have identified the question to be addressed as whether the reasons indicate that the judge gave independent and impartial consideration to the evidence and the issues, rather than whether justice was "seen to be done": see, for example, *Amaca* at [14]. It may also be noted that, in his judgment in *Li*, Brereton JA described "the central issue" as being "whether the judge has — or appears to have — personally and independently engaged with the issues so as to render an independent and impartial judgment": *Li* at [124]. His Honour's conclusions as to the deficiency in the primary judge's reasons were expressed in the same terms: *Li* at [143].

48 In any event, as the appellant submitted, it is not strictly necessary to resolve this issue in the present appeal. The appellant advanced his case on the basis that the reasons were inadequate because the extent and nature of the copied material was such as to indicate that the primary judge had not given independent and impartial consideration to the issues and did not contend that this Court should apply any wider formulation.

49 Nor is it necessary to resolve the other area of controversy between Basten JA and Brereton JA in *Li*, namely, whether a "reasonable person" test should be adopted (that is, whether a "reasonable person in the position of the unsuccessful party would have a legitimate sense of grievance about the lack of independent or impartial analysis"). Again, other than noting the matters set out at [43] above with respect to the decision in *Alexandria Landfill*, the appellant did not contend that a "reasonable person" test should be adopted. He submitted that the issue did not need to be determined.

50 Although the Director submitted that such a test should not be adopted, as it may "inappropriately broaden the duty", it is not clear that the assessment of the adequacy of a judge's reasons would differ under "the reasonable person" test as enunciated by Brereton JA, as compared to the approach of Basten JA. In bias cases, a "reasonable person" test ensures that judgments are not "based purely upon the assessment by some judges of the capacity or performance of their colleagues": *Johnson v Johnson* [2000] HCA 48; (2000) 201 CLR 488 at [12]. Whether or not a "reasonable person" test is adopted, it is clear that the test is objective. The personal characteristics of the judge alluded to in *Johnson* must not be taken into account when assessing the adequacy of the reasons provided.

51 In summary, it is not necessary to finally determine the limits of the appropriate test to be applied in relation to the adequacy of reasons which involve copying of a party's submissions. At a minimum, it is clear from the above authorities that reasons will be inadequate where, when objectively assessed as a whole, they do not demonstrate that the judge "gave independent and impartial consideration to the evidence and the issues".

The disputed facts hearing

52 The disputed facts hearing was heard over three days, on 28, 29 and 30 October 2021. The evidence given in that hearing was as follows.

53 Wesley Mason (who will be referred to as "the victim" in respect of appeal grounds 1 and 2) gave evidence by way of an Evidence In Chief Interview ("EICI") and oral evidence in chief. He explained that in or around August 2014, the appellant offered him private coaching. This coaching had commenced by October 2014. The first instance of offending occurred after approximately a year of private coaching.

54 The victim gave evidence that the first instance of offending involved oral sex and the use of a dildo. He gave evidence that the second instance of the offending, which occurred "approximately a week later", involved penile-anal penetration by the appellant performed on the victim. The victim said that after this occasion, engaging in sexual activity following training became "a thing I just did" and that penile-anal penetration by the appellant was the "new normal".

55 The victim gave evidence that the appellant would also regularly attend his house for dinner and would stay overnight in his room afterward. He said that sexual activity would occur on these occasions, as well as at the appellant's house following training sessions. He explained that his trundle bed (on which he would sleep, while the offender took the main bed in his room) had broken during sexual intercourse on one occasion.

56 The victim also gave evidence that during sexual activity the appellant would never wear a condom; that the appellant would ejaculate on him or in a tissue; on one occasion, a few years after the offending began, the appellant ejaculated inside him; and that he anally penetrated the appellant on approximately three occasions.

57 When asked to "guesstimate" the frequency of the offending, the victim estimated that sexual activity occurred "over thirty-five [times] … probably about forty-five times". The victim said that the offending ended in or around 2018, after he rebuffed the appellant twice.

58 Statements of the victim's mother and stepfather were tendered without objection. Neither were required for cross-examination.

59 These statements included evidence as to the frequency with which the appellant came to visit. The victim's mother and stepfather also recalled the victim's trundle bed breaking, although they differed in their recollections as to when this occurred. The victim's mother stated that the victim did not disclose how this occurred at the time, but later told her that the offending caused the bed to break.

60 The appellant gave evidence that penile-anal intercourse occurred only twice, once in January 2017 when he anally penetrated the victim and again one to two weeks later when the victim anally penetrated him. The appellant denied ever ejaculating inside the victim or having penile-anal intercourse at the victim's house.

61 The appellant gave evidence that he and the victim had engaged in sexual activity four or five times before the first instance of anal penetration. The

appellant asserted that, in total, he engaged in sexual activity with the victim on 14 or 15 occasions. The appellant denied that sexual activity always occurred while he was coaching the victim, including when he stayed at the victim's house. The appellant said that sexual activity occurred less than half of the time they were together.

62 The appellant also gave evidence that the majority of his sexual contact with the victim occurred during two summer training periods in 2015/2016 and 2016/2017, and that outside these periods, contact was infrequent. He agreed that he visited the victim's house approximately 10 times each summer during the summers of 2015/2016, 2016/2017 and 2017/2018. He maintained that he stayed overnight about half of the time, and that sexual intercourse occurred on "less than half" of the occasions when he stayed overnight. The appellant also claimed that he had very limited contact with the victim during 2016 (when the victim was injured) and during 2017 (when the victim moved to a different football club).

63 The evidence before the primary judge also included a statement of agreed facts relating to a record of interview which the appellant had participated in with police on 27 June 2020 (the record of interview was not admitted into evidence): *Porter (No 2)* at [166]. The agreed facts stated that in this interview, the appellant admitted that he had known the victim since the victim was 12 years old, but denied having a sexual relationship, or any sexual intercourse with the victim. He also denied showing the victim pornography, or ever using dildos or sex toys with the victim. The appellant also told police that there was no reason why the victim's DNA would be on any of the sex toys located in his home.

64 There were no oral submissions at the conclusion of the disputed facts hearing. Both parties provided written submissions in accordance with the directions of the primary judge. The prosecution provided written submissions on 1 December 2021. The appellant provided submissions in reply on 6 December 2021. The prosecution provided further submissions in reply on 10 December 2021.

The primary judge's decision

65 In *Porter (No 2)*, the primary judge commenced by setting out the issues in dispute, before summarising the victim's evidence, the unchallenged statements of his mother and his stepfather and the evidence of the appellant: *Porter (No 2)* at [1]-[10] (summary of issues); [11]-[71] (the victim's evidence); [72]-[84] (evidence of the victim's mother) and [85]-[98] (evidence of the victim's stepfather); and [99]-[167] (evidence of the appellant and the appellant's record of interview). The summary of the evidence in the proceedings was comprehensive. It was not drawn from the submissions of either party. The primary judge did not indicate or foreshadow any of her findings as to witness credibility in this part of the judgment, other than noting that the appellant's denials in his record of interview were in "contradistinction" to the evidence given by the appellant in Court: *Porter (No 2)* at [166].

66 Following the summary of the evidence, the primary judge then briefly, but accurately, set out the legal principles to be applied to the determination of

disputed facts before summarising the submissions made on behalf of the appellant. It is important to note that the primary judge's summary of the submissions was not limited to recounting the submissions made on behalf of the appellant. Rather, at various points in this summary, the primary judge interposed her own responses to the submissions made by the appellant's counsel. For example:

(a) After recounting the appellant's counsel's submission that "whether the door of the [victim's'] bedroom was open or closed, it is highly likely that people walking up and down the hallway could be heard and, by necessary inference, that noises come from the bedroom would be heard", the primary judge noted that the victim's mother's statement contained the following: "we would ask [for the] door to stay open but I can recall times when [the] door was closed": *Porter (No 2)* at [177].

(b) After noting the victim's evidence concerning whether sexual offending occurred after the NRL Grand final (namely, that whilst he could not recall any sexual contact, "that's not to say it didn't happen") and the appellant's counsel's submission that "in a 'word-on-word' contest about the number and frequency of sexual encounters, 'matters of that ilk' point in favour of the appellant's account, or at least, makes it difficult to reject his account and to accept the [victim's] account beyond a reasonable doubt", the primary judge responded (at [189]):

> I disagree. In my view, it does not logically follow that the Court would reject the [victim's] overall account in light of that particular answer.

(c) After recounting the appellant's submission that the appellant "had a better and more detailed recollection than the [victim]", the primary judge responded (at [225]):

> I do not agree. I observed both the [victim] and the offender carefully in giving evidence. In my view, that submission of the offender is not borne out.

(d) The primary judge noted the appellant's submission that the circumstances in which the relationship ended (that is, where the appellant and the victim's family remained good friends) suggested that the "relationship was not based purely upon the satisfaction of the offender's wants or needs". Her Honour responded that this submission did "not greatly assist the Court in determining the disputed facts": *Porter (No 2)* at [226].

(e) In response to the appellant's submission that the appellant's account of desisting with penile-anal intercourse because the victim did not enjoy it was to be preferred to the victim's evidence that penile-anal intercourse continued until he rejected the appellant's advances in 2018, the primary judge stated "[t]his submission, in my view, ignores the change in age of the [victim]": *Porter (No 2)* at [220].

(f) The primary judge noted the submission that a WhatsApp exchange between the appellant and his friend in which the appellant described the victim as being "1 in 100 million" should be viewed as a reference

> to the appellant's sexual inexperience with children and close relationship with the victim, and that this tended to "add credence to the offender's evidence". The primary judge responded, "I am not persuaded that it adds any credence to the offender's evidence": *Porter (No 2)* at [233].

67 The primary judge also expressly rejected the submissions made on behalf of the appellant that the victim's evidence possessed "the hallmarks of recent invention" (at [199]), that the victim's evidence bore a degree of "semantic contortion" (at [202]), and that the victim's evidence that sexual activity occurred approximately 35 to 45 times was a "bald guess": *Porter (No 2)* at [210].

68 In addition, at various points in the summary, the primary judge responded to submissions made on behalf of the appellant concerning evidence which the primary judge considered to be taken out of context by extracting the relevant passages of the transcript of the evidence of the witness within their proper context: *Porter (No 2)* at [205], [208], [215] and [217].

69 Although the primary judge summarised the submissions made on behalf of the appellant at length, her Honour did not summarise the submissions made on behalf of the prosecutor. Rather, following her summary of the appellant's submissions, the primary judge immediately proceeded to her conclusion (*Porter (No 2)* at [237]-[266]). There is no dispute that the primary judge's findings in this conclusion were heavily drawn from the prosecutor's written submissions.

70 We have extracted the primary judge's findings under the heading "Conclusion" in Annexure A of this judgment. The passages in Annexure A which have a single underline are those which are relevantly identical to the prosecutor's submissions, but which were not attributed to the prosecutor. In those passages, only minor alterations were made to the text of the submissions (for example, the prosecutor's description of the victim as "impressive and honest" was changed to "honest and impressive"). The passages which have a double underline are those which are also relevantly identical to the prosecutor's written submissions, but which were attributed to the prosecutor. It is important to note the limited use which can be made of Annexure A. It is confined to making clear the nature and extent of the use of the prosecutor's written submissions at the point at which it occurred in the conclusion part of the primary judge's reasons. It does not contain important parts of the judgment which are not copied, such as the evidence summary and the responses to individual submissions: see [83] below.

71 As is apparent from Annexure A, paragraphs [237]-[257] of the findings under the heading "Conclusion" were substantially identical to various paragraphs contained in the prosecutor's written submissions dated 1 December 2021 and in the prosecutor's written submissions in reply dated 10 December 2021. The primary judge referred to the prosecutor's submissions in only a limited number of paragraphs ([240], [243], [248]-[249] and [257]). In

the remainder of these paragraphs in which the prosecutor's submissions were replicated, there is no indication of the fact that the text had been sourced from the prosecutor's submissions.

72 The remaining paragraphs of the judgment, [258]-[266], were not identical to the written submissions of either party. In this part of the judgment, the primary judge addressed the absence of evidence from another witness who had been referred to in the evidence ([258]-[259]), before returning to her findings as to the credibility of the victim and the appellant ([260]).

73 In the final paragraphs of the judgment, the primary judge reiterated that she had found the victim to be an "impressive witness", who gave "compelling" and "truthful" evidence (*Porter (No 2)* at [260]). Her Honour also recorded that she had "grave reservations" about the appellant's evidence. She considered that the appellant was attempting to "minimise" his own actions, and noted that there was "complete inconsistency" between what the appellant initially told the police in his record of interview and his evidence in court. Her Honour also again referred to the "significant inconsistencies" between the appellant's evidence and the evidence of the victim's mother and stepfather: *Porter (No 2)* at [260].

74 The primary judge concluded that there was no "reasonable possibility that the appellant's recollection is correct", and formally recorded that she did not accept the appellant's evidence: *Porter (No 2)* at [261].

75 Her Honour then recorded that she was satisfied beyond reasonable doubt of the account given by the victim "of 35 to 45 occasions", and indicated that she proposed to sentence the appellant on the basis that there were 35 occasions of sexual activity and that penile-anal penetration occurred on and from the second occasion of sexual activity (in the latter respect, noting the victim's evidence that penile-anal intercourse became "the new normal"): *Porter (No 2)* at [262].

76 Her Honour recorded that she was satisfied beyond reasonable doubt that the victim penetrated the appellant's anus with his penis on three occasions and that the other occasions of penile-anal sexual intercourse involved the appellant penetrating the victim's anus: *Porter (No 2)* at [263]. Her Honour was also satisfied beyond reasonable doubt that on one occasion when the appellant penetrated the victim's anus at the victim's home, the appellant ejaculated into the victim's anus without using a condom: *Porter (No 2)* at [263].

77 Finally, her Honour "underline[d]" her recognition of the principles in *Liberato v The Queen* [1985] HCA 66; (1985) 159 CLR 507, and again emphasised that she was satisfied beyond reasonable doubt of the victim's evidence, and the appellant's evidence did not give rise to a reasonable doubt: *Porter (No 2)* at [264]-[265].

Determination

78 It is clear from the authorities outlined above that whilst the unattributed replication of a party's submissions in a judicial decision is to be strongly discouraged, such copying does not, without more, vitiate a judgment.

79 The vice in the copying of a party's submissions in a judgment is not in plagiarism or the appropriation of a party's intellectual property. Accordingly,

determining whether a judgment has been vitiated by unattributed copying does not involve an assessment of the proportion of original material contained in the judge's reasons. Rather, the question to be asked is whether the copying is such that it should be inferred that the primary judge has not made an independent decision on the whole of the evidence and the law.

80 As the appellant submitted, some of the features of a judge's reasons which may be relevant to determining whether the reasons indicate that the judge made an independent and impartial decision will include:

(a) The nature of the proceedings being determined (for example, whether the proceedings are judicial or administrative, criminal or civil, final or interlocutory);

(b) The extent of the reproduction, including both its volume and its nature (for example, whether the material copied is of uncontested evidence or established authority, or is of the party's arguments and conclusions);

(c) Whether the adoption of a party's submissions was accompanied by an independent analysis of the evidence and/or the legal principles to be applied;

(d) Whether the judgment refers to the submissions of the unsuccessful party, and whether any aspects of the unsuccessful party's submissions were accepted; and

(e) Whether the judge edited parts of the submissions which had been copied.

81 Whether or not the copied material is attributed to its author is also relevant to this assessment. There is a qualitative difference between a judgment which cites portions (even extensive portions) of a party's submissions, and then indicates agreement with those submissions, and a judgment which adopts the submissions of a party as the Court's reasons without acknowledging the source of the material copied.

82 In particular, where a judge openly expresses agreement with the submissions of a party, there is a transparency in the reasoning that is entirely absent where the judge simply adopts a party's submission as their own reasoning. As Mr Game SC submitted on behalf of the appellant, where the copied material is not attributed, there is a "concealment" of the process by which the judgment was created. For this reason, where the copied portion of the judgment is not attributed, particularly careful attention will need to be given to the assessment of whether the judge has in fact made an independent decision on the whole of the evidence and the law.

83 As can be seen from Annexure A, a considerable portion of the primary judge's conclusions in the disputed facts judgment were copied from the prosecution's written submissions, without attribution. Nonetheless, as the authorities cited above make clear, where there are other sufficient indications in the judgment that the primary judge actively engaged with the evidence and the submissions of both parties, the judgment will not be set aside by reason of the fact of copying alone. The judgment will only be vitiated where the reasons are such that it should be inferred that they are not the product of the active application of an independent and impartial mind.

84 There are features of the reasons which are cause for concern. It is of concern that the judgment related to factual findings concerning the sentencing of an offender for grave criminal conduct, which carried a maximum penalty of imprisonment for 25 years. It is of concern that the extracts of the prosecution's submissions that were adopted by the primary judge related to findings of credibility. It is of concern that the primary judge adopted the prosecutor's adjectives, without attribution and so presenting them as arrived at independently, when describing the evidence of the victim and the appellant, and that the primary judge used the prosecutor's examples (and no others) when illustrating the reasons for her findings of credibility of each. It is of particular concern that the primary judge did not cite the prosecutor's submissions, but rather adopted the prosecutor's prose as her own, without attribution, in a large portion of the conclusion. Each of these matters have caused us to approach the judgment with considerable caution.

85 However, despite these matters, we do not consider that it should be inferred that the primary judge did not apply an independent mind to the resolution of the issues before her. It is necessary to read the judgment fairly, and as a whole: *Garay v The Queen (No 3)* [2023] ACTCA 2 at [150]. The structure of the judgment is not determinative, and the concluding paragraphs of the judgment cannot be read in isolation: *Garay (No 3)* at [150].

86 While a substantial part of the primary judge's conclusions were copied from the prosecution's written submissions, other significant aspects of the primary judge's reasoning were not. In particular, the primary judge accurately summarised all of the evidence that had been given in the disputed facts hearing, addressed the submissions made on behalf of the appellant in the course of her summary of those submissions and reiterated her final conclusions as to the credibility of the appellant and the victim.

87 Many of the primary judge's responses to the appellant's submissions were brief. In respect of some, this was because a brief response was all that was required. For example, the appellant's submission that the exchange between the offender and his friend (that the victim was "1 in a million") added credence to the appellant's account did not require much by way of rejection.

88 However, other responses should have been the subject of more explanation. Further, a number of the primary judge's responses to the appellant's submissions were less than compelling. For example, as Mr Game SC submitted, the primary judge's finding (at [253]) that the breaking of the trundle bed was "consistent with the sexual activity that the victim stated took place on multiple occasions in his bedroom" was not compelling evidence as to the frequency of the appellant's sexual abuse of the victim, particularly as the appellant's case was that sexual activity had occurred on 14 or 15 occasions. Similarly, a finding that the victim was "truthful" did not address the reliability of his estimate as to the frequency of the offending.

89 Nonetheless, a complaint of a failure to give reasons is not established by demonstrating that the reasons in fact provided were not convincing. Any such error in reasoning is properly addressed by a ground of appeal that alleges

factual or legal error in the judgment. The appellant has additionally made a complaint of this nature in respect of the disputed facts judgment in ground 2. That complaint has merit for the reasons outlined below.

90 In summary, there are aspects of the judgment which are of concern (notably, the nature of the proceedings, the form and extent of the copying, and the lack of attribution). Nevertheless, when read as a whole, and particularly in light of the primary judge's extensive analysis of the evidence, engagement with the offender's submissions and reiteration of her Honour's conclusions, the reasons sufficiently demonstrate that the primary judge gave independent and impartial consideration to the evidence and the issues. Accordingly, ground 1 should be dismissed.

Ground 2: Factual findings in relation to number of occasions of sexual activity

The parties' submissions

91 By his plea of guilty to Count 2, the appellant admitted that he was an adult, who had engaged in a "relationship" with a child, and that the "relationship" involved more than one sexual act. As noted above, in his evidence, the appellant further admitted that there had been 15 occasions of sexual activity, but denied that sexual activity had occurred on any further occasions.

92 The prosecution sought to establish, as a matter of aggravation, that the appellant had sexually abused the victim on 35 to 45 occasions. As noted above, the primary judge found that the sexual abuse had occurred on "at least" 35 occasions: *Porter (No 2)* at [252]. Her Honour took this finding into account when sentencing the appellant: *Porter (No 3)* at [29].

93 In this ground of appeal, the appellant submitted that it was not "reasonably open" on the evidence for the primary judge to find beyond reasonable doubt that there were at least 35 separate occasions of sexual activity. He submitted the primary judge could not be so satisfied because of the "inevitable imprecision" of the victim's evidence and the lack of independent evidentiary support for the victim's "guesstimate".

94 In response, counsel for the Director contended that a finding that sexual activity occurred "at least 35 times" was both open and "entirely correct", in light of the circumstances of the sexual relationship, the context for the victim's guesstimate, and the evidence of the victim, his mother and stepfather, and the appellant.

Standard of review

95 In *Stott v The Queen* [2021] ACTCA 18 at [27]-[40], this Court considered, but did not resolve, the standard of review to be applied to a challenge to a factual finding on an appeal against sentence, specifically, whether it is sufficient for an appellant to establish that there has been a factual error in the sense that the appellate court considers that a different factual finding should have been made, or whether it is necessary for the appellant to establish that the factual finding "was such that it was not reasonably open to the sentencing judge to make that finding" before the appellate court should intervene. It is also

unnecessary to resolve that issue in the present appeal. It is sufficient for the Court to determine the appeal ground as framed, which pleads that the impugned finding was "not open".

Determination

96 Consideration of this ground of appeal requires close attention to be given to the evidence in the disputed facts hearing.

97 In the EICI, investigating police asked the victim whether he recalled the last time that he was sexually abused. The victim responded "Um no, I can't remember the last time it happened". He then continued:

> I can't remember how many times it happened, and I can't remember the last time it happened. I remember the first time and that second and the time he um (indistinct) but, yeah. Yeah that was — that was about it.

98 Later in the EICI, investigating police asked the appellant to "guesstimate" how many times he had been sexually abused by the appellant:

> Q764: … If you were to guess — guesstimate — how many times it occurred over that three year period, do you reckon you could?
>
> A: Oh, I said — I said before it would have to be over thirty-five but now I'm thinking it would have to be more, probably about maybe forty-five times. It happened — it happened a lot.

99 In cross-examination, the victim explained that he arrived at this "guesstimate" by "thinking about how old I was and how many years I knew him and how many years after I first knew him that the offending started taking place, and also the amount of opportunities he had to abuse me".

100 As noted above, the appellant gave evidence that there had been sexual intercourse on much fewer occasions, but still on a substantial number of occasions that was not inherently inconsistent with the victim's evidence that it happened a lot. The appellant's evidence was that, in total, he engaged in sexual activity with the victim on 14 or 15 occasions.

101 The primary judge rejected the appellant's evidence as to the frequency of the sexual intercourse, and held that the victim's evidence was "compelling" and "truthful": *Porter (No 2)* at [260]. It was well open to the primary judge to make both findings. Indeed, on our review of the evidence, we would make the same findings.

102 However, a conclusion that the victim was a credible witness was not determinative of whether the victim's estimate of sexual intercourse having occurred on more than 35 occasions should be accepted. It was also necessary for the primary judge to assess the reliability of the victim's estimation. This required an analysis of the victim's evidence as to the specific occasions of sexual offending that he could recall, as well as the victim's broader recall of the appellant's opportunities to offend against him.

103 The victim gave evidence of the following nine specific incidents of sexual abuse:

(a) The first occasion, when the victim was sexually assaulted by the appellant in late November or early December 2015 at the appellant's house after a training session. This occasion involved the appellant

performing fellatio on the victim, making the victim perform fellatio on the appellant, and penetration of the victim's anus with a dildo.

(b) The second sexual assault, which occurred about a week after the first. This incident involved anal intercourse. The victim recalled that this incident occurred prior to 6 January 2016, but accepted that it may have occurred after 31 December 2015.

(c) The third sexual assault, which occurred approximately 9 days after the second sexual assault and also involved anal intercourse. On this occasion, the appellant encouraged the victim to penetrate him.

(d) Later the same night, the appellant had dinner at the victim's house and stayed over at the victim's house. Sexual intercourse occurred again in which the appellant anally penetrated the victim.

(e) An occasion on 6 January 2016, when the victim trained and went to play slot cars with the appellant and another person. The victim recalled that the appellant sexually assaulted him in his (the victim's) bedroom on this day.

(f) In April 2017, when the victim turned 14, he attended the appellant's house for his birthday, and they had sexual intercourse involving a plastic vagina which the appellant gifted to him, as well as anal intercourse. The appellant showed the victim his collection of sex toys.

(g) At some point after April 2017, when the victim was 14 or 15 years old, the appellant anally penetrated the victim at the victim's house and ejaculated inside him.

(h) Further to (c) above, an additional two occasions when the victim was encouraged to anally penetrate the appellant (another occasion at the appellant's house and once at his house).

104 There were other occasions where the victim's evidence was less certain. For example, although the victim had initially recalled that sexual activity had occurred on 31 December 2015 at the victim's house after the appellant had spent time kicking a ball with the appellant, the victim acknowledged in cross-examination that he was not sure about this occasion, explaining that it was "hard for [him] to recall specific dates and times".

105 Beyond these occasions, the victim's evidence as to the frequency of sexual offending was more general. The victim explained that "each time is very vague after the first one", and that after the second occasion (when the appellant first penetrated the victim's anus with his penis), anal penetration became "the new normal". His evidence as to the frequency of abuse after this time included the following:

> Whenever I would see him it would … happen frequently. So not every time. But most times.
>
> It happened a lot. Mainly at my house.
>
> A few times it happened twice a day.
>
> Most of the stuff at his house happened between 13 and 14 … [but] most of the events happened at my house.
>
> It wouldn't happen every time [the victim went to the appellant's house] but it happened pretty frequently.

> [Sexual intercourse occurred] not every time but most times [that he spent with the appellant].
>
> [Sexual offending] could have possibly happened on all of my birthdays. It has happened a lot of times.

106 As to opportunity, the victim gave evidence that the offending commenced in November or December 2015 (when the victim was 12 years old) and continued until 2018, at some point before September 2018 (when the victim was 15 years old).

107 The victim's evidence as to his contact with the appellant during this period was as follows:

(a) During "footy season", the appellant "didn't really come over", as he was "always doing other stuff". It was mainly in spring and summer that the offending occurred.

(b) In January each year, the appellant was on leave and trained the victim "most often", "sometimes twice a week". However, there was no set routine for the training.

(c) In early 2016, the victim suffered a knee injury. This limited the amount of training that the victim could do. However, the victim maintained that he continued recovery training with the appellant during this time.

(d) Sometime after 10 April 2017 (the victim's 14th birthday), the victim moved football clubs. After this time, sexual activity "was still happening, … but not as frequently".

(e) The victim estimated that he attended the appellant's house 25 times after his 14th birthday. However, the end date of this estimate was not clear, and in particular, it was unclear whether it included occasions after sexual activity ceased in September 2018, but before most contact between the victim and the appellant ceased in March 2020.

108 The victim's mother and stepfather also gave the following evidence which was relevant to the number of opportunities the appellant had to engage in offending against the victim:

(a) The victim's mother gave evidence that the appellant would stay at their house on a "weekly" basis "for a few months at a time". She also said that he would spend the victim's birthdays from age 12 to 16 (2015 to 2019) and Christmases (from 2016 to 2019) together with their family. She said that she asked for the bedroom door to remain open, but there were occasions when it was closed.

(b) The victim's stepfather gave evidence estimating that the appellant slept at the house between 20 and 30 times during the period that the victim was 13 to 15 years old.

109 As can be seen from the above, other than the nine occasions of sexual offending which the victim specifically recalled, the victim's evidence of the offending was general in nature.

110 The evidence, even taken at its highest, did not support a finding beyond reasonable doubt that the appellant sexually abused the victim on at least 35 occasions. There was imprecision in the victim's evidence when describing

the offending as occurring on "most" occasions when the appellant slept over, in particular, whether it meant "more often than not", or "almost always". The evidence does not permit any reliable assessment to be made of the relative frequency of the offending.

111 Importantly, as can be seen from the above, the victim's evidence as to the number of times that the appellant slept over was also imprecise. Whilst the appellant slept over regularly for weeks at a time over the period from December 2015 to September 2018, it is clear that there were long periods where the appellant did not have contact with the victim. The victim's evidence did not permit a reliable estimation to be made of the opportunities for offending.

112 Nor, contrary to the primary judge's finding, did other evidence "support" the victim's estimation that he was sexually abused on 35 to 45 occasions: cf *Porter (No 2)* at [252]. The victim's stepfather's evidence was that the appellant slept over at the victim's house on as few as 20 occasions. The victim's mother's evidence was that the appellant slept over weekly "for a few months at a time". There was also no evidence from the victim or his parents as to how frequently the victim went to the appellant's house, adding to the inevitable imprecision of any estimate as to the number of occasions of sexual abuse.

113 In our view, all that can be concluded is that the appellant sexually abused the victim considerably more times than the 15 occasions acknowledged by the appellant. Whilst it is probable and even quite likely that the sexual abuse occurred on 35 occasions or more, it is not possible to conclude beyond reasonable doubt that the appellant sexually abused the victim on 35 occasions or more.

114 It must be emphasised that the lack of imprecision in the victim's recall does not reflect adversely on the victim's honesty. As counsel for the respondent submitted in her written submissions on the appeal, it is common for children who are regularly abused over a lengthy period to have difficulty providing information as to the specific dates or other identifying information as to particular offences: see *Royal Commission into Institutional Responses to Child Sexual Abuse* (Criminal Justice Report, 2017) Pts III-VI, 10. Indeed, it was in recognition of these difficulties that s 56 of the *Crimes Act* was enacted and amended: Presentation Speech, *Royal Commission Criminal Justice Legislation Amendment Bill 2020* (ACT) (Hansard, 2 July 2020, p 1472). The gravamen of the offending under s 56 of the *Crimes Act* is in the acute and repeated breach of trust in the relationship, rather than on the specific number of offences committed. The assessment of criminality under s 56 is more qualitative than quantitative.

115 In view of the purpose for which s 56 of the *Crimes Act* was enacted, it may be doubted that the task of engaging in a calculation of precisely how many occasions sexual offending had occurred was necessary, or particularly useful, in determining the sentence to be imposed. In these circumstances, it may be that relatively little turns on the difference between the finding made by the primary judge, and the finding that we consider to be correct on the evidence.

116 Nonetheless, once the task of determining the number of occasions that sexual offending occurred was embarked upon, it was necessary for the primary judge to make findings not only as to the victim's credibility, but also the reliability and accuracy of his estimate, and thereby its probative effect in relation to sentence determination.

117 For the reasons outlined above, the primary judge's finding that sexual offending had occurred on at least 35 occasions was in error, and that error was material to the sentence imposed.

118 Accordingly, it is necessary to resentence the appellant in respect of Count 2. The appellant accepted that this was a task that can be performed by this Court: see similarly *Stott* at [39].

Resentence for Count 2

119 In resentencing the appellant for Count 2, we have assessed the nature and circumstances of the offending on the basis set out above, namely, that whilst the appellant sexually offended against the victim on considerably more than 15 occasions, it is not possible to conclude beyond reasonable doubt that the offending occurred on 35 or more occasions.

120 However, the offending remains grave in nature. The appellant preyed upon the victim to satisfy his own sexual desires over an extended period of time. The appellant inveigled himself into the victim's family, becoming not only his private coach, but also a trusted family friend. The appellant was considerably older than the victim, and had significant power over him by reason of his position as the victim's private coach.

121 The offending involved repeated anal penetration, both with objects and penile-anal penetration. The appellant did not use a condom, risking the transmission of a sexually transmitted disease. The offending occurred in the victim's home on numerous occasions.

122 Although we cannot reach a conclusion beyond reasonable doubt as to exactly how many occasions the appellant sexually assaulted the victim, it cannot be doubted that the offending was persistent, sustained and on any view, numerically significant in the sense of not being infrequent or episodic. The offending occurred over a lengthy period, from when the victim was 12 years old to 15 years old.

123 As the primary judge noted, the observations of the Victorian Court of Appeal in *Director of Public Prosecutions (Vic) v DDJ* [2009] VSCA 115; (2009) 22 VR 444 at [32] were particularly apposite to the offending:

> … it is the persistence of the sexual relationship over time which is at the heart of the offence. The repetition of the sexual abuse is likely to heighten the victim's fear that the abuse will occur again, and to increase the damage which he or she suffers. Equally the repetition is likely to make the offender progressively more aware of the effect the abuse is having on the victim. In each of these respects, culpability is heightened.

124 As the victim impact statements made clear, the appellant's offending has had a "significant and long-lasting impact", both upon the victim and his wider

family: *Porter (No 3)* at [91]. The sentence to be imposed must recognise the harm done to the victim and to the broader community: s 7 of the *Crimes (Sentencing) Act 2005* (ACT).

125 We have proceeded on the basis of the primary judge's unchallenged findings as to the appellant's subjective case, namely:

(i) The appellant's good character should be given no weight because the "offender's good character and reputation as a coach" enabled him to gain his position as the victim's personal coach, which facilitated the offending: *Porter (No 3)* at [212]-[213], referring to s 34A of the *Crimes (Sentencing) Act*.

(ii) The appellant's prospects of rehabilitation are "guarded": *Porter (No 3)* at [302].

(iii) The adverse media coverage concerning the charges was not such as to justify a reduction of the sentence on the basis of extra curial punishment: *Porter (No 3)* at [273]-[280].

(iv) The appellant's depression "may mean that a given sentence will weigh more heavily on the [appellant] than it would on a person in normal health" and may create a "serious risk of imprisonment having a significant adverse effect on the [appellant's] mental health": see *Porter (No 3)* at [188], citing *R v Verdins* [2007] VSCA 102; (2007) 16 VR 269 at [32].

(v) The appellant's moral culpability may be reduced "to a limited extent" by reason of his paedophilic disorder, but it was "not significantly ameliorated". The disorder did not ameliorate the need for general deterrence, but heightens the importance of specific deterrence (noting, in this respect, the treatment sought by the offender): *Porter (No 3)* at [193]-[196].

(vi) The admissions made by the appellant during the execution of a search warrant were not such as to justify a discount under s 35A of the *Crimes (Sentencing) Act*: *Porter (No 3)* at [252].

126 The primary judge gave "some limited weight" to remorse in respect of each of the offences: *Porter (No 3)* at [200]. Although this finding was challenged by the appellant in respect of Count 3, the appellant did not appear to challenge this finding in respect of Count 2.

127 When first interviewed, the appellant denied having any sexual relationship with the victim. Although he admitted having sexually offended against the victim in his evidence in the disputed facts hearing, the primary judge found that the appellant's evidence minimised the extent of the offending: *Porter (No 2)* at [260]. That finding was not challenged by the appellant in this ground of appeal. In any event, as noted above, we agree with the primary judge's assessment of the appellant's evidence.

128 The primary judge appears to have concluded that the offender's minimisation of the offending may not have been deliberate: *Porter (No 2)* at [260] ("the offender is deceiving himself"). Even if the minimisation were not deliberate, it speaks to a lack of insight and acceptance of the appellant's

responsibility for the offending. In these circumstances, we have, like the primary judge, given little weight to the appellant's remorse in respect of this count.

129 The primary judge afforded a discount of 10% for the appellant's plea of guilty in respect of Count 2, because the victim was required to give evidence at the disputed facts hearing: *Porter (No 3)* at [236]. Noting the factual findings made above, but also bearing in mind that the appellant's account in the disputed facts hearing has not been accepted, we consider that a discount of 15% is appropriate.

130 Taking into account each of the above matters and the purposes of sentencing as set out in s 7 of the *Crimes (Sentencing) Act*, we will impose a sentence of 14 years' imprisonment, to be reduced by 15% to 11 years, 10 months and 23 days' imprisonment.

Ground 3: Manifest excess (Count 3)

Introduction

131 The appellant submits that the sentence imposed in respect of Count 3, the grooming of Riley Priestley contrary to s 66(1)(b) of the *Crimes Act*, was manifestly excessive in all of the circumstances. The maximum penalty for an offence contrary to s 66(1)(b) is 7 years' imprisonment.

132 The primary judge imposed a sentence of 3 years' imprisonment for Count 3. Prior to the 20% discount for the offender's early guilty plea, the notional starting point for this sentence was 3 years and 9 months' imprisonment. The sentence imposed for Count 3 was substantially accumulated on Count 1, increasing the overall sentence by 2 years and 4 months.

133 The principles in relation to manifest excess are well established, and were summarised by this Court in *Hawker v The Queen* [2020] ACTCA 40 at [14]:

> The principles in relation to assessing whether a sentence is manifestly excessive are well established. Appellate intervention is not justified simply because an appellate court may have a different view as to the appropriate sentence than the sentencing judge: *Lowndes v The Queen* [1999] HCA 29; 195 CLR 665 at [15]; *Markarian v The Queen* [2005] HCA 25; 228 CLR 357 at [28], or where the result arrived at below is markedly different from other sentences that have been imposed in other cases: *Wong v The Queen* [2001] HCA 64; 207 CLR 584 (*Wong*) at [58]; *Hili v The Queen; Jones v The Queen* [2010] HCA 45; 242 CLR 520 (*Hili*) at [58]. Rather, the appellant must demonstrate that the sentence is such that it may be inferred that there was some misapplication of principle in the sentencing of the appellant, even though when and how is not apparent from the statement of the sentencing judge's reasons: *Wong* at [58]; *Hili* at [58]-[59], [75]-[76].

See also *Tracey v The Queen* [2020] ACTCA 51 at [37]-[38].

The nature and circumstances of the offending

134 The primary judge correctly recognised that "references to low, mid-range and high-range are unlikely to be helpful in this jurisdiction", and that "it is preferable for a sentencing judge to confine themselves to identifying features of the case that inform the objective seriousness of that case": *Porter (No 3)*,

citing *R v Toumo'ua* [2017] ACTCA 9; (2017) 12 ACTLR 103 at [24]. As the appellant submitted, that observation has added force in respect of a "protean" offence such as grooming.

135 Despite this observation, the primary judge then went on to assess the objective seriousness of the offending in respect of Count 3 as "above mid-range". Her Honour explained that this was necessary because of the structure of the offender's submissions. It is unclear why the structure of the offender's submissions rendered it necessary to engage in this assessment.

136 On this appeal, we do not consider it appropriate to classify the objective seriousness of the offending in respect of a hypothetical range. Rather, we consider it more appropriate to identify features of the offending which inform the "nature and circumstances of the offending": see s 33(1)(a) of the *Crimes (Sentencing) Act*.

137 In the present case, these included the following:

(a) The victim was 12 years old at the time that the offending commenced. This age is within the lower to middle range of the offending encompassed by the provision (namely, 10 years to 16 years). The appellant was aware of the victim's age.

(b) There was a significant age disparity between the appellant and the victim. The appellant was 49 years old at the time of the offending.

(c) The period of grooming was approximately three months (the first training session was on 24 March, and it appears that the grooming continued until the appellant's arrest on 27 June 2020). The grooming occurred regularly, increasing from initially once per week for an hour, to twice per week for approximately two hours.

(d) The appellant's use of his coaching position involved a significant breach of trust. The grooming involved the use of the appellant's position and pre-existing contact with the victim to initiate a personal relationship.

(e) As counsel for the prosecutor submitted, there was also an "element of manipulation" in the appellant isolating the victim on a field not visible from the road during their sessions, and warning the victim's parents not to tell anyone about the sessions due to COVID-19 restrictions.

138 In assessing the nature and circumstances of the offence, it is also important to bear in mind that the offending that is covered by s 66(1)(b) of the *Crimes Act* is wide. It encompasses not only sexual conduct — such as sexualised conversations, the showing of pornographic material to the child and/or touching of the child — but also conduct that is "otherwise benign", but which is engaged in "with the intention of making it more likely that the young person would commit or take part in, or watch someone else taking part in, an act of a sexual nature": see further Presentation Speech, *Crimes Legislation Amendment Bill 2017 (No 2)* (ACT) (Hansard, 30 November 2017, p 5388).

139 In the present case, the evidence of the appellant's intent was established in text messages between the offender and a friend (see at [21] above) which "demonstrated that the appellant was interested in Riley Priestley and was seeking to utilise his time with Riley to groom him for potential sexual

conduct": *Porter (No 3)* at [41]. Whilst the appellant's intent was clearly demonstrated by these text messages (and the appellant's plea of guilty), the offending in the present case was less serious than offending that involves sexualised conduct towards a young person, or which involves exposing a child victim to sexual or indecent material.

Subjective factors

140 In assessing this ground of appeal, we have considered the sentence on the basis of the primary judge's unchallenged findings as to the appellant's subjective case, which are set out at [125] above.

141 Further to those findings, the appellant challenged the primary judge's finding that remorse should be given "limited" weight in respect of Count 3. That finding was as follows:

> The Courts have stated on many occasions that statements made by an offender which are not supported by the offender giving sworn evidence should be treated with considerable caution: see *Butters v R* at [18], *Fusimalohi v The Queen* at [8], *Alvares v R* at [44], *Mun v R* at [36], and *R v Mumberson* at [38]. Courts do not simply disregard evidence of remorse if the offender does not go into the witness box and give evidence concerning remorse. It is, however, relevant to the weight of the evidence: *Butters* at [18], *Mun* at [37], and *Van Zwam v R* at [6] and [110]. These cases can be contrasted with *Imbornone v R* and *R v Harrison*, where the sentencing judge, in each case, was not in error in rejecting the offender's self-serving untested statements as evidence of remorse.
>
> Accordingly, I accept that the offender has made statements of remorse to the PSR authors and his psychological treatment team and that his application to revoke bail provides some recognition of the gravity of his offending conduct. I can therefore ascribe some weight to the remorse expressed. I note that the offender has expressed some belated regret for putting issues to proof in the disputed facts hearing through cross-examination of the victim. I take the foregoing combination of matters into account in assessing remorse and therefore I ascribe some limited weight to remorse.

Porter (No 3) at [199]-[200], citations omitted.

142 The appellant contended that greater weight should have been given to the remorse shown, noting that:

(a) The appellant pleaded guilty to the grooming offence at an early opportunity.

(b) The appellant did not dispute the facts nor did he require the victim for the grooming offence for cross-examination.

(c) The appellant had voluntarily sought and participated in treatment for his paedophilic disorder where that condition had contributed to his offending.

(d) The author of the pre-sentence report concluded that the appellant had demonstrated "significant remorse" and victim empathy.

(e) Mr Newton, forensic psychologist, concluded that the appellant is developing insight and remorse into his offending.

143 It appears that the primary judge may have limited the weight to be given to remorse because the appellant did not give sworn evidence as to remorse:

Porter (No 3) at [199], set out at [141] above. Whilst a "self serving" untested statement of an offender which is not supported by sworn evidence must sometimes be treated with caution, where the statement is corroborated by other evidence before the court, the weight to be given to the statement should not be limited only by reason of the fact that the statement was not tested.

144 In assessing whether the sentence imposed fell within the bounds of the sentencing discretion we are not bound to afford the same weight to an individual factor as the primary judge.

145 In our view, the weight to be given to remorse in the present case should not be limited by the absence of sworn evidence. In assessing the evidence of remorse, we have taken into account the matters listed at [142] above. However, we have also taken account of the evidence of the appellant's treating psychologist, Mr Burrows, that the appellant "demonstrated a limited understanding of the destructive impact of his actions". We have given moderate weight to the appellant's remorse in respect of the offending the subject of Count 3.

Comparative cases

146 There are no comparative cases concerning offences committed under the current s 66(1)(b) of the *Crimes Act* in this jurisdiction.

147 The primary judge referred to a number of comparative cases from New South Wales concerning similar offences: *Porter (No 3)* at [267]. As her Honour correctly observed, those cases concerned an offence which carries a maximum penalty which is almost double the maximum penalty in this jurisdiction, and which also required proof of additional elements. Those decisions are of no guidance in assessing whether the sentence imposed was manifestly excessive.

Plea of guilty

148 The primary judge afforded the appellant a 20% discount in relation to his plea of guilty in respect of Count 3, accepting that the plea was "entered at an early (but not the earliest) stage of proceedings and [was] of significant utilitarian value": *Porter (No 3)* at [228]. This finding was not challenged by either party and will be applied in our consideration of this ground.

Conclusion

149 There can be no question that the offending in the present case was serious. As seen in Riley's victim impact statement, offences of grooming have the potential to cause serious harm to children, which may be grave and long lasting: see *R v Johnston* [2020] ACTSC 46 at [16]. In particular, even where the grooming does not result in an offence of sexual assault, the offending may increase the vulnerability of the child and cause a damaging loss of the capacity for the victim to trust people: *Adamson v The Queen* [2015] VSCA 194; (2015) 47 VR 268 at [47]-[49]. In the present case, the gravity of the offending was heightened by the breach of trust occasioned by the appellant's position as the victim's private coach.

150 However, it must also be borne in mind that the maximum penalty (which is the guidepost against which the sentence must be assessed) in this jurisdiction is

imprisonment for 7 years. Bearing in mind this maximum penalty and the wide range of offending which may be captured by this offence (see at [138] above), whilst giving full weight to the recognition of the harm caused and the need for general and specific deterrence, we consider that a starting point of imprisonment for 3 years and 9 months was manifestly excessive.

151 On resentence, we will impose a starting point of imprisonment for 2 years, which, following a 20% discount for the early plea, will result in a term of imprisonment of 1 year, 7 months and 6 days.

Totality

152 The sentences imposed for Counts 1 and 4 were not challenged. However, as we are imposing new sentences for Counts 2 and 3, it will be necessary to reconsider questions of totality for all four charges.

153 We have considered the issues of concurrence and accumulation in accordance with the principles set out in *O'Brien v The Queen* [2015] ACTCA 47; (2015) 19 ACTLR 244 and *R v Gommeson* [2014] NSWCCA 159; (2014) 243 A Crim R 534 at [100]-[116]. In particular, whilst we have been careful to impose an overall sentence that is "just and appropriate" for all of the offences (*O'Brien* at [26]), we have borne carefully in mind that the offences were committed against multiple child victims, and that the overall sentence must reflect the harm suffered by each of the victims: *O'Brien* at [26(c)]; *Benn v The King* [2023] NSWCCA 24 at [183] and *Gommeson* at [100], [106] and [114].

154 In resentencing the appellant, the Court must also redetermine the appropriate non-parole period to be imposed. The primary judge imposed a non-parole period that was 62.5% of the head sentence. In redetermining the non-parole period to be imposed, we have borne in mind that "[t]here is no mathematical formula by which the length of a non-parole period, or its proportion to the head sentence, is fixed", and that "the actual period of full-time imprisonment will often be more important than its mathematical relationship with the head sentence": *R v Ruwhiu* [2023] ACTCA 18 at [112]-[113]. The application of these principles in the present case leads to a ratio that is higher (although not significantly higher) than that imposed by the primary judge.

155 The sentences to be imposed (following discount) will be as follows:

(a) **Count 2** (CC2020/7714) — 11 years, 10 months and 23 days' imprisonment, commencing on 18 November 2021 and expiring on 10 October 2033.

(b) **Count 1** (CC2020/11987) — 3 years and 4 months' imprisonment, commencing on 11 January 2033 and expiring on 10 May 2036.

(c) **Count 3** (CC2020/13262) — 1 year, 7 months and 6 days' imprisonment, commencing on 12 September 2035 and expiring on 17 April 2037.

(d) **Count 4** (CC2020/11989) — 2 years' imprisonment, commencing on 18 November 2036 and expiring on 17 November 2038.

156 The total effective sentence is imprisonment for 17 years. The overall non-parole period to be imposed is 11 years' imprisonment.

Orders

157 For the above reasons, the following orders are made:

(1) Leave to appeal is granted.

(2) The appeal is allowed.

(3) The appellant is resentenced to a total effective sentence of 17 years' imprisonment, made up of the following four individual sentences:

(a) For the offence of using a child under 12 years of age to produce child exploitation material (CAN2020/11987), the appellant is convicted and sentenced to 3 years and 4 months' imprisonment, commencing on 11 January 2033 and expiring on 10 May 2036.

(b) For the offence of engaging in a sexual relationship with a child under special care (CAN2020/7714), the appellant is convicted and sentenced to 11 years, 10 months and 23 days' imprisonment, commencing on 18 November 2021 and expiring on 10 October 2033.

(c) For the offence of grooming a young person (CAN2020/13262), the appellant is convicted and sentenced to 1 year, 7 months and 6 days' imprisonment, commencing on 12 September 2035 and expiring on 17 April 2037.

(d) For the offence of possessing child exploitation material (CAN2020/11989), the appellant is convicted and sentenced to 2 years' imprisonment, commencing on 18 November 2036 and expiring on 17 November 2038.

(4) The overall non-parole period will be 11 years imprisonment, commencing on 18 November 2021 and expiring on 17 November 2032.

Appeal allowed

Solicitors for the appellant: *Hugo Law Group*.

Solicitors for the respondent: *ACT Director of Public Prosecutions*.

RICHARD DAVIES

Annexure A

Porter v The Queen [2024] ACTCA 9

Conclusion

237. In my view, the complainant presented as an honest and impressive witness, who did his best to recall undoubtedly traumatic events from his childhood and who made appropriate concessions to propositions put to him by counsel for the offender.

238. For example, he agreed that he mainly saw the offender during the summer months, outside of the football playing season, and that it was mainly in the summer months that the offender stayed over at his family home. He also agreed that he was injured throughout the 2016 season, although he disputed that he saw less of the offender due to this, stating that he was involved in "ongoing recovery".

239. Although he did not remember the exact dates, the complainant also agreed with counsel for the offender's proposition that there were a number of occasions when the complainant and his family attended movies, and other events, with the offender.

240. In terms of the issues in dispute, counsel for the prosecution submitted that the complainant's answers in cross-examination were consistent with his evidence-in-chief. I agree. This is particularly so, in terms of the numbers of occasions that the offender engaged in sexual activity with the complainant, and the number of occasions that sexual activity included penile-anal intercourse.

241. In terms of the number of times sexual activity took place between himself and the offender, the complainant maintained that his answer in his EICI was accurate (being approximately 35 to 45 times), explaining that he came to his "guesstimation" by considering factors such as how old he was at the time, and the number of opportunities the offender had to abuse him.

Annexure A — continued

242. The complainant's evidence, that penile-anal intercourse was part of the ongoing activity from the second time it occurred, and that the nature of the sexual activity revolved around what the offender, not what the complainant, wanted, is wholly consistent with the power imbalance that existed in this unlawful sexual relationship between the complainant and the offender.

243. The prosecution submitted that the offender gave untruthful evidence about his contact with the complainant so as to minimise the opportunities to engage in sexual activity to align with how many occasions the offender stated sexual activity occurred. In my view, there is force to this submission.

244. The offender, in his evidence, stated that the offender spent the night at the complainant's house approximately 15 times over three consecutive summers.

245. In my view, the offender's evidence as to how many times he stayed at the complainant's house is an attempt to minimise the number of opportunities he had to engage in sexual activity. It is at odds with the undisputed evidence of the complainant's stepfather that the offender slept at their house about 20 to 30 times.

246. Another example of the offender minimising contact with the complainant was his evidence that, after the complainant's move to play AFL for Queanbeyan in 2017, he did not engage in any personal training with the complainant. This is at odds with, again, the evidence of the complainant's stepfather, that the offender continued to have private training sessions with the complainant after his move to the Queanbeyan club.

247. The offender, in his evidence, stated that he had sex with the complainant about 14 or 15 times and that the majority of this activity occurred in "the two periods of summer training (2015/2016 and 2016/2017). On his own evidence, the offender engaged in sexual activity with the complainant in the summer of 2017/2018 on at least three occasions, as well as on the Queen's Birthday of 2018, and once in between (making five occasions total) (T99.27-36).

Annexure A — continued

248. With the majority of the occasions occurring in the summers of 2015/2016 and 2016/2017, as well as the five occasions listed above, and other occasions stated by the offender during the course of the football seasons, counsel for the prosecution submitted that the complainant's estimate of about 35 to 45 times is credible and realistic on the evidence. Again, there is forensic force to this submission.

249. Further, the undisputed evidence of the complainant's mother is consistent with the complainant's evidence. Similarly, it was submitted, the offender's acceptance of the complainant's general description of the sexual activity, including the regular and frequent use by the offender of dildos to penetrate the complainant's anus, from the very first occasion, is consistent with the complainant's evidence.

250. The complainant gave evidence that penile-anal intercourse was part of their ongoing activity from the second time that it occurred, and that the nature of their sexual activities revolved around what the offender wanted, not what the complainant wanted.

251. As stated earlier, the complainant's evidence is wholly consistent with the power imbalance that exists in an unlawful sexual relationship between a young boy and a mature man, between the complainant and the offender.

252. In my view, the evidence supports the complainant's version of events, that the offender engaged in sexual activity with him on at least 35 occasions and that each occasion, bar the first, involved penile-anal intercourse as part of the sexual activity engaged in thereafter (Q620A of the complainant's EICI).

253. The breaking of the trundle bed in the complainant's bedroom is consistent with the sexual activity that the complainant stated took place on multiple occasions in his bedroom. It is also consistent with the undisputed evidence of the complainant's mother and stepfather, who note in their statements the breaking of the trundle bed.

Annexure A — continued

254. It is not accurate to describe the complainant's account of the sexual activity that occurred on his 14th birthday as "brief and generic" compared to the offender's account.

255. It is not accurate to state that the complainant accepted in cross-examination that he and the offender went to see "The Force Awakens" on 4 February 2016. The complainant agreed that he saw this movie with the offender, but was consistent in his evidence that he was not sure of the date.

256. It is not accurate to describe the complainant's evidence that sexual activity occurred every time the offender stayed at the complainant's home in contrast to his answers in cross-examination. The complainant stated in his EICI that sexual activity occurred "*Um, whenever he came over to stay, like, or came over to play board games*" (Q758A). The use of the word "whenever" does not necessarily imply that the complainant was asserting that sexual activity occurred every time the offender stayed over, and should be read in context with his evidence (for example at Q594A Q620A, Q660A, Q737A and Q744A).

257. I note that the prosecution conceded that there is no evidential basis upon which to place the sexual activity that occurred in the complainant's home as the "evening or early the next morning". This was, however, an error of the summary of the complainant's evidence and does not reflect on the court's assessment of the complainant's evidence.

258. There is no evidence from Caleb Parker. As referred to in the evidence, he was one of the complainant's "idols". In cross-examination it was put to the complainant that when police spoke to Caleb Parker he made no complaint of any sexual misconduct concerning the offender. I therefore cannot and do not make a finding whatsoever concerning the offender's activities with Caleb Parker. There is no evidence.

Annexure A — continued

259. Nevertheless, I am persuaded that before the first instance of sexual activity with the complainant, the offender discussed with the complainant how the offender had made Caleb Parker "feel good" about himself. The offender confirmed in cross-examination that this conversation had taken place but stated that the reference to making Caleb Parker "feel good" about himself was with regards "to his footy career and where he progressed to". On the complainant's evidence, the offender had said that to the complainant prior to the first occasion that the offender had engaged in activities of a sexual nature with the complainant. That is, referring to, or implying, having undertaken sexual activities with Caleb Parker (Q30A, Q223A, Q240A, Q248A, Q253A-Q257A). The complainant rejected in cross-examination that the reference to sexual activities was an embellishment (T80.25-30). I find beyond reasonable doubt that the reference to Caleb Parker prior to the first occasion was part of the sexual grooming the offender undertook of the complainant. I am satisfied beyond reasonable doubt of the complainant's evidence in this regard, that is, that the offender referred to making Caleb Parker "feel good" and that the offender "hoped he could do the same" for the complainant, prior to walking the complainant to his bedroom.

260. As I observed at the outset, I found the complainant to be an impressive witness. His evidence was compelling. In my view, he gave truthful evidence and was not undermined in cross-examination as discussed above. I have grave reservations about the offender's evidence. The impression that I gained from analysing his evidence in the context of all the evidence is that the offender is deceiving himself as to what occurred and attempting in that way to minimise his own actions. It should be noted that there is complete inconsistency between what the offender initially told the police and his evidence before me in court. Further there are significant inconsistencies referred to above between the evidence of the offender on the one hand and the evidence of the complainant's mother and stepfather on the other.

Annexure A — continued

261. I do not consider that there is a reasonable possibility that the offender's recollection is correct as I do not accept the offender's evidence for the reasons outlined above.

262. I am satisfied beyond reasonable doubt of the account given by the complainant of 35 to 45 occasions. For the purposes of this factfinding exercise, I propose to sentence on the basis that there were 35 occasions of sexual activity and that penile-anal penetration occurred after the first occasion of sexual activity, that is, from the second occasion. I have formed this view taking into account the complainant's evidence concerning the "new normal" after the first occasion of penile-anal intercourse (Q620A of the complainant's EICI).

263. I am satisfied beyond reasonable doubt that the complainant penetrated the offender's anus with his penis on three occasions and the other occasions of penile-anal sexual intercourse involved the offender penetrating the complainant's anus. I am also satisfied that on one occasion where the offender was penetrating the complainant's anus at the complainant's home, the offender ejaculated into the complainant's anus, without the use of a condom.

264. It is important that I underline that the issue is not a choice between two inconsistent versions. In coming to my findings, I have taken into account *Liberato v The Queen* (1985) 159 CLR 507 to the effect that even if I prefer the evidence of the prosecution, I should not make that finding unless I am satisfied beyond reasonable doubt of the truth of that evidence. I cannot find an issue against an accused if that evidence gives rise to a reasonable doubt. The evidence of the offender has not given rise to a reasonable doubt.

265. I am satisfied beyond reasonable doubt of the complainant's evidence. I note that it has been described in *R v Johnson* [2015] SASCFC 170 at [2] as a "perverse paradox that the more extensive the sexual exploitation of a child, the more difficult it can be proving the offence": see also the Explanatory Statement to the Royal Commission Criminal Justice Legislation Amendment Bill 2020 (ACT), which introduced the current form of s 56 of the *Crimes Act*. There is no such difficulty in this case.

266. The prosecution case is proven beyond reasonable doubt.

SUPREME COURT OF THE AUSTRALIAN CAPITAL TERRITORY

Hicks (a pseudonym) v Director of Public Prosecutions (ACT) (No 2)

[2023] ACTCA 34

Baker, Taylor and Bromwich JJ

16, 28 August 2023

Criminal Law — Inciting another to procure the commission of an offence — Whether offence known to law — Whether legislative amendments overcome decision in R v Holliday [2017] HCA 35; (2017) 260 CLR 650 — Criminal Code 2002 (ACT), ss 45, 47.

Statutes — Interpretation — Consideration of extrinsic matters — Explanatory Statement and Presentation Speech — Whether Parliament's intention clear — Legislation Act 2001 (ACT), ss 138, 140.

Section 47 of the *Criminal Code 2002* (ACT) provides, *inter alia*:

> **47 Incitement**
>
> (1) If a person urges the commission of an offence (the offence incited), the person commits the offence of incitement.
>
> Maximum penalty: …
>
> (2) A person also commits the offence of incitement if the person urges another person to aid, abet, counsel, procure, be knowingly concerned in or a party to, the commission of an offence (the offence incited) by someone else.
>
> (3) However, the person commits the offence of incitement only if the person intends that the offence incited be committed.
>
> (4) Despite subsection (3), any special liability provisions that apply to an offence apply also to the offence of incitement to commit the offence.
>
> (5) A person may be found guilty of the offence of incitement —
>
> (a) even if it was impossible to commit the offence incited; and
>
> (b) whether or not the offence incited was committed.
>
> (6) Any defence, procedure, limitation or qualifying provision applying to an offence applies to the offence of incitement in relation to the offence.

Section 45 of the *Criminal Code* provides, *inter alia*:

45 Complicity and common purpose

(1) A person is taken to have committed an offence if the person aids, abets, counsels, procures, or is knowingly concerned in or a party to, the commission of the offence by someone else.

(2) However, the person commits the offence because of this section only if —

(a) either —

(i) the person's conduct in fact aids, abets, counsels, or procures the commission of the offence by the other person; or

(ii) as a result of the person's conduct, the person in fact is knowingly concerned in or a party to the commission of the offence by the other person; and

(b) when carrying out the conduct, the person either —

(i) intends the conduct to aid, abet, counsel, procure, or result in the person being knowingly concerned in or a party to, the commission of any offence (including its fault elements) of the type committed by the other person; or

(ii) intends the conduct to aid, abet, counsel, procure, or result in the person being knowingly concerned in or a party to, the commission of an offence by the other person and is reckless about the commission of the offence (including its fault elements) in fact committed by the other person.

(3) To remove any doubt, the person is taken to have committed the offence only if the other person commits the offence.

(4) Despite subsection (2), any special liability provisions that apply to an offence apply also to the offence of aiding, abetting, counselling, procuring, or being knowingly concerned in or a party to, the commission of the offence.

(5) A person must not be found guilty of aiding, abetting, counselling, procuring, or being knowingly concerned in or a party to, the commission of an offence if, before the offence was committed, the person —

(a) ended the person's involvement; and

(b) took all reasonable steps to prevent the commission of the offence.

(6) A person may be found guilty of aiding, abetting, counselling, procuring, or being knowingly concerned in or a party to, the commission of an offence even if the person who committed the offence is not prosecuted or found guilty.

(7) To remove any doubt, if a person is taken to have committed an offence because of this section, the offence is punishable as if, apart from the operation of this section, the person had committed the offence.

(8) If the trier of fact is satisfied beyond reasonable doubt that a defendant committed an offence because of this section or

> otherwise than because of this section but cannot decide which, the trier of fact may nevertheless find the defendant guilty of the offence.

The applicant was charged with five offences including counts 1 and 2 on the indictment which each alleged the applicant incited another to procure the offence of murder, contrary to s 47 of the *Criminal Code*. The prosecution case was that the applicant posted on a forum on a "murder for hire" website on the dark web that she was willing to pay $20,000 for the hire of a person to murder her parents. The prosecution alleged that the applicant came to an agreement with another user of the website, who appeared to be the website administrator, to pay the equivalent of $10,000 upfront in bitcoin for the murders, that she then paid the equivalent of approximately $7,500 in bitcoin and told the unknown person that she was trying to gain access to the remaining funds. The murders were not carried out and there was no evidence that the unknown person ever took any action to have the applicant's parents killed.

The applicant demurred to the indictment with respect to counts 1 and 2 and sought orders striking these counts from the indictment. The Supreme Court dismissed the applicant's demurrer and the applicant sought leave to appeal against that decision. The applicant contended that the offence of incitement to procure, where the substantive offence sought to be procured had not been carried out, was not known to law. The applicant submitted that establishing liability for the offence as extended by s 47(2) following amendment in 2018 in response to the High Court's decision in *R v Holliday* [2017] HCA 35; (2017) 260 CLR 650 (*Holliday (HCA)*), required recourse to s 45 of the *Criminal Code*. The applicant further submitted that as neither s 47(6) nor s 45(3) were affected by the 2018 amendments, where the offence alleged was an incitement to procure, s 47(6) continued to apply the limitation or qualification contained in s 45(3) that the procured offence must be committed before the procurer could be deemed liable under s 45 for the offence of incitement under s 47(1). Accordingly, the applicant contended that the offence of inciting to procure under s 47 could not be established where the substantive offence procured was not in fact committed. The prosecution resisted the demurrer, and while acknowledging that in *Holliday (HCA)* the High Court had held that the offence of incitement to procure was not known to law, submitted that following the 2018 amendments, an offence against s 47(1) of the *Criminal Code* could be committed under s 47(2) where a person incited another person to commit an offence, even where that offence was not carried out. The prosecution submitted that in enacting s 47(2), the legislature intended to (and did) create a discrete offence of incitement to procure, conceptually and procedurally distinct from derivative offences under s 45, and which did not depend on s 45 to establish liability.

Held, granting the application for leave to appeal, but dismissing the appeal:

(1) The proper construction of s 47(2) must be determined by reference to principles of statutory interpretation which requires consideration of the text, purpose, context, and history of the provision. On a plain reading of s 47(2), the incited offence, the offence allegedly procured, was in this case the substantive offence of murder. The clear words of s 47(2) impose liability without recourse to s 45. [36]-[38], [75]

Director of Public Prosecutions (ACT) v Hicks (a pseudonym) (No 3) [2023] ACTSC 56, considered.

SZTAL v Minister for Immigration and Border Protection [2017] HCA 34; (2017) 262 CLR 362; *R v Holliday* [2017] HCA 35; (2017) 260 CLR 650, considered.

(2) Section 47(2) did not strictly create a new offence but rather expanded the offence created by s 47(1) to include the procurement of an offence by another person. The gravamen of the offence under s 47(1), extended by s 47(2), was the conduct of a person in "urging" the commission of an offence. The use of the word "procure" was not a textual indication that Parliament intended that liability under s 47(2) be conditioned upon the criteria in s 45 being satisfied. [39]-[40], [75]

(3) There was no textual support for the proposition that in enacting s 47(2), Parliament intended to create two types of incitement offences within s 47, one which required the substantive offence to be committed and one which did not. The drafting mechanism adopted, by creating an extension of the s 47(1) liability, was a powerful indication that Parliament did not so intend. [41]

(4) Section 47(5)(b) was expressed as applying to all offences of incitement. There was no textual basis to read s 47(5)(b) as applying only to conduct which was criminalised by s 47(1). The fact that s 47(5)(b) was enacted in the same amending legislation as s 47(2) provided further confirmation that in enacting s 47(2), Parliament did not intend to interfere with the inchoate nature of the offence created by s 47. [42]

(5) There was no contextual or purposive reason to construe s 47(2) as conditioned upon the establishment of liability under s 45. Section 45 is a derivative liability provision, which has the effect of deeming a person to be responsible for an offence where it is proved that the person engaged in a specified form of complicity such as procurement. [45]-[47]

(6) The apparent assumption of the drafter of the Explanatory Statement that the "offence incited" in s 47(2) was a reference to offences that were "taken to have been committed" under s 45 is contrary to the text of s 47 when read in the context of the Act as a whole and should be viewed with caution. Greater weight can and should be placed on the statements in the extrinsic materials as to the purpose of the amendments, particularly where, as here, that purpose is clearly and unequivocally stated, namely, to overcome the decision of the High Court in *Holliday (HCA)*. It is a fundamental principle of statutory construction that an interpretation that would best achieve the purpose of the Act is to be preferred to any other interpretation. [56]-[58], [74]

(7) If liability under s 47(2) first required demonstration of liability under s 45, there would be a conflict between s 45(3), which required the substantive offence to be committed before liability can arise, and s 47(5)(b), which provided that a person may be found guilty of the offence of incitement whether or not the offence incited was committed. Principles of statutory interpretation require that, in the event of such conflict, the legislative direction in s 47(5)(b) should prevail as it was both the more specific of the two provisions, applying only to offences of incitement, and the later of the two provisions. Further, in accordance with s 138 of the *Legislation Act 2001* (ACT), a resolution of the conflict which achieved Parliament's purpose must be preferred to one which did not. [69]-[71], [75]

Ross v The Queen [1979] HCA 29; (1979) 141 CLR 432; *Refrigerated Express Lines (Australasia) Pty Ltd v Australian Meat & Livestock Corporation (No 2)* [1980] FCA 45; (1980) 44 FLR 455; *Project Blue Sky Inc v Australian Broadcasting Authority* [1998] HCA 28; (1998) 194 CLR 355, referred to.

Cases Cited

Attorney-General (SA) v Woods-Pierce (2021) 140 SASR 43.

Hicks (a pseudonym) v Director of Public Prosecutions (ACT) [2023] ACTCA 17.

Holliday v The Queen (2016) 12 ACTLR 16.

Lee v New South Wales Crime Commission (2013) 251 CLR 196.

Mondelez Australia Pty Ltd v Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union (2020) 271 CLR 495.

Project Blue Sky Inc v Australian Broadcasting Authority (1998) 194 CLR 355.

R v Holliday (2017) 260 CLR 650.

R v Holliday [2015] ACTSC 222.

R v JS (2007) 175 A Crim R 108.

Refrigerated Express Lines (Australasia) Pty Ltd v Australian Meat & Livestock Corporation (No 2) (1980) 44 FLR 455.

Ross v The Queen (1979) 141 CLR 432.

Sydney Seaplanes Pty Ltd v Page (2021) 106 NSWLR 1.

SZTAL v Minister for Immigration and Border Protection (2017) 262 CLR 362.

Walsh v Sainsbury (1925) 36 CLR 464.

Xiao v The Queen (2018) 96 NSWLR 1.

Application

The applicant sought leave to appeal against the decision of the Supreme Court dismissing the applicant's demurrer.

J White SC, for the applicant.

K Lee, for the respondent.

Cur adv vult

28 August 2023

The Court

Introduction

1 The applicant seeks leave to appeal against a decision of McCallum CJ, which refused her application for two counts of inciting another to procure the offence of murder to be struck from her indictment.

2 The prosecution case is that the applicant requested an unknown person on a "murder for hire" website on the dark web to arrange to have her parents killed. It is alleged that the applicant posted on a forum on the site that she was willing to pay $20,000 for the hire of a person to murder her parents, preferably making the murder look like it was an accident. The prosecution further alleges that the applicant came to an agreement with another user of the website, who appeared to be the website administrator, to pay the equivalent of $10,000 AUD upfront in bitcoin for the murders. It is alleged that the applicant then paid the equivalent of approximately $7,500 AUD in bitcoin and told the unknown person that she was "trying to gain access to the remaining funds".

3 The murders were not carried out. The applicant's parents are still alive, and there is no evidence that the unknown person that the applicant contacted on the dark web ever took any action to have the applicant's parents killed.

4 The applicant has been charged with five offences arising out of these events. Counts 1 and 2 each allege that the applicant incited another to procure the offence of murder, contrary to s 47 of the *Criminal Code 2002* (ACT). The remaining offences charged on the indictment (theft and money laundering) are not relevant to the proceedings before this Court.

5 By an application dated 21 March 2023, the applicant demurred to the indictment with respect to Counts 1 and 2 and sought orders striking these counts from the indictment. The applicant contended that the offence of incitement to procure, where the substantive offence sought to be procured is not carried out, is not known to law.

6 The prosecution resisted the demurrer. The prosecution acknowledged that in *R v Holliday* [2017] HCA 35; (2017) 260 CLR 650 (*Holliday (HCA)*), the High Court held that the offence of incitement to procure was not known to law. However, the prosecution submitted that this position changed in 2018, following the amendment of s 47 of the *Criminal Code* in response to the *Holliday (HCA)* decision. The prosecution submitted that following those amendments, an offence against s 47(1) of the *Criminal Code* may be committed via s 47(2) where a person incites another person to commit an offence, even where that offence is not carried out.

7 The demurrer application came before McCallum CJ on 22 March 2023, which was shortly before the proceedings were listed for trial. On the following day, McCallum CJ dismissed the applicant's demurrer and ordered the applicant to answer over to the charges: *Director of Public Prosecutions (ACT) v Hicks (a pseudonym) (No 3)* [2023] ACTSC 56 ("the primary judgment"). The applicant seeks leave to appeal from this decision.

8 On 5 April 2023, Baker J stood over the question of leave to be determined with the substantive appeal at a hearing of the Court of Appeal comprised of three judges: *Hicks (a pseudonym) v Director of Public Prosecutions (ACT)* [2023] ACTCA 17 at [3] and [20].

9 The issue that arises for determination in this application is whether a person can be found guilty under s 47 of the *Criminal Code* of inciting a person to procure an offence where the procured offence is not carried out. For the reasons set out below, we conclude that McCallum CJ correctly answered this question in the affirmative.

Relevant legislation

Section 47 of the Criminal Code

10 Section 47 of the *Criminal Code* provides as follows:

> **47 Incitement**
>
> (1) If a person urges the commission of an offence (the offence incited), the person commits the offence of incitement.
>
> Maximum penalty: …

(2) A person also commits the offence of incitement if the person urges another person to aid, abet, counsel, procure, be knowingly concerned in or a party to, the commission of an offence (the offence incited) by someone else.

(3) However, the person commits the offence of incitement only if the person intends that the offence incited be committed.

(4) Despite subsection (3), any special liability provisions that apply to an offence apply also to the offence of incitement to commit the offence.

(5) A person may be found guilty of the offence of incitement —

(a) even if it was impossible to commit the offence incited; and

(b) whether or not the offence incited was committed.

(6) Any defence, procedure, limitation or qualifying provision applying to an offence applies to the offence of incitement in relation to the offence.

(7) …

11 Section 45 of the *Criminal Code* further provides:

45 Complicity and common purpose

(1) A person is taken to have committed an offence if the person aids, abets, counsels, procures, or is knowingly concerned in or a party to, the commission of the offence by someone else.

(2) However, the person commits the offence because of this section only if —

(a) either —

(i) the person's conduct in fact aids, abets, counsels, or procures the commission of the offence by the other person; or

(ii) as a result of the person's conduct, the person in fact is knowingly concerned in or a party to the commission of the offence by the other person; and

(b) when carrying out the conduct, the person either —

(i) intends the conduct to aid, abet, counsel, procure, or result in the person being knowingly concerned in or a party to, the commission of any offence (including its fault elements) of the type committed by the other person; or

(ii) intends the conduct to aid, abet, counsel, procure, or result in the person being knowingly concerned in or a party to, the commission of an offence by the other person and is reckless about the commission of the offence (including its fault elements) in fact committed by the other person.

(3) To remove any doubt, the person is taken to have committed the offence only if the other person commits the offence.

(4) Despite subsection (2), any special liability provisions that apply to an offence apply also to the offence of aiding, abetting, counselling, procuring, or being knowingly concerned in or a party to, the commission of the offence.

(5) A person must not be found guilty of aiding, abetting, counselling, procuring, or being knowingly concerned in or a party to, the commission of an offence if, before the offence was committed, the person —

(a) ended the person's involvement; and

(b) took all reasonable steps to prevent the commission of the offence.

(6) A person may be found guilty of aiding, abetting, counselling, procuring, or being knowingly concerned in or a party to, the commission of an offence even if the person who committed the offence is not prosecuted or found guilty.

(7) To remove any doubt, if a person is taken to have committed an offence because of this section, the offence is punishable as if, apart from the operation of this section, the person had committed the offence.

(8) If the trier of fact is satisfied beyond reasonable doubt that a defendant committed an offence because of this section or otherwise than because of this section but cannot decide which, the trier of fact may nevertheless find the defendant guilty of the offence.

Legislative history

12 Before turning to the parties' competing constructions of s 47, it is convenient to briefly set out the relevant legislative history of this provision, including the respective decisions of this Court and the High Court in *Holliday*.

The decision of the Court of Appeal and the High Court in *Holliday*

13 The Crown case in *Holliday* was similar to the case alleged in the present proceedings. The Crown alleged that whilst Mr Holliday was in custody pending sentence for child sex offences,[1] he offered another inmate, Mr Powell, a reward for organising people outside of prison to kidnap two of the witnesses, force them to make video-recorded statements designed to exculpate him of the offences, and then kill them. Mr Powell did not arrange the kidnapping or murder of the two witnesses; instead, he reported Mr Holliday to police.

14 Mr Holliday was tried on indictment before a jury in the ACT Supreme Court on five counts, two of which alleged that he incited Mr Powell to procure a kidnapping contrary to s 47(1) of the *Criminal Code*. Mr Holliday was convicted of all counts.

15 At the time that Mr Holliday was convicted, s 47 was in different terms to its present form. In particular, s 47 of the *Criminal Code* did not then contain equivalent provisions to the current ss 47(2) and 47(5)(b). Section 47(2) extends the s 47(1) offence to persons who urge another person to, *inter alia*, procure the commission of an offence. Section 47(5)(b) clarifies that a person may be found guilty of incitement "whether or not the offence incited was committed".

16 In the absence of an equivalent to the present s 47(2), the prosecution relied on s 45 of the *Criminal Code* to establish liability. Specifically, the

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1 The High Court decision in *Holliday* records that Mr Holliday was in custody pending *sentence* for the offences: *Holliday (HCA)* at [1]. However, the reasons of Murrell CJ and Wigney J in the Court of Appeal decision record that Mr Holliday was in custody pending *trial* for those offences: *Holliday v The Queen* [2016] ACTCA 42; (2016) 12 ACTLR 16 (*Holliday (CA)*) at [1] (Murrell CJ) and [66] (Wigney J). The High Court's decision is consistent with the reasons for sentence of the trial judge in *Holliday* at first instance, which also records that Mr Holliday was in custody pending *sentence*: *R v Holliday* [2015] ACTSC 222 at [3]; and with Refshauge J in the Court of Appeal decision: *Holliday (CA)* at [56].

prosecution contended that the "offence incited" under s 47 was the offence of kidnapping, which s 45 of the *Criminal Code* deems to have been committed where a person "procures" such an offence.

17 Mr Holliday made a "no case" submission at the conclusion of the prosecution case, contending that the offence with which he was charged was not known to law. The trial judge rejected this application, and Mr Holliday was subsequently convicted by the jury of all charges.

18 Mr Holliday appealed his convictions to this Court. The Court of Appeal (Murrell CJ, Refshauge and Wigney JJ) unanimously allowed Mr Holliday's appeal with respect to his conviction for inciting Mr Powell to procure a kidnapping; but their Honours' reasoning to this result differed: *Holliday v The Queen* [2016] ACTCA 42; (2016) 12 ACTLR 16 (*Holliday (CA)*).

19 Chief Justice Murrell held that there was no offence of incitement to procure known to law, at least where the substantive offence is not committed: *Holliday (CA)* at [20]. In so finding, her Honour rejected the contention that an "offence committed" under s 47(1) could encompass derivative liability under s 45: *Holliday (CA)* at [27]-[35].

20 In contrast, Wigney J considered that there was "no reason in principle" why the offence incited under s 47 cannot be an offence which is deemed to have been committed by reason of s 45 of the *Criminal Code*: *Holliday (CA)* at [90], [94] and [108]. However, as Wigney J observed, this was "not the end of the matter": *Holliday (CA)* at [109]. His Honour noted that s 47(5) of the *Criminal Code* applies "[a]ny defence, procedure, limitation or qualifying provision" that applies to the substantive offence to the offence of incitement. His Honour considered that s 45(3) of the *Criminal Code*, which requires the substantive offence being procured to be committed before liability can be extended to the procurer, was such a limiting or qualifying provision. His Honour concluded that this limitation or qualification on liability applied to the offence of incitement "so as to bar the possibility of conviction for incitement if the principal offence was not committed": *Holliday (CA)* at [110].

21 In a concurring judgment, Refshauge J agreed with Wigney J's reasons for upholding the appeal. His Honour noted that Wigney J had held that "there can, in an appropriate case, be an offence of incitement to commit an offence where the incitee is only taken to be able to commit the offence under s 45 of the Criminal Code", whereas Murrell CJ had held that no such offence is known to law: *Holliday (CA)* at [64]. Justice Refshauge did not consider that it was necessary for the disposition of the appeal to resolve that issue and declined to do so: *Holliday (CA)* at [65].

22 The Director of Public Prosecutions appealed the Court of Appeal's decision to the High Court. The High Court (Kiefel CJ, Bell and Gordon JJ, Gageler and Nettle JJ agreeing) unanimously dismissed the Director's appeal, holding that there was no offence in the *Criminal Code*, as it then stood, of "incitement to procure": *Holliday (HCA)* at [8].

23 In so holding, the joint judgment of Kiefel CJ, Bell and Gordon JJ ("the joint judgment") held that s 45 of the *Criminal Code* does not create a discrete offence to which s 47 could attach: *Holliday (HCA)* at [42]. In these

circumstances, it was unnecessary for their Honours to consider whether ss 45(2)(a) and (3) were limitations or qualifying provisions within the meaning of s 47(5) of the *Criminal Code*: *Holliday (HCA)* at [64].

24 Justice Nettle similarly concluded that s 45 did not create an offence of procuring the commission of an offence by a third person: *Holliday (HCA)* at [72] and [81]. Like the joint judgment, having so found, Nettle J did not consider it necessary to consider the effect of s 47(5): *Holliday (HCA)* at [88].

25 Justice Gageler agreed with Kiefel CJ, Bell and Gordon JJ that the appeal must be dismissed because s 47(1) was not engaged: *Holliday (HCA)* at [66]. However, unlike the joint judgment and Nettle J, his Honour placed emphasis on the limitation in s 45(3), noting that "unless that other person actually went on to kidnap a witness, Mr Powell could not have been taken by s 45(1) to have committed that offence by procuring it": *Holliday (HCA)* at [67].

26 In dismissing the appeal, the High Court acknowledged that Mr Holliday's conduct was serious, and that there were policy reasons why it might be thought that there should be an offence of incitement to procure. However, the joint judgment emphasised that this was a matter for the legislature, observing (at [8]):

> If the legislature wishes incitement to procure to be a discrete offence under the Criminal Code … then that is a matter for the legislature to consider; and it is for the legislature, if appropriate, to expressly provide for that offence.

The 2018 amendments

27 The High Court's invitation was acted on by the legislature the following year when the ACT Parliament enacted the *Crimes Legislation Amendment Act 2018* (ACT) ("the 2018 Amending Act"), which inserted ss 47(1A) and 47(4) into the *Criminal Code* as follows:

> **Incitement**
>
> **New section 47(1A)**
>
> *Insert*
>
> (1A) A person also commits the offence of incitement if the person urges another person to aid, abet, counsel, procure, be knowingly concerned in or a party to, the commission of an offence (the offence incited) by someone else.
>
> **18 Section 47(4)**
>
> *substitute*
>
> (4) A person may be found guilty of the offence of incitement —
>
> (a) even if it was impossible to commit the offence incited; an
>
> (b) whether or not the offence incited was committed.

28 Sections 47(1A) and (4) have since been renumbered as ss 47(2) and (5) of the *Criminal Code*. The terms of each section have not otherwise changed since they were inserted.

29 The 2018 Amending Act did not make any amendments to s 45 of the *Criminal Code*. On its face, s 47(2) is a self-contained provision which extends liability under s 47(1). Section 47(1) continues to create the substantive offence

of incitement, and s 47(2) provides alternative ways by which that substantive offence may be committed. A live question is whether text, context, or legislative history should result in the provision being read differently and in particular, whether any resort to s 45 is even necessary, let alone compelled.

Extrinsic material

30 The Presentation Speech and Explanatory Statement for the 2018 Amending Act attached to the *Crimes Legislation Amendment Bill 2017 (No 2)* (ACT). The Presentation Speech for the *Crimes Legislation Amendment Bill 2017 (No 2)* was read in the Legislative Assembly for the ACT on Thursday 30 November 2017 (page 5390):

> The last set of amendments in this bill are direct responses to court outcomes. An important part of this bill, and an important role of the Attorney-General, is to respond to judicial decisions. The High Court recently ruled that an attempted kidnapping organised out of the Alexander Maconochie Centre was technically not illegal because the offender attempted to hire another person to undertake the kidnapping. That person did not ultimately go through with the crime, but this is clearly behaviour that the community expects to be criminalised. That case, Holliday v the Queen, highlighted a clear gap in the ACT's Criminal Code. The bill amends the Criminal Code to correct the issue.

31 The Explanatory Statement for the 2018 Amending Act states the following in relation to these amendments:

> **Clause 17 — Incitement, New section 47(1A)**
>
> This clause amends section 47 of the Criminal Code to insert new s 47(1A) to provide that a person can incite another to commit an offence if they urge another person to aid, abet, counsel, procure, be knowingly concerned in or a party to, the commission of an offence by someone else.
>
> This amendment corrects the issue identified in *The Queen v Holliday* [2017] HCA (unreported, 6 September 2017) (Holliday) where the High Court dismissed a prosecution appeal from a decision of the ACT Court of Appeal. The principal issue was whether Holliday could be convicted of an offence of inciting the commission of an offence by urging another inmate, Powell, to procure a third person to commit the substantive offence of kidnapping. The Court held that, at least in circumstances where no offence of kidnapping was committed, Holliday could not be convicted of urging Powell to commit the offence of kidnapping contrary to section 47 of the Criminal Code. A majority of the High Court reached that conclusion on the basis that in order for a person to be convicted of an offence of incitement under section 47 of the Criminal Code, that person must have urged the commission of a discrete offence. The majority concluded that procuring the commission of an offence is not a discrete offence under the Criminal Code.
>
> This clause makes it clear that the offence incited referred to in section 47(1) includes an offence a person is taken to have committed pursuant to section 45 (complicity and common purpose) of the Criminal Code.
>
> This amendment corrects the issue identified in Holliday. The gap exposed compromises the ability to prosecute crimes where the instigator takes care to distance him or herself from the criminal activity, as well as crimes proposed at the top levels of criminal organisations utilising more sophisticated means.

Clause 18 — Section 47(4)

This clause amends section 47(4) to include a provision to the effect that that a person may be found guilty of incitement whether or not the offence incited was committed.

This clause is inserted to remove any doubt that a person may be found guilty of the offence of incitement even though the offence incited was an offence a person is taken to have committed pursuant to section 45, and the offence incited was not committed.

The parties' submissions

32 The parties provided detailed and helpful written and oral submissions to the Court. For present purposes, their positions can be briefly summarised.

33 Shortly stated, the applicant contends that the amendments to s 47 only partially rectified the issues identified in *Holliday (HCA)*. The applicant acknowledges that, following the 2018 amendments to s 47, the offence of inciting to procure is now an offence known to law, made possible by s 47(2). However, the applicant submits that establishing liability for the offence extended by s 47(2) requires recourse to s 45 of the *Criminal Code*. As neither s 47(6) nor s 45(3) were affected by the 2018 amendments, where the offence alleged is an incitement to procure, s 47(6) continues to apply the limitation or qualification contained in s 45(3). That is, s 47(6), applying s 45(3), requires that the procured offence be committed before the procurer can be deemed liable under s 45 for the offence of incitement under s 47(1). Accordingly, the applicant contends that the offence of inciting to procure under s 47 cannot be established where the substantive offence procured is not in fact committed.

34 In response, the prosecution contends that s 47 fully rectified the gap identified by the High Court in *Holliday (HCA)*. The prosecution submits that in enacting s 47(2), the legislature "intended to do (and did) that which the plurality in *R v Holliday* alluded to: they created a discrete offence of incitement to procure." The prosecution submits that this discrete, inchoate offence is conceptually and procedurally distinct from derivative offences under s 45, and that the route to liability under s 47(2) does not pass through s 45. As the s 47(2) offence is a "stand-alone" provision, which does not depend on s 45 to establish liability, the qualifications and limitations in s 45 have no application. Implicit in this submission is that s 47(6) ("Any defence, procedure, limitation or qualifying provision applying to an offence applies to the offence of incitement in relation to the offence") will not pick up s 45(3), given that s 45 is not an offence to which s 47 applies; but s 47(6) will, of course, pick up other relevant defences, limitations and qualifications in respect of the substantive offences to which s 47 does apply. In construing the amendments, the prosecution also emphasises the importance of s 47(5)(b), which clarifies that the offence of incitement is committed "whether or not the offence incited was committed".

Determination

35 The applicant contends that the amendment of s 47 "does not alter the relationship that s 45 has to s 47" and that "section 45 is still the route by which accessorial liability travels". As outlined above, the prosecution disagrees with

this proposition. The prosecution submits that s 47 is a stand-alone offence, to which s 45 has no application. For the reasons that follow, the prosecution's submission should be accepted.

36 The proper construction of s 47(2) must be determined by reference to principles of statutory interpretation. As McCallum CJ stated in the primary judgment, this requires consideration of the text, purpose, context and history of the provision: *Hicks (No 3)* at [15], citing *SZTAL v Minister for Immigration and Border Protection* [2017] HCA 34; (2017) 262 CLR 362 at 368; see also ss 139, 140 and 141 of the *Legislation Act 2001* (ACT).

37 Commencing with the text, s 47(2) provides that a person "also commits the offence of incitement" if the person, *inter alia*, "procures" the commission of an offence by a third party. As McCallum CJ correctly concluded, on a plain reading of s 47(2), the "incited offence" (that is, the offence allegedly procured) in the present case is the substantive offence of murder: *Hicks (No 3)* at [19]; see similarly *Holliday (HCA)* at [64]. The clear words of s 47(2) impose liability without recourse to s 45.

38 As noted at [35] above, the appellant asserts that the amendment of s 47 "does not alter the relationship that s 45 has to s 47". A fundamental difficulty with this proposition is that, in *Holliday (HCA)*, the High Court held that s 45 had no relationship to s 47: *Holliday (HCA)* at [42] ("there is no offence under s 45 to which s 47 can attach"). In order to succeed, the applicant must demonstrate that the amendments to s 47 introduced a relationship between the two provisions that did not previously exist.

39 The applicant correctly observed that s 47(2) does not strictly create a new offence. Rather, s 47(2) expands the offence created by s 47(1) to include the procurement of an offence by another person. However, recognition that s 47(2) does not strictly create a new offence does not assist the applicant. The text of s 47(2) expands the s 47(1) offence. It does not contain any indication that the pathway to liability under s 47(2) should be via s 45. Indeed, apart from the common use of the word "procure" in each section, there is no textual link at all between s 47 and s 45. We do not consider that the use of the word "procure" is a textual indication that Parliament intended that liability under s 47(2) be conditioned upon the criteria in s 45 being satisfied.

40 In this respect, it is important to note that the gravamen of the offence under s 47(1), which is extended by s 47(2), is the conduct of a person in "urging" the commission of an offence. As McCallum CJ correctly concluded, s 47(1) as extended by s 47(2) is an inchoate offence, which may be committed regardless of whether or not the offence incited in fact occurs: *Holliday (CA)* at [15].

41 There is no textual support for the proposition that in enacting s 47(2), Parliament intended to create two types of incitement offences within s 47, one which requires the substantive offence to be committed and one which does not. Indeed, the drafting mechanism adopted — creating an extension of the s 47(1) liability — is a powerful indication that Parliament did not so intend.

42 The applicant's contention that s 47(2) of the *Criminal Code* requires that liability first be established under s 45 is also contrary to the clear words of s 47(5)(b), which state that a person may be found guilty of incitement "whether

or not the offence incited was committed". The applicant's contention that s 47(5)(b) only has application to offending which does not fall within s 47(2) contradicts a plain reading of the provision. Section 47(5)(b) is expressed as applying to all offences of incitement. There is no textual basis to read s 47(5)(b) as applying only to conduct which is criminalised by s 47(1). The fact that s 47(5)(b) was enacted in the same amending legislation as s 47(2) provides further confirmation that in enacting s 47(2), Parliament did not intend to interfere with the inchoate nature of the offence created by s 47.

43 In these circumstances, the fact that the legislature left s 45 intact does not support the applicant's construction of s 47(2). It was not necessary for the legislature to amend s 45 for the simple reason that it is not engaged with respect to offending within s 47(2).

44 Nor does the fact that the legislature left s 47(6) intact provide support for the applicant's construction. As noted at [33] above, s 47(6) continues to have application with respect to the substantive offences to which s 47 applies. For example, the "claim of right defence" in s 410 of the *Criminal Code* may be applied by s 47(6) to an allegation that a person induced (or induced the procurement of) a property offence within Pt 4.1 of the *Criminal Code*. The property offence is "the offence incited" within the meaning of ss 47(1) and 47(2), which is the "offence" referred to in s 47(6). In contrast, s 47(6) does not pick up the limitation in s 45(2), because s 45 is not engaged by the provision.

45 Nor is there any contextual or purposive reason to construe s 47(2) as conditioned upon the establishment of liability under s 45. Section 45 is a derivative liability provision, which has the effect of deeming a person to be responsible for an offence where it is proved that the person engaged in a specified form of complicity (such as procurement). Where procurement is the form of complicity alleged, the qualifications to such liability in s 45 include:

(i) The person's conduct must in fact procure the commission of the offence by the other person (s 45(2)(a));

(ii) When carrying out the conduct, the person must either intend to procure the commission of an offence (including its fault element) of the type committed by the other person or intend to procure the commission of an offence by the other person and be reckless about the commission of the offence (including its fault elements) in fact committed by the other person (s 45(2)(b));

(iii) The offence procured must in fact be committed (s 45(3)); and

(iv) The person will not be guilty of procuring if, before the offence was committed, the person ended their involvement, and took all relevant steps to prevent the commission of the offence (s 45(5)).

46 None of the above qualifications are apposite to the operation of s 47(2). Indeed, there would be considerable practical difficulties in applying any of these qualifications to an offence under s 47(2). In particular, the application of the qualifications set out in (i), (iii) and (iv) to an offence of inciting a procurement would be directly inconsistent with s 47(5)(b), which provides that a person may be found guilty of an incitement "whether or not the offence incited was committed". The application of (iv) to the offending within s 47(2)

would also constitute a significant departure from incitement offences generally, in which withdrawal is relevant to punishment, but not to liability: *Walsh v Sainsbury* [1925] HCA 28; (1925) 36 CLR 464 at 476.

47 The application of the qualification in (ii) above to an offence under s 47(2) would also occasion difficulty and potential confusion. Section 45(2)(b) contains the relevant fault element for the offence of procuring. But that element is directed at the person who performs the procuring. It does not address the fault element of the person who incites the procurement, which is the subject of s 47(2).

48 The high point of the applicant's contention that s 47(2) liability must travel through s 45 is the Explanatory Statement to the 2018 Amending Act. As outlined above, the Explanatory Statement made the following comments in respect of the enactment of s 47(1A) (now s 47(2)):

> This clause makes it clear that the offence incited referred to in section 47(1) includes an offence a person is taken to have committed pursuant to section 45 (complicity and common purpose) of the Criminal Code.

49 In respect of s 47(5)(b), the Explanatory Statement further stated:

> This clause is inserted to remove any doubt that a person may be found guilty of the offence of incitement even though the offence incited was an offence a person is taken to have committed pursuant to section 45, and the offence incited was not committed.

50 These statements provide some support for the applicant's contention that the "incited offence" in s 47(2) should be read as a reference to a substantive offence which the person is taken to have committed pursuant to s 45.

51 However, the Explanatory Statement must be viewed with caution insofar as it is sought to be used in support of the applicant's contention that liability under s 47(2) must first travel through s 45.

52 As the preamble to the Explanatory Statement directs, the Statement "must be read in conjunction with the Bill …":

> It is not, and is not meant to be, a comprehensive description of the amendments. What is said about a provision is not to be taken as an authoritative guide to the meaning of a provision, this being a task for the courts.

53 It must also be borne in mind that "the quality and extent of the assistance extrinsic materials provide in fixing the meaning of statutory text is not uniform": *Mondelez Australia Pty Ltd v Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union* [2020] HCA 29; (2020) 271 CLR 495 at [67]. Rather, as the High Court continued in *Mondelez*:

> Lacking both the force of law and the precision of parliamentary drafting, however, an explanatory memorandum cannot be taken to be an infallible and exhaustive guide to the legal operation of a provision. Notoriously, explanatory memoranda sometimes get the law wrong.

54 In assessing the weight to be given to the Explanatory Statement in

determining the meaning of s 47(2), we have taken into account the matters set out in s 141(2) of the *Legislation Act* and particularly s 141(2)(a), which requires the Court to consider:

> the desirability of being able to rely on the ordinary meaning of the Act, having regard to the purpose of the Act and the provisions of the Act read in the context of the Act as a whole.

55 In our view, the apparent assumption of the drafter of the Explanatory Statement that the "offence incited" in s 47(2) is a reference to offences that are "taken to have been committed" under s 45 is contrary to the text of s 47 when read in the context of the Act as a whole.

56 Although the assumption in the Explanatory Statement concerning the pathway to liability under s 47(2) should be viewed with caution, greater weight can and should be placed on the statements in the extrinsic materials as to the purpose of the amendments, particularly where, as here, that purpose is clearly and unequivocally stated.

57 The Explanatory Statement and the Presentation Speech each record that the 2018 amendments to s 47 were a response to the High Court's decision in *Holliday*. The purpose of the amendments was clearly set out in the Presentation Speech, in which the Attorney-General explained:

> The High Court recently ruled that an attempted kidnapping organised out of the Alexander Maconochie Centre was technically not illegal because the offender attempted to hire another person to undertake the kidnapping. That person did not ultimately go through with the crime, but this is clearly behaviour that the community expects to be criminalised. That case, Holliday v the Queen, highlighted a clear gap in the ACT's Criminal Code. The bill amends the Criminal Code to correct the issue.

(Legislative Assembly for the ACT: 2017 Week 14 Hansard, Thursday 30 November 2017, page 5390, emphasis added.)

58 It is a fundamental principle of statutory construction that an interpretation that would best achieve the purpose of the Act is to be preferred to any other interpretation: s 140 of the *Legislation Act*.

59 Mr White SC, who appeared for the applicant, acknowledged this principle. As outlined above, he contended that the "issue" which was addressed by the 2018 amendments was the finding of the High Court that incitement to procure is not an offence that is known to law.

60 With respect to the able submissions of Mr White SC, this construction of the purpose of the 2018 amendments does not pay proper regard to the purpose of Parliament as plainly expressed in the extrinsic materials.

61 There is no question that the Court may consider the extrinsic materials in ascertaining the legislature's purpose in enacting the amendments: ss 138 and 142 of the *Legislation Act*. It is often difficult to determine Parliament's intent from such materials: *Sydney Seaplanes Pty Ltd v Page* [2021] NSWCA 204; (2021) 106 NSWLR 1 at [39] (Bell P, Leeming JA and Emerson AJA agreeing). Such a difficulty does not arise in the present case. As set out above, Parliament's concern was, to put it bluntly, that a person (Mr Holliday) who had

procured another person to undertake a kidnapping had escaped criminal liability because the kidnapping had not in fact occurred. It was this "clear gap" in the *Criminal Code* which the legislature intended to fill.

62 Parliament was not immediately concerned with the liability of persons who incited a successful procurement. That was not the situation in *Holliday*. Indeed, as the joint judgment of the High Court in *Holliday* observed, where the substantive offence procured comes to fruition, s 45 may well operate directly to impose liability, circumventing the need for any reliance on s 47 at all: *Holliday (HCA)* at [45].

63 Mr White SC fairly acknowledged that on the applicant's construction on s 47(2), the facts in *Holliday* would not be decided any differently. Such a construction would be contrary to the clearly expressed purpose of Parliament in enacting s 47(2).

64 Nor does the principle of legality assist the applicant. There may be a question as to the weight to be afforded to the principle of legality when construing a criminal code. As Spigelman CJ observed in *R v JS* [2007] NSWCCA 272; (2007) 175 A Crim R 108 at [145], "fundamental aspects of the law have been altered by the Criminal Code in substantial and indeed critical matters". In construing code provisions, there can be no general assumption that Parliament did not intend to interfere with common law concepts.

65 Further, contrary to the applicant's submission, s 47(2) does not "reverse" "fundamental principles" of accessorial liability. Foundational to the applicant's argument is the assumption that because s 47(2) relates to conduct such as aiding and abetting, counselling, and procuring, s 47(2) must be concerned with accessorial liability. This assumption should not be accepted. Accessorial liability is not concerned with the form of the conduct alleged. Rather, as McCallum CJ correctly observed, accessorial liability is concerned with a mode of proof: *Hicks (No 3)* at [23], citing *Holliday (HCA)* at [32], [34] and [43]. For the reasons outlined at [39] above, s 47 creates a stand-alone inchoate offence. No part of s 47 relates to accessorial liability.

66 In any event, the principle of legality does not require Courts to interpret a criminal statute contrary to the clear purpose of the legislation: *Attorney-General (SA) v Woods-Pierce* [2021] SASCA 112; (2021) 140 SASR 43 at [62]; *Xiao v The Queen* [2018] NSWCCA 4; (2018) 96 NSWLR 1 at [276]. As Gageler and Keane JJ held in *Lee v New South Wales Crime Commission* [2013] HCA 39; (2013) 251 CLR 196 at [314]:

> … [i]t is of little assistance, in endeavouring to work out the meaning of parts of [a legislative] scheme, to invoke a general presumption against the very thing which the legislation sets out to achieve.

67 For the above reasons, in our view, the text of s 47(2), construed in context and in accordance with its purpose, does not require any recourse to s 45. Section 47 operates according to its terms, which do not pick up s 45 via s 47(6). In these circumstances, s 45(3) is not engaged.

68 If we are wrong in our construction of s 47(2) and, correctly read, the "incited offence" in s 47(2) is a reference to s 45, we would nonetheless arrive at the same conclusion.

69 If the route to liability under s 47(2) passes through s 45, there would be a conflict between s 45(3), which requires the substantive offence to be committed before liability can arise, and s 47(5)(b), which provides that a person may be found guilty of the offence of incitement "whether or not the offence incited was committed".

70 Various principles of statutory interpretation each indicate that, in the event of such conflict, the legislative direction in s 47(5)(b) must prevail. In particular, s 47(5)(b) is both the more specific of the two provisions (it applies only to offences of incitement) and the later of the two provisions: *Ross v The Queen* [1979] HCA 29; (1979) 141 CLR 432 at 440 and *Refrigerated Express Lines (Australasia) Pty Ltd v Australian Meat & Livestock Corporation (No 2)* [1980] FCA 45; (1980) 44 FLR 455 at 468-469; 29 ALR 333 at 347.

71 Most importantly, however, in accordance with s 138 of the *Legislation Act*, a resolution of the conflict which achieves Parliament's purpose must be preferred to one which does not. As the High Court held in *Project Blue Sky Inc v Australian Broadcasting Authority* [1998] HCA 28; (1998) 194 CLR 355 at [70]:

> A legislative instrument must be construed on the prima facie basis that its provisions are intended to give effect to harmonious goals. Where conflict appears to arise from the language of particular provisions, the conflict must be alleviated, so far as possible, by adjusting the meaning of the competing provisions to achieve that result which will best give effect to the purpose and language of those provisions whilst maintaining the unity of all the statutory provisions.

72 As outlined above, the Explanatory Statement to the 2018 amendments expressly clarified that s 47(5)(b) was inserted "to remove any doubt that a person may be found guilty of the offence of incitement even though the offence incited was an offence a person is taken to have committed pursuant to section 45, and the offence incited was not committed" (emphasis added). This clear statement of the legislative purpose compels the conclusion that any conflict between s 47(5)(b) and s 45(3) should be resolved by reading down s 45(3) as not applying to offences of incitement.

73 For completeness, we observe that neither our preferred interpretation or the alternative interpretation of s 47(2) requires us to consider the correctness of the decision of Wigney J in *Holliday (CA)* concerning the proper construction of s 45, or whether Refshauge J's agreement with that decision was such that Wigney J's reasoning should be viewed as part of the *ratio decidendi* of the decision. As outlined above, on our preferred interpretation, s 45 is not engaged in respect of liability alleged under s 47(2). On the alternative interpretation, Wigney J's reasoning has been overtaken by the subsequent enactment of s 47(5)(b).

Conclusion

74 The purpose of Parliament in enacting s 47(2) of the *Criminal Code* could not have been clearer. Parliament intended to ensure that in a situation where

person A incites person B to procure the commission of a substantive offence, person A could be guilty of the extended offence of incitement even if the substantive offence is not in fact committed. An interpretation which promotes this purpose must be preferred to one that does not.

75 For the reasons outlined above, we are of the view that the application of s 47(2) does not require recourse to s 45. Sections 47(1) and 47(2) read together create a stand-alone inchoate offence of incitement to procure. In the alternative, we consider that if liability under s 47(2) first requires demonstration of liability under s 45, the conflict that subsequently arises between s 47(5)(b) and s 45(3) must be resolved by giving effect to the declaration in s 47(5)(b) that a person may be found guilty of the offence of incitement whether or not the offence incited was committed. Either of these interpretations give full effect to the purpose expressed by Parliament in enacting s 47(2) and s 47(5)(b). It follows that McCallum CJ was correct to dismiss the application for a demurrer.

76 The hearing of this application has not fragmented the trial, which had been adjourned for reasons unrelated to this appeal. The issue of statutory construction raised by this application is important, and had it been determined in favour of the applicant, it would have finally determined the applicant's liability in respect of two significant counts on the indictment. Leave to appeal should be granted, but the appeal should be dismissed for the reasons outlined above.

Orders

77 The orders of the Court are as follows:

(1) Leave to appeal is granted;

(2) The appeal is dismissed.

Leave to appeal granted, appeal dismissed

Solicitors for the applicant: *Legal Aid ACT*.

Solicitors for the respondent: *ACT Director of Public Prosecutions*.

RICHARD DAVIES

SUPREME COURT OF THE AUSTRALIAN CAPITAL TERRITORY

Tui v McLucas

[2024] ACTSC 164

Baker J

29 April, 16, 24, 29 May 2024

Traffic Law — Offences — Driving with prescribed concentration of alcohol in breath — Default disqualification period — Court required to impose a period of disqualification that was appropriate — Effect of legislative reduction of default disqualification period whilst appeal pending — Road Transport (Alcohol and Drugs) Act 1977 (ACT), ss 28, 33 (repealed) — Road Safety Legislation Amendment Act 2024 (ACT) — Legislation Act 2001 (ACT), s 84A.

The appellant pleaded guilty in the Magistrates Court to a charge of driving with a prescribed concentration of alcohol in breath, level 3 as a special driver subject to a learner's licence and as a repeat offender, contrary to s 19(1) of the *Road Transport (Alcohol and Drugs) Act 1977* (ACT). The appellant was convicted with the Court imposing a good behaviour order for a period of 18 months and a fine of $800. As no order was made in relation to the disqualification of the appellant's licence, the default disqualification of three years' disqualification applied. The appellant appealed from the sentence on the ground that the magistrate had erred by sentencing on the basis that the appellant had previously committed three drink driving offences whereas in fact he had only two prior drink driving offences on his record. The respondent conceded that the magistrate's erroneous finding had the capacity to affect the sentence that was imposed and that the Court was therefore required to resentence the appellant. While the appeal was pending, the *Road Safety Legislation Amendment Act 2024* (ACT) came into operation reducing the default disqualification period that applied to the offending from three years to two years and increasing the minimum disqualification period from six months to 12 months.

Held, allowing the appeal in part and resentencing the appellant:

(1) No penalty less than that imposed, namely, an $800 fine and an 18 month good behaviour order, could be appropriate. [25]

(2) Notwithstanding that the amended disqualification period did not come into effect until after the commission of the offence, by reason of s 84A(3) of the *Legislation Act 2001* (ACT) the reduction in the default disqualification period

applied on resentence, and by reason of s 84A(2) of the *Legislation Act*, as the applicable minimum disqualification period had been increased, the amended minimum disqualification period did not apply on resentence. [33]

(3) Whilst the default disqualification period was not strictly a maximum penalty, and in particular, was not reserved for the most serious examples of the offence, it was not necessary for the Court to be satisfied that there were good reasons before imposing a period of disqualification that was less than the default period. Rather, the Court was required to ask what period of disqualification was appropriate, in particular to meet the need for the protection of the community. [35]-[41]

Clarkson v Earle [2016] ACTSC 331, followed.

Barnes v Barratt [2018] ACTSC 295, not followed.

Ayres v Ford [2016] ACTSC 204; *Stoehr v Meyer* [2016] ACTSC 144; (2016) 311 FLR 23; *Burow v Hoyer* [2015] ACTSC 21; (2015) 292 FLR 325; *Tindall v Spalding* [2014] ACTSC 253; (2014) 10 ACTLR 198; *Mwauluka v Turkich* [2013] ACTSC 1, referred to.

Cases Cited

Attorney-General's Application (No 3 of 2002) (NSW), Re (2004) 61 NSWLR 305.

Ayres v Ford [2016] ACTSC 204.

Barnes v Barratt [2018] ACTSC 295.

Burow v Hoyer (2015) 292 FLR 325.

Clarkson v Earle [2016] ACTSC 331.

Irving v Head (2016) 75 MVR 13.

Kentwell v The Queen (2014) 252 CLR 601.

Krewaz v Jordan [2012] ACTSC 84.

Kristiansen v Yeats [2022] ACTSC 351.

Milner v Bonde (2018) 28 Tas R 62.

Morrison v Maher [2021] ACTSC 312.

Mwauluka v Turkich [2013] ACTSC 1.

R v Bonfield [2021] ACTSC 362.

Senderowski v Mothersole [2013] ACTSC 217.

Shaw v Leach [2014] ACTSC 135.

Stoehr v Meyer (2016) 311 FLR 23.

Tindall v Spalding (2014) 10 ACTLR 198.

Veen v The Queen (No 2) (1988) 164 CLR 465.

Appeal

The appellant appealed against the sentence imposed in the Magistrates Court.

T Sharman, for the appellant.

D Armstrong, for the respondent.

Cur adv vult

29 May 2024

Baker J.

Introduction

1 The appellant, Tsai Tui, pleaded guilty in the Magistrates Court to a charge of driving with a prescribed concentration of alcohol in breath, as a special driver, contrary to s 19(1) of the *Road Transport (Alcohol and Drugs) Act 1977* (ACT) ("Alcohol and Drugs Act"). At the time of the offending, the offence carried a maximum penalty of 6 months' imprisonment and a fine of $1,600: s 26 of the Alcohol and Drugs Act.

2 The appellant was sentenced as a repeat offender of drive motor vehicle with alcohol in breath, level 3, as a special driver subject to a Learner's Licence. The appellant entered into a good behaviour order for a period of 18 months and was fined $800. As no order was made in relation to the disqualification of the appellant's licence, the default disqualification for a driver of three years' disqualification applied: s 33 of the Alcohol and Drugs Act.

3 By way of a Notice of Appeal filed 24 November 2023, the appellant appeals from this sentence, on the single ground that the Magistrate erred by sentencing him on the basis that he had previously committed three drink driving offences. The appellant in fact had two prior drink driving offences, one of which was committed in the ACT and one in New South Wales.

4 Whilst acknowledging that the error was understandable, as the matter was being dealt with in the context of a busy Magistrate's list, and neither party corrected the Magistrate at the time that the finding was made, the Director nonetheless conceded that the Magistrate had erred by taking into account a higher number of previous convictions, and that her Honour's erroneous finding had the capacity to affect the sentence that was imposed. I agree with this concession.

5 The Director further accepted that, error having been established, this Court must resentence the appellant: see *Kentwell v The Queen* [2014] HCA 37; (2014) 252 CLR 601; *Kristiansen v Yeats* [2022] ACTSC 351 at [67]-[71]. I agree. The misreading of the appellant's criminal history is a factual error, which had bearing on the "instinctive synthesis" of how the Magistrate reached the finding of the appropriate sentence to be imposed. Accordingly, I am required to independently re-exercise my discretion as to the appropriate sentence for the offence.

6 As outlined further below, whilst the present appeal was pending, the default disqualification period that applied to the offending was reduced from three years to two years by the *Road Safety Legislation Amendment Act 2024* (ACT). The assessment of the appropriate disqualification period on resentence is to be conducted against the now reduced disqualification period: s 84A of the *Legislation Act 2001* (ACT).

Resentence

The offending

7 At about 6:35 pm on 30 August 2023, ACT Police were dispatched to a

car park outside the Uniting Church in Melba. The police arrived at around 6:52 pm, and observed three males standing in between two parked vehicles. One of those males was later identified as the appellant.

8 The police approached the three males and asked them what they were doing. The men responded that they were having farewell drinks for a friend. Police observed several empty glass beer bottles on the grass beside the vehicles. Police asked how the three men were planning on getting home, and they stated their respective partners would pick them up. Police advised the men that they were prohibited from driving under the influence of alcohol. The men responded they were getting picked up "shortly".

9 At approximately 7:37 pm the same night, police observed the same vehicle that was parked in the car park travelling eastbound along a street in Melba. The police followed the car and activated their siren, causing the car to stop. Upon approaching the vehicle, police identified the two men in the car as the men in the car park outside the Uniting Church they had spoken to earlier that night.

10 Police conducted a roadside alcohol screening test on the appellant, who was driving and held an ACT Learner's Licence. The test result returned positive. A further alcohol screening test was conducted on the appellant's friend, who was the licenced supervising driver accompanying the appellant. The appellant's friend also returned a positive test.

11 Both the appellant and his friend were taken into custody. Police observed the appellant to be moderately intoxicated and noticed a moderate smell of liquor on his breath.

12 At about 9:01 pm, the appellant provided a sample of his breath for analysis. The analysis returned a level 3 blood alcohol concentration level, at 0.09 grams of alcohol per 210 litres of breath. The appellant stated he had consumed six mid-strength beers over a period of three hours at the car park.

13 ACT Police issued an Immediate Suspension Notice of the appellant's licence.

The appellant's subjective case

14 The appellant is a 36 year old man of Tongan descent, who moved to Australia in 2005 from New Zealand. He completed his year 10 studies at Erindale College and has been variously employed full time in concreting, in stone masonry, as a security officer, as a removalist, and in scaffolding, in which he has been employed in for the last five years.

15 The appellant tendered two character references, from Mr McSmith, the appellant's employer at BAS Scaffolding, and Terry Campese, who the appellant met through football. In the first reference, Mr McSmith described the appellant as "reliable, punctual and a very hardworking employee", who has been "a great role model for [the company's] young scaffolders moving up". He stated the appellant "feels he has let down his family and me as his employer" by his offending. Mr Campese is a former coach of the appellant's football squad, who has known the appellant for 20 years. He described the appellant's

"great leadership on and off the field, especially with the younger Polynesian players". Mr Campese stated the appellant "has expressed to [him] his shame and remorse at this thoughtless and immature behaviour".

Criminal history

16 The appellant has both an ACT and NSW criminal record.

17 The appellant's ACT criminal history involves a number of past driving offences. In 2016, the appellant was convicted of driving a motor vehicle while unlicenced. In 2012, he was convicted of driving a motor vehicle without consent and driving a motor vehicle while unlicenced. He also has convictions for contravening a direction by a member of ACT Police (in 2009), common assault (in 2007), failure to appear after a bail undertaking (in 2008) and resisting a Commonwealth public official (in 2006).

18 The appellant also has a criminal record in New South Wales, which includes convictions for destroying/damaging property, affray and driving while disqualified from holding a licence.

19 The appellant has two previous convictions for driving while intoxicated. In 2006, when the appellant was 19 years old, he was convicted in the ACT of driving under the influence of alcohol as a special driver (learner driver). The offender was fined $250 and his licence was disqualified for 6 months. In 2007, the appellant was convicted in NSW for driving with a mid-range PCA. The offender was fined $1,000 and he was disqualified from holding a licence for 2 years.

Consideration

The penalty to be imposed

20 At the time of the offending, an offence contrary to s 19(1) of the Alcohol and Drugs Act, when committed by a repeat offender, carried a maximum penalty of six months' imprisonment and a fine of $1,600.[1]

21 I have taken into account the following matters in determining the nature and circumstances of the offending: see s 33(1)(a) of the *Crimes (Sentencing) Act 2005* (ACT):

(a) The appellant was a "special driver", subject to a Learner licence. He was not permitted to have any alcohol in his blood whilst driving. The appellant could not have been under any misapprehension as to whether his intoxication level was permitted;

(b) The appellant registered a concentration of 0.091, which places him within the Level 3 range (which encompasses blood alcohol concentration levels of more than 0.08 g and less than 0.15 g);

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1 As discussed further below, the penalty and disqualification periods that applied to the offending were amended whilst the present appeal was pending. The maximum penalty for a level 3 offence contrary to s 19 committed by a repeat offender is now 100 penalty units ($16,000), imprisonment for 12 months or both. This increased penalty does not apply to the present appeal: s 84(2) of the *Legislation Act*.

(c) The appellant is a repeat offender for the purposes of the Alcohol and Drugs Act. He has a previous conviction in the ACT for the offence of special driver PCA in blood in 2006 and for a corresponding NSW offence in 2007;

(d) The appellant was reminded by police just over half an hour before being caught behind the wheel of a car that he should not drive as he had been drinking;

(e) The appellant did not drive out of necessity or in an emergency (when police told him not to drive, he said that his partner was coming to pick him up);

(f) The journey from the Uniting Church car park on Conley Drive in Melba to Verbrughhen street in Melba (where the police stopped the appellant) is 300 metres. (There is no evidence of the intended length of the journey); and

(g) The appellant had one passenger in his car when stopped by police. That passenger was the supervising driver (who was also affected by alcohol).

22 The appellant has a troubling driving history, which encompasses a number of breaches of the Road Rules. I have taken into account that the latest conviction concerned offending some eight years ago, in 2016. The offender was then 29 years old. He is now 36 years old. However, this gap in prior offending assumes less significance when one takes into account the circumstances of the offending, namely that the appellant was expressly warned about driving by police only half an hour before he committed the present offence. The sentence to be imposed must powerfully convey the criminality of his actions to the appellant.

23 The grave consequences associated with drink driving are well known. As Howie J held in *Re Attorney-General's Application (No 3 of 2002) (NSW)* [2004] NSWCCA 303; (2004) 61 NSWLR 305 at [7]:

> It is trite to observe that, what is commonly referred to as, "drink-driving" amounts to socially irresponsible behaviour of a very significant degree having regard to the potential consequences of any driver on a public road being unable to properly manage and control a motor vehicle. It must also be a matter of common knowledge within the public in general that it is a criminal offence to drive a motor vehicle whilst under the influence of alcohol and that substantial penalties, including imprisonment, are available to the courts to punish those who commit the offence. For many years there has been an extensive media campaign to stress the seriousness of such conduct and the consequences that flow from it, both so far as the offender is concerned and in terms of its impact upon the safety of members of the public on or about the highways. In addition, drivers of motor vehicles must be aware that the use of random breath testing since 1982 has increased the chances of detection and hence the likelihood of conviction, punishment and licence disqualification.

See also *Krewaz v Jordan* [2012] ACTSC 84 at [1] and *Milner v Bonde* [2018] TASSC 42; (2018) 28 Tas R 62 at [16].

24 The appellant's character referees speak of the appellant's commitment to

his work as a scaffolder and his role assisting in the coaching of the Queanbeyan Blues, his leadership and mentorship towards younger employees, and young rugby league players. Regrettably, it is not uncommon for persons who are otherwise of good character to commit driving offences, particularly offences concerning driving under the influence of alcohol.

25 Taking into account the appellant's plea of guilty, in all of the circumstances, no penalty less than that imposed, namely, an $800 fine and an 18 month good behaviour order, could be appropriate.

The disqualification period

26 It remains necessary to consider what period of disqualification should be ordered. This requires consideration of the applicable default disqualification period and the approach to be taken to default disqualification periods generally.

The applicable default disqualification period

27 At the time of the offending, s 33(3) of the Alcohol and Drugs Act provided that:

> If a court convicts a person other than a special driver of an offence against s 19(1) and finds that the concentration of alcohol in the person's blood or breath was at level 2, 3 or 4, the person is automatically disqualified from holding or obtaining a driver licence for:
>
> (i) the period mentioned in the item applying to that level in table 33, column 4 [the default disqualification period]; or
>
> (ii) if the court orders a shorter period of disqualification that is not less than the period mentioned in column 3 of that item [the minimum disqualification period] — the shorter period.

28 At the time of the offending, s 33 prescribed a default disqualification period of three years and a minimum disqualification period of 6 months for a level 3 offence committed by a repeat offending.

29 Shortly before judgment was to be delivered in this appeal, the *Road Safety Legislation Amendment Act 2024* (the 2024 Amending Act) came into operation. The Amending Act replaced ss 32 to 34 of the Alcohol and Drugs Act with a new Pt 4 of the Act, which provides for driver disqualification periods for first and repeat offenders, for offences against s 19 of the Act (and other offences). Following that amendment, s 28 of the Alcohol and Drugs Act now provides that the default disqualification period for an offence against s 19 committed by a level 3 repeat offender is two years. The minimum disqualification period has increased from six to twelve months disqualification.

30 The Explanatory Statement for the *Road Safety Legislation Amendment Bill 2023* (ACT) makes reference to the risk that automatic licence disqualification, if applied "without sufficient due process and legal safeguards", may limit:

> … a person's human rights by limiting a person's ability to work where they use their car or licence for work, and right to family and children where a person relies on a car to care for family members. It can also have a disproportionate impact on disadvantaged and vulnerable community members, particularly those with lower incomes who may struggle to pay fines or legal fees.

(At p 9.)

31 The Statement clarifies that the Amending Act "carries over" the "legislated government policy" that is enacted in the current provisions (of default and minimum disqualification periods), "with adjustments being made to ensure the disqualification is appropriate and proportionate". The Statement explains that the default disqualification periods have been calculated by a formula which is consistent with that applied in Victoria, and which is slightly lower than NSW.

32 The Statement recognises that the application of that ratio has led to a "reduction of default automatic licence disqualification periods for some of the higher range drink driving offences", including those for a s 19, level 3 repeat offender. The Statement states that it is expected that the reduction will "bring minimum and default automatic licence disqualification periods more in line with the automatic disqualification periods imposed by the courts currently".

33 The amended disqualification period did not come into effect until well after the commission of the present offence. As the applicable minimum disqualification period was increased, the amended minimum disqualification period does not apply on resentence to the offending that is the subject of the present appeal: s 84A(2) of the *Legislation Act*. However, both parties agreed that the reduction in the default disqualification period will apply on resentence by reason of s 84A(3) of the *Legislation Act*, which provides that:

> If a law reduces the maximum or minimum penalty, or the penalty, for an offence, the reduction applies to an offence committed before or after the law commences, but does not affect any penalty imposed before the law commences.

34 As outlined above, the penalty imposed by the Magistrate was affected by error and requires resentencing according to law. On that resentence, s 84A(3) requires the application of the reduced disqualification period.

The approach to be taken to the default disqualification period

35 The relationship between the minimum and default disqualification periods under s 33 of the Alcohol and Drugs Act was considered by Murrell CJ in *Ayres v Ford* [2016] ACTSC 204; *Stoehr v Meyer* [2016] ACTSC 144; (2016) 311 FLR 23; and *Clarkson v Earle* [2016] ACTSC 331 at [10]-[12], citing *Burow v Hoyer* [2015] ACTSC 21; (2015) 292 FLR 325 (Refshauge J) and *Tindall v Spalding* [2014] ACTSC 253; (2014) 10 ACTLR 198 (Burns J).

36 Her Honour concluded that the default disqualification period should not be treated as applying in the "usual case", and the critical question is not whether there is a sufficient reason to justify reduction of the "default" disqualification. Rather, her Honour held that a court should ask what period of disqualification is necessary or desirable to achieve the relevant sentencing purposes. Whilst a primary consideration will be the purpose of protection of the public, the impact of disqualification on the offender may also be considered.

37 A different approach appears to have been taken by Penfold J in *Barnes v Barratt* [2018] ACTSC 295. In *Barnes* at [52], Penfold J (following her Honour's previous decision in *Mwauluka v Turkich* [2013] ACTSC 1 at [46]) held that:

> Unlike a maximum sentence specified for an offence, which would only be imposed for the most serious examples of the offence (although not only for an

> offence such that it is impossible for the sentencing judge to imagine a worse case of the offence) (*Veen v The Queen (No 2)* (1988) 164 CLR 465 at p 478), the default disqualification period is to apply automatically on conviction for the offence concerned unless there is good reason to reduce it.

(Emphasis added.)

38 It does not appear that the decision of Murrell CJ in *Clarkson* (and earlier decisions) was drawn to Penfold J's attention in the hearing in *Barnes*. On the other hand, it also appears that the decision of Penfold J in *Mwauluka* was not drawn to Murrell CJ's attention in *Clarkson*.

39 The distinction between the approaches in *Barnes* and *Clarkson* is fine, and in many cases may not be determinative of the ultimate outcome. However, in at least some cases (of which the present case may be one), this distinction will be important. The *Barnes* approach would require the court to be positively satisfied that there is a "good reason" for the default disqualification period to be reduced. In contrast, the *Clarkson* approach requires the court to ask what the appropriate period of disqualification should be to achieve the relevant sentencing purposes, particularly protection of the community. It does not appear that this aspect of the decisions in *Barnes*, or *Clarkson*, have been since considered by this Court.[2]

40 Whilst the use of the term "default" in s 28 (previously s 33) of the Alcohol and Drugs Act lends some support for the *Barnes* approach, in my view, the approach outlined in *Clarkson* is to be preferred for the following reasons:

(a) Section 28(2) does not authorise a court to increase the default disqualification period.[3] The text of the provision only authorises the Court to impose a "shorter period" than the disqualification period: s 28(2) of the Alcohol and Drugs Act; cf s 63(3)(c) of the *Road Transport (General) Act 1999* (ACT). If the "default disqualification" were intended to apply in "the usual case", it might be expected that s 28 would expressly provide for an increase in the disqualification period where the offending or the subjective case of the offender is more serious than a "usual case".

(b) Section 28 does not require the Court to be "satisfied" of any matter before imposing a shorter disqualification period.

(c) The increases in the default disqualification period between levels 2, 3 and 4 (which are entirely determined by the offender's blood alcohol concentration level) are significant. At the time of the offending, the increase in the default disqualification period from level 2 (under 0.05 g) to level 3 (above 0.05 g but less than 0.08 g) was from 12 months to 3 years. The default disqualification period for level 4

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2 *Barnes* was cited in *R v Bonfield* [2021] ACTSC 362, but not on this issue.

3 Such an increase could only be made under s 65 of the *Road Transport (General) Act 1999* (ACT), which empowers the Court to order that a person's licence be disqualified until further order of the Court. Section 65 provides for an indeterminate loss of licence, where the Court is not satisfied that the default period of disqualification will be sufficient to protect the community.

(above 0.08 g but less than 0.15 g) was five years. Following the enactment of the 2024 Amending Act, the increases are somewhat less severe (two years for a level 3 offence, and three years for a level 4 offence).

(d) As Refshauge J observed in *Burow* (cited by Murrell CJ in *Stoehr* at [21]-[23]), the present form of the disqualification provision, which refers to a "default" disqualification period, was introduced by the *Road Transport Legislation Amendment Act 1999* (ACT) in 2000: *Burow* at [19]-[28]. Prior to these amendments, ss 32 and 33 of the Alcohol and Drugs Act referred to a "maximum" disqualification period. Although the terminology ("maximum" to "default") was amended, the periods of disqualification were not. There was no indication in the extrinsic material to this amendment to suggest that the change in terminology was intended to convert the pre-amendment "maximum" to a "usual" period of disqualification.

(e) Further to (d) above, when s 33 and related provisions were later amended by the *Road Transport Legislation Amendment Act 2016* (ACT) (which amended the Alcohol and Drugs Act to provide that an automatic disqualification period "is taken to be an order of the court", so as to enable the bringing of an appeal against an automatic disqualification period), the Explanatory Statement to that Bill (the *Road Transport Legislation Amendment Bill 2015 (No 2)* (ACT)) confirmed that "under each of these provisions (ss 32, 33 and 34) … the period of disqualification may therefore be the minimum period, the default period, or a period shorter than the default period that is not less than the minimum period".

41 Accordingly, whilst the "default disqualification period" is not strictly a maximum penalty, and in particular, is not reserved for the most serious examples of the offence, it is not necessary for the Court to be satisfied that there are "good reasons" before imposing a period of disqualification that is less than the default period. Rather, the Court should ask what period of disqualification is appropriate, in particular to meet the need for the protection of the community.

42 In the present case, there is no evidence that the loss of the appellant's licence will have any effect on the appellant above and beyond the inconvenience that is common to all offenders upon the loss of their licence. I bear in mind that the earlier offences which increased the default disqualification period occurred seventeen years ago. I am also satisfied that the appellant is remorseful for his conduct. However, for the reasons outlined above, the circumstances of the present offending, particularly the fact that the offender was warned by police not to drive shortly before the offence was committed, are such that the protection of the public must carry particular weight.

43 In my view, a disqualification period slightly less than the two year amended default disqualification period is appropriate. On resentence, I will impose a disqualification period of 20 months.

Relevance of the statutory stay of the Court's orders

44 Section 216(1) of the *Magistrates Court Act 1930* (ACT) ("MCA") states:

> (1) If a person (the ***appellant***) appeals under this division —
>
> (a) the enforcement or execution of the decision, conviction, order, sentence or penalty that is the subject of the appeal is stayed until the appeal is decided or is abandoned or discontinued;

45 As a result of s 216 of the MCA, the 18-month good behaviour order and the disqualification period were stayed upon the filing of the appeal.

46 It is sometimes the case that an appellant will not be aware of the effect of s 216 in staying orders of the Magistrates Court, particularly disqualification periods. This Court has held that evidence that an appellant did not drive as a result of such a mistaken belief may be taken into account in determining the period of disqualification to be imposed on appeal: *Shaw v Leach* [2014] ACTSC 135 at [30]-[33]; *Senderowski v Mothersole* [2013] ACTSC 217 at [23] and *Irving v Head* [2016] ACTSC 37; (2016) 75 MVR 13 at [105].

47 When these proceedings were first listed for hearing on 29 April 2024, Mr Sharman, who appeared for the appellant, sought, and was granted, an adjournment to obtain evidence that the appellant did not drive following the imposition of the automatic disqualification period as a result of a mistaken belief that he was not permitted to drive. The appellant was absent for this hearing as he was attending a funeral in Queensland. The prosecution also sought time to consider the operation of the stay provisions.

48 On 16 May 2024, Mr Sharman sought, and was granted, a further adjournment to obtain instructions from the appellant and to execute any necessary affidavits. The appellant was absent as the appellant's father had been taken to the hospital at the South Coast and the appellant had gone to see him. On 24 May 2024, Mr Sharman again sought an adjournment, indicating that he had still not been able to contact his client. As Mr Sharman could not provide any information as to when his client may be in a position to respond to his requests to make contact, I refused this application.

49 Accordingly, there is no evidence before the Court as to whether the appellant has been driving during the period that his disqualification was stayed. In these circumstances, the statutory stay does not provide a basis for reducing the disqualification period that is otherwise appropriate.

Orders

50 For the reason outlined above, no lesser sentence is appropriate other than that imposed by the Magistrate, namely a conviction, $800 fine and an 18-month good behaviour order. However, I have concluded that the disqualification period should be somewhat less than that which was ordered by the Magistrate.

51 Where the Court resentences an appellant following a successful appeal, it is often preferable that the Court set a new sentence, including resetting the term of any good behaviour order to take account of the statutory stay. However, as the appellant has not attended Court for the delivery of the judgment, it will not be possible for the appellant to sign a new good behaviour undertaking at this

time. The parties agreed that in these circumstances, it is open to the Court to confirm the good behaviour order of 18 months which was imposed by the Magistrate. As a result of the statutory stay, that order will now expire on 25 November 2025.

52 For the reasons outlined above, I will make a separate order setting aside the default disqualification period of three years' disqualification which applied at the time of the proceedings in the Magistrates Court, and will impose a new disqualification period of 20 months.

53 I recognise that this approach, of confirming one penalty, and varying another penalty, may not be permissible under comparable appellate provisions in New South Wales. However, as Mossop J observed in *Morrison v Maher* [2021] ACTSC 312 at [37], the text of s 218 of the MCA (which differs from s 6(3) of the *Criminal Appeal Act 1912* (NSW)) permits a court to "confirm, reverse or vary" a penalty appealed from. I am satisfied that s 218 of the MCA enables the Court to confirm one penalty appealed from (specifically, the good behaviour order), whilst varying another penalty appealed from (the disqualification period).

54 Accordingly, I make the following orders:

(1) The appeal is allowed in part.

(2) The appeal against the conviction and sentence imposed in the Magistrate's Court is dismissed. The $800 fine and the 18 month good behaviour order previously imposed by the Magistrate are confirmed.

(3) The appeal against the disqualification period is allowed. The appellant will be disqualified from driving for a period of 20 months, to date from today.

Appeal allowed in part

Solicitors for the appellant: *Tim Sharman Solicitors*.

Solicitors for the respondent: *ACT Director of Public Prosecutions*.

RICHARD DAVIES

SUPREME COURT OF THE AUSTRALIAN CAPITAL TERRITORY

Director of Public Prosecutions (ACT) v John (No 2)

[2024] ACTSC 199

Christensen AJ

3, 18, 25, 27 June 2024

Criminal Law — Sentencing — Drug and Alcohol Treatment Order — Breach by commission of further offences — Cancellation — Whether offender "subject to" a "sentence order" — Whether mandatory cancellation requires there to be temporal co-existence of the treatment order and the sentence order — Crimes (Sentencing) Act 2005 (ACT), s 80ZD.

Words and Phrases — "Subject to".

Following amendment in November 2023, s 80ZD of the *Crimes (Sentencing) Act 2005* (ACT) (the Sentencing Act) provides, inter alia:

> **80ZD Breach of treatment order — commission of offence**
>
> (1) This section applies if —
>
> (a) an offender to whom a treatment order applies commits an offence against a law in force in Australia or elsewhere (a further offence) while subject to the order; and
>
> (b) the further offence is punishable by imprisonment; and
>
> (c) the court —
>
> (i) convicts the offender of the further offence; or
>
> (ii) is satisfied that the offender was convicted by another court, in the ACT or elsewhere, of the further offence.
>
> (2) If the offender is not subject to a sentencing order for the further offence, the court may —
>
> (a) make no order in relation to the treatment order; or
>
> (b) give the offender a warning about the need to comply with the offender's treatment order obligations; or
>
> (c) make an order amending the treatment and supervision part of the order; or
>
> (d) make an order cancelling the treatment order.
>
> (3) If the offender is subject to a sentencing order for the further offence, the court must make an order cancelling the treatment order.

> *Note* A sentence of imprisonment suspended under a treatment order is not part of a suspended sentence order (see s 12 (7)).
>
> …
>
> (9) In this section:
>
> ***sentencing order*** — see section 12A (9).

A sentencing order for the purposes of s 80ZD is defined in s 12A(9) of the Sentencing Act:

> (9) In this section:
>
> …
>
> ***sentencing order*** means any of the following:
>
> (a) an order for imprisonment by full-time detention;
>
> (b) a suspended sentence order;
>
> (c) an intensive correction order;
>
> (d) a deferred sentence order;
>
> (e) a parole order;
>
> (f) an order under a law in force in Australia that corresponds to an order mentioned in paragraphs (a) to (e).

On 28 August 2023, the offender was sentenced to a term of imprisonment of two years and eight months for an offence of aggravated robbery. The sentence was backdated to commence on 22 July 2022, with the balance of one year, six months and twenty-one days suspended and incorporated into the custodial part of a treatment order pursuant to s 80W of the Sentencing Act. The treatment and supervision part of the treatment order was to commence on the same day as the suspension of the balance of the term of imprisonment and to end on 20 March 2025. The offender was admitted to a residential rehabilitation program on 28 August 2023. He successfully completed the program and graduated on 24 November 2023. On 7 December 2023, the offender committed the offences of taking a motor vehicle without consent and damaging property (the sentence offences). The following day, on 8 December 2023, the offender attended at court for a scheduled appearance as part of the treatment order, following which he was arrested and charged in relation to the sentence offences and was remanded in custody by the Magistrates Court. As a result of his being remanded in custody, on 15 December 2023, the Supreme Court provisionally suspended the treatment and supervision part of the treatment order pursuant to s 80ZC of the Sentencing Act. The offender remained in custody from the date of his arrest and on 7 March 2024, following pleas of guilty being entered, the offences were committed for sentence to the Supreme Court.

A preliminary issue arose as to whether the offender was "subject to" a sentencing order at the time of the review of his treatment order requiring mandatory cancellation of the treatment order pursuant to s 80ZD(3) or whether there was a discretion not to do so pursuant to s 80ZD(2)(d) of the Sentencing Act.

The prosecution submitted that if a sentencing order were to be imposed with respect to the sentence offences, then cancellation of the treatment order would be mandatory pursuant to s 80ZD(3) of the Sentencing Act. The prosecution further submitted that even in circumstances where a full-time imprisonment had already been served, that mandatory cancellation was enlivened and that the term "is subject to" was properly read as not requiring a temporal co-existence between the

offender being subject to a sentencing order and the court acting under s 80ZD(3) of the Sentencing Act.

Held, sentencing the offender to terms of imprisonment for the sentence offences but reinstating the treatment order:

(1) The legislative purpose is significant in working out the meaning of s 80ZD. In doing so, the court is concerned with the intention disclosed by the meaning of the language used. [50]

Lacey v Attorney-General (Qld) (2011) 242 CLR 573, referred to.

(2) Section 80ZD was amended so that the focus was not simply on whether there was a sentence of imprisonment imposed, but whether the offender was subject to a particular form of sentencing order that was inconsistent with meeting the obligations of a treatment order. [59]-[63]

(3) The legislature was concerned to ensure that there was not an inconsistency in orders that an offender was subject to. A period of full-time imprisonment would be inconsistent with the ability to achieve the objects of a treatment order, as would an offender being subject to both a treatment order and another type of order involving forms of engagement with Corrective Services. [56], [65]-[68]

(4) Having regard to statutory framework and legislative intent within which s 80ZD operates, there is no textual or purposive reason why a term of imprisonment, which has been served by the time the review under s 80ZD occurs, enlivens mandatory cancellation of the treatment order. [70]

(5) The appropriate orders for the sentence offences are periods of imprisonment that have been served. Accordingly, at the review and determination of his treatment order pursuant to ss 80ZH and 80ZD of the Sentencing Act following the imposition of the orders for the sentence offences, the offender is not subject to a sentencing order and s 80ZD(3) does not apply. [77]

Cases Cited

Lacey v Attorney-General (Qld) (2011) 242 CLR 573.

Public Prosecutions (ACT), Director of v Deighan (No 2) [2023] ACTSC 295.

R v Burge (No 2) [2024] ACTSC 20.

R v Rosewarne [2021] ACTSC 217.

R v Rowlands (No 2) [2024] ACTSC 143.

R v Tran [1999] NSWCCA 109.

UD v Bishop (2021) 17 ACTLR 159.

Veen v The Queen (No 2) (1988) 164 CLR 465.

Sentence

G Meikle, for the prosecution.

C Duffy, for the offender.

Cur adv vult

27 June 2024

Christensen AJ.

Introduction

1 Matthew John is a participant in the Drug and Alcohol Sentencing List (DASL) who comes before the Court following the commission of offences

during the term of his Drug and Alcohol Treatment Order (Treatment Order). The commission of the offences led to the provisional suspension of the treatment and supervision part of the Treatment Order pursuant to s 80ZC of the *Crimes (Sentencing) Act 2005* (ACT) (Sentencing Act).

2 Mr John is to be sentenced in relation to the offences, and the review proceeding in respect to the Treatment Order is to be considered under s 80ZH of the Sentencing Act. It is convenient in this matter to address firstly the matters for sentence, followed by consideration and determination of the review of the Treatment Order.

Background

3 On 28 August 2023, Mr John was sentenced for an offence of aggravated robbery contrary to s 310 of the *Criminal Code 2002* (ACT) (*Criminal Code*). A sentence of two years and eight months imprisonment was imposed. The sentence was backdated to commence on 22 July 2022, with the balance of one year, six months and twenty-one days suspended and incorporated into the custodial part of the Treatment Order pursuant to s 80W of the Sentencing Act.

4 The treatment and supervision part of the Treatment Order was imposed to commence on the same day as the suspension of the balance of the term of imprisonment and end on 20 March 2025. No good behaviour order was made under s 80ZA of the Sentencing Act. Thus, the sentence order ends on 20 March 2025.

5 Mr John was admitted to the Canberra Recovery Services residential rehabilitation program on 28 August 2023. He successfully completed this program and graduated on 24 November 2023.

6 On 7 December 2023, Mr John committed the offences of taking a motor vehicle without consent contrary to s 318(1) of the *Criminal Code* and damaging property contrary to s 403(1) of the *Criminal Code* (the sentence offences).

7 The following day, on 8 December 2023, Mr John attended at court for a scheduled appearance as part of the Treatment Order. During this court appearance, Mr John made admissions to having consumed alcohol and methamphetamine: s 80ZM of the Sentencing Act. He was formally warned, and a reflection was requested: Supreme Court of the Australian Capital Territory, *Behavioural Contract Protocol – Sanctions and Incentives*, 30 September 2021. Upon leaving the court precinct, Mr John was arrested and charged in relation to the sentence offences. He was remanded in custody by the Magistrates Court.

8 As a result of this, on 15 December 2023, the Supreme Court provisionally suspended the treatment and supervision part of the Treatment Order pursuant to s 80ZC of the Sentencing Act. Mr John has remained in custody since his arrest while the sentence offences have progressed through the court process. On 7 March 2024, following a plea of guilty being entered, the offences were committed for sentence to the Supreme Court.

Sentence offences

9 As already observed, the sentence offences involve two offences committed

on 7 December 2023. The offence of take motor vehicle without consent has a maximum penalty of imprisonment for five years and/ or 500 penalty units. The offence of damage property has a maximum penalty of 10 years imprisonment and/ or 1,000 penalty units.

Nature and circumstances of the offences: s 33(1)(a) of the Sentencing Act

10 The vehicle that was taken without consent and was damaged was a Kawasaki Ninja motorcycle.

11 Mr John was at the house of an associate in Isabella Plains. There were multiple people present on 7 December 2023, and they consumed illicit substances. Shortly after 10 am, Mr John and his associates went to a next door house and took the motorcycle. Mr John pushed it back to his associate's house.

12 At that time, the owner of the vehicle was at home with his partner. The victim saw the vehicle being taken and contacted police.

13 Before police attended, Mr John used an angle grinder to damage the steering column and fuel cap. This is described in the facts as being "severe damage". The damage caused enabled the vehicle to be driven without a key.

14 The facts provide that shortly after, Mr John rode the vehicle away from the premises.

15 At about 10.30 am, police were near to the victim's address, and they saw the motorcycle being ridden on a nearby street. Police were unable to locate the vehicle, or the person driving it.

16 Police investigations led to Mr John's partner being arrested at about 11 am. She informed the police that she was present when the vehicle was taken by Mr John. Another of the associates was also arrested. He denied any knowledge of Mr John's presence in respect to the vehicle. Both associates were released from custody and the information provided to the Court by the prosecution is that no other person was charged in respect to the offending.

17 The facts provide that Mr John "later realised that the vehicle belonged to [the victim], who was an old friend. As such, the defendant later met up with [the victim] at the Gowrie Shops Car Park and handed [him] back the vehicle … after handing the vehicle back … the defendant made no attempt to hand himself into police".

18 As already observed, Mr John was arrested the following day in relation to these offences. Mr John declined to participate in a record of interview.

Loss or damage and effect on the victims: ss 33(1)(e) and 33(1)(f) of the Sentencing Act

19 The value of the vehicle is not known, nor is the cost of the repairs to the vehicle from the damage. Presumably, the value of the motorcycle was not insignificant, but it was not at the value of a car, and the motorcycle was returned. The damage caused appears to have been relatively significant, such that there were likely financial implications for the victim.

20 Further, the victim likely experienced frustration and inconvenience from the offences. The circumstances of the taking of the vehicle were likely also alarming for the victim and his partner.

Consideration

21 The prosecution submitted that, in assessing the objective seriousness of the offence of take motor vehicle without consent, the Court should have regard to the vehicle having been driven by the offender for a period of time. However, Mr John is not charged in relation to, nor to be sentenced for, such conduct. I adopt what was said by Murrell CJ in *R v Rosewarne* [2021] ACTSC 217 at [123] as to the considerations that inform the objective seriousness of the offence of take motor vehicle without consent as being —

(a) the degree of planning;

(b) the motive for the offence, including whether it was undertaken to facilitate another offence; and

(c) whether the taking caused damage to the vehicle (unless separately charged) and whether the vehicle was recovered.

22 The considerations that Murrell CJ identified were not intended by her Honour to be exhaustive, but there is no basis, given the elements that establish the offence, upon which the considerations could extend to a person having driven the vehicle beyond what was required to establish the taking of the vehicle. Here, there was no such driving involved in the taking of the vehicle.

23 I do accept the prosecution submission as to some other features said to be salient in assessing the objective seriousness of this offence. That is, the vehicle was taken from the victim's home, it appears to have been opportunistic offending involving limited planning and premeditation, and that the vehicle was returned to the victim.

24 I would add to this that there is a brazenness to the offending that is of concern and suggests a need to reflect specific deterrence in the sentence to be imposed. Further, there is nothing to suggest the motivation for the offending was to facilitate another offence.

25 The prosecution otherwise submitted that the duration of the vehicle having been taken appears to have been for the better part of a day and that this is informative in assessing the objective seriousness of the offence. I accept that this is informative to the extent that it informs the loss to, and the effect on, the victim.

26 Mr John pleaded guilty to both offences at a stage when the matters were in the Magistrates Court, with a relatively early indication of this intention and no brief of evidence having been prepared. There is a high utilitarian value to the plea of guilty such that if it is necessary to quantify the appropriate discount it would be 25 per cent. This early plea of guilty otherwise indicates Mr John's remorse and insight, as do his actions in returning the motorcycle to the victim.

27 The prosecution did submit that the case was one that was "overwhelming strong" such that there ought not be a significant reduction for the plea of guilty: s 35(4) of the Sentencing Act. This submission was partially premised on Mr John having returned the vehicle to its owner, and as such, it was submitted that a reduction may still arise due to assistance in administration of justice: s 35A of the Sentencing Act. I am not persuaded that the case was overwhelmingly strong given that, on the extent of information known to the

Court, the return may have only formed part of a circumstantial case. The information available to the Court is that the direct evidence involved inconsistent witness accounts.

28 I am though satisfied that the return of the vehicle enlivens consideration of s 35A. Whether the Court imposes a lesser penalty in such circumstances remains discretionary, and any lesser penalty must not be unreasonably disproportionate to the nature and circumstances of the offence. Here, I have had regard to the recovery of the vehicle, and the circumstances in which it was returned, in assessing the objective seriousness and the remorse demonstrated. I am not persuaded that any additional reduction, beyond that already determined for the plea of guilty, is appropriate.

29 The prosecution submission, one seemingly at least partially premised on an assessment of objective seriousness that erroneously included reliance on Mr John having driven the vehicle, was that no penalty other than imprisonment is appropriate: s 10 of the Sentencing Act. It was further submitted by the prosecution that a period of full-time imprisonment that involved the time spent remanded on pre-sentence custody would not be inappropriate. This is a submission that the Court may consider: s 34AA of the Sentencing Act.

30 On behalf of Mr John, it was submitted that there was an acceptance that imprisonment was appropriate given the offending occurred while Mr John was subject to conditional liberty.

31 As said in *R v Rowlands (No 2)* [2024] ACTSC 143, applying *R v Tran* [1999] NSWCCA 109 at [15], the betrayal of the opportunity of a Treatment Order is regarded very seriously and should weigh against the offender. There are, as observed by Norrish AJ in *Director of Public Prosecutions (ACT) v Deighan (No 2)* [2023] ACTSC 295, "degrees of seriousness of breaches of conditional liberty". A breach involving a Treatment Order is a serious example of this aggravating factor on sentence, given the privilege entailed in such an order and the betrayal of the trust that the court and the community place in a participant afforded such an opportunity.

32 I agree that the breach of conditional liberty that occurred here is of significance in determining the appropriate sentence to be imposed. It was not only a breach of a Treatment Order but was one that occurred only some two weeks after completion of residential rehabilitation. The offending was not of a similar nature to the original offending, but it occurred in circumstances of a similar nature, arising when there had been engagement in illicit substance use with associates.

33 However, the nature and circumstances of the offending here lead to a conclusion that this was an offence of low objective seriousness. It lacks features of seriousness that typically arise in offences of this type, such as the taking of a vehicle in the early hours of the morning following a burglary of the house to obtain the keys. The motorcycle was returned within a relatively short timeframe, and the financial implications involved, while no doubt not insignificant for the victim, are, relatively, insubstantial for offending of this type.

34 As already observed, the brazenness of the take motor vehicle offending does

merit a level of deterrence in the sentence to be imposed. As does Mr John's criminal history. Mr John's criminal history does not involve offending of the same complexion of the sentence offences, but it does demonstrate that the sentence offences are not "uncharacteristic aberrations" and that Mr John manifests "a continuing attitude of disobedience": *Veen v The Queen (No 2)* (1988) 164 CLR 465 at 477 (*Veen (No 2)*). Mr John's criminal history reflects offending behaviour in New South Wales and the ACT [redacted]. His offending involves primarily drug and driving offences, and some occasions of assault and burglary. He has been previously imprisoned in both jurisdictions.

35 While the criminal history cannot of course be "given such weight as to lead to the imposition of a penalty which is disproportionate to the gravity" of the sentence offences, it leads to a conclusion that not only deterrence, but punishment and protection of society are relevant sentencing purposes: *Veen (No 2)* at 477. The other purposes of sentencing, as provided in s 7 of the Sentencing Act, are also relevant in determining the appropriate sentence. In addition, there is the feature of the offending having occurred while on a Treatment Order, which, as already observed above at [30]-[31], is an aggravating factor.

36 I conclude that having considered possible alternatives, no penalty other than imprisonment is appropriate.

37 Mr John has been remanded in custody in relation to the charges since 8 December 2023, a total of 202 days. It is appropriate that the term be backdated in accordance with s 63 of the Sentencing Act.

38 It is also appropriate that there be a level of concurrency between the sentences to be imposed to give effect to the totality principle. The orders will otherwise reflect that the damage caused to the vehicle was separately charged and does not inform the objective seriousness of the take motor vehicle offence.

Cancellation proceeding

39 The prosecution submitted that if a sentencing order is imposed with respect to the sentence offences, then cancellation is mandatory per s 80ZD(3) of the Sentencing Act. If though a sentencing order was not imposed, then cancellation is discretionary under s 80ZD(2)(d).

40 However, the terms of the section mean that it is not simply whether such an order is imposed, but whether the offender "is subject to" such an order. Section 80ZD, as in effect from 9 November 2023, provides —

> **80ZD Breach of treatment order — commission of offence**
>
> (1) This section applies if —
>
> (a) an offender to whom a treatment order applies commits an offence against a law in force in Australia or elsewhere (a further offence) while subject to the order; and
>
> (b) the further offence is punishable by imprisonment; and
>
> (c) the court —
>
> (i) convicts the offender of the further offence; or
>
> (ii) is satisfied that the offender was convicted by another court, in the ACT or elsewhere, of the further offence.

(2) If the offender is not subject to a sentencing order for the further offence, the court may —

(a) make no order in relation to the treatment order; or

(b) give the offender a warning about the need to comply with the offender's treatment order obligations; or

(c) make an order amending the treatment and supervision part of the order; or

(d) make an order cancelling the treatment order.

(3) If the offender is subject to a sentencing order for the further offence, the court must make an order cancelling the treatment order.

Note A sentence of imprisonment suspended under a treatment order is not part of a suspended sentence order (see s 12 (7)).

(4) If the court cancels a treatment order under subsection (2) (d) or (3), the court must either —

(a) impose the sentence of imprisonment that was suspended under the custodial part of the treatment order; or

(b) if the court considers it appropriate in the circumstances — resentence the offender for each offence in relation to which the treatment order was made and in any way in which the court could deal with the offender if it had convicted the offender of each offence at the time of resentencing, other than by making an order under section 12A (Drug and Alcohol Treatment Orders).

(5) If the court orders the imposition of a sentence of imprisonment under this section, the court —

(a) must order that the offender serve all or part of the sentence by full-time detention at a correctional centre; and

(b) may reduce the sentence by any period served in custody under the treatment and supervision part of the treatment order, taking into account the extent to which the offender complied with that part of the order.

(6) The court may make an order under this section on its own initiative or on application by —

(a) the offender; or

(b) the director of public prosecutions; or

(c) a member of the treatment and supervision team; or

(d) a person prescribed by regulation.

(7) If the court makes an order under this section, the court must, as soon as practicable after the order is made, ensure that written notice of the order, together with a copy of the order, is given to —

(a) the offender; and

(b) any other person the court considers should receive the notice.

(8) Failure to comply with subsection (7) does not invalidate the treatment order.

(9) In this section:

sentencing order — see section 12A (9).

41 A sentencing order for the purposes of s 80ZD is defined in s 12A(9) of the Sentencing Act as —

(9) In this section:

…
sentencing order means any of the following:
(a) an order for imprisonment by full-time detention;
(b) a suspended sentence order;
(c) an intensive correction order;
(d) a deferred sentence order;
(e) a parole order;
(f) an order under a law in force in Australia that corresponds to an order mentioned in paragraphs (a) to (e).

42 As will become apparent from the orders, a sentencing order is to be imposed. That is, a period of full-time imprisonment is imposed for the sentence offences. The term of the order is such that, as at the time of the review proceeding in respect to the Treatment Order, the period of full-time imprisonment will have been served.

43 A preliminary issue then arises as to whether mandatory cancellation is pursuant to s 80ZD(3) or whether there is a discretion pursuant to s 80ZD(2)(d). That is, whether Mr John is "subject to" a sentencing order at the time of the review of his Treatment Order.

Statutory construction

44 The prosecution submitted that even in circumstances where the full-time imprisonment has been served, that mandatory cancellation is enlivened. It was submitted that both a textual and a purposive analysis lead to this conclusion. The defence representative did not make any submissions contrary to this.

45 I accept the prosecution submissions as to the approach to be taken for the statutory interpretation exercise that is to be undertaken. That is, Ch 14 of the *Legislation Act 2001* (ACT) (*Legislation Act*) is relevant, as are the common law presumptions that operate in statutory interpretation. The prosecution also, appropriately, emphasised the centrality of legislative purpose in the interpretive process: *UD v Bishop* (2021) 17 ACTLR 159 at [68].

46 Adopting a textual analysis, with reference to the statute as a whole, the prosecution submitted that "is subject to" is properly read as not requiring a temporal co-existence between the offender being subject to a sentencing order and the Court acting under s 80ZD(3) of the Sentencing Act. It was submitted that undue emphasis ought not be placed on the choice of tense given the tense otherwise utilised in the section. It was submitted that the point in time at which s 80ZD is applied is ultimately arbitrary and that the section is best read as to whether the offender is subject to a sentencing order as a further condition precedent to mandatory cancellation, and no more.

47 The prosecution further submitted that if the court was against their submission as to there being no requirement for temporal co-existence, then in any event, the requirement is met at the time of sentence being passed as the offender is still made subject to an order on that date. The prosecution emphasised s 10(2) of the Sentencing Act, which states that "the court may, by

order, sentence the offender to imprisonment". It was submitted that s 63, as to the direction a court may make, provides a mechanical feature for an order under s 10(2), rather than altering the nature of the order.

48 The prosecution also relied on a purposive interpretation and submitted that the legislature was concerned with a sole question as to what the quality of the sentence imposed for the further offence was. The prosecution submission is that if the answer to that question is a "sentencing order" as defined under s 12A(9), then s 80ZD(3) is enlivened.

49 The prosecution submission with reference to solely a textual reading of the section may have some persuasive force. It can be accepted that if the question as to whether a participant faces mandatory cancellation, without any scope for judicial discretion, hinges on the time at which the Court comes to consider the application of s 80ZD, then there is potential for contortion or unfairness.

50 In working out the meaning of s 80ZD, ascertaining the legislative purpose becomes of significance: ss 138 and 141 of the *Legislation Act*. In doing so, the Court is concerned with the intention disclosed by the meaning of the language used, that is, the purpose resides "in its text and structure, albeit it may be identified by reference to common law and statutory rules of construction": *Lacey v Attorney-General (Qld)* (2011) 242 CLR 573 at [44].

51 Here, the legislative history of the provision is informative as to this.

52 Up until 8 November 2023, the original relevant subsections of 80ZD provided —

> …
>
> (2) If the sentence *imposed* on the offender for the further offence *is not a sentence of imprisonment*, the court may —
>
> (a) make no order in relation to the treatment order; or
>
> (b) give the offender a warning about the need to comply with the offender's treatment order obligations; or
>
> (c) make an order amending the treatment and supervision part of the order; or
>
> (d) make an order cancelling the treatment order and either —
>
> (i) impose the sentence of imprisonment that was suspended under the custodial part of the treatment order; or
>
> (ii) if the court considers it appropriate in the circumstances — resentence the offender for each offence in relation to which the treatment order was made and in any way in which the court could deal with the offender if it had convicted the offender of each offence at the time of resentencing, other than by making an order under section 12A (Drug and alcohol treatment orders).
>
> (3) If the sentence *imposed* on the offender further offence *is a sentence of imprisonment*, the court must make an order cancelling the treatment order and imposing the sentence of imprisonment that was suspended under the custodial part of the treatment order.

(Emphasis added.)

53 The legislature was seemingly concerned to draw a distinction between further offences that involved a sentence of imprisonment, of whatever form — or "mechanical feature" to adopt the prosecution description — and offences for which a sentence of imprisonment was not imposed.

54 The legislative intent as to this can be ascertained from the Explanatory Statement to the *Sentencing (Drug and Alcohol Treatment Orders) Legislation Amendment Bill 2019* (ACT) (2019 Explanatory Statement). This provides, in the explanation to the breach provisions where there has been further offending —

> In order to comply with their obligations under the treatment and supervision part of a DATO, the offender must be within the community to attend appointments and participate in programs. This section applies if the offender is held in custody after being charged with further offences … the court must make an order provisionally suspending the treatment and supervision part of the DATO until the offender is no longer in custody, or the court makes an order cancelling the DATO.

55 It is also relevant to observe that in the 2019 amendments that introduced the Drug and Alcohol Treatment Order provisions, the 2019 Explanatory Statement provides in respect to s 12A —

> Paragraph 12A(1)(c) requires the offender not to be subject to a "sentencing order" for another offence, as the DATO is a highly intensive order which requires the offender to engage with multiple agencies in order to address both the offender's criminogenic and therapeutic risk factors. Requiring the offender to comply with multiple orders would undermine the basis for the order and would jeopardise the sentencing goals.

56 It is apparent that the legislature was concerned to ensure that there was not an inconsistency in orders that an offender was subject to. That is, a period of full-time imprisonment is plainly inconsistent with the ability to achieve the objects of a Treatment Order, as is the ability to be subject to both a Treatment Order and another type of order involving forms of engagement with Corrective Services.

57 The 2019 Explanatory Statement suggests that the legislature was not concerned with whether the further offending was of such a nature that the s 10 threshold of the Sentencing Act was crossed such that the only appropriate sentence order was a term of imprisonment. Rather, the legislature was concerned to avoid inconsistency in orders.

58 In November 2023, s 80ZD of the Sentencing Act was amended with the provision introduced as set out above at [40]. A significant change was made, being one that enforces the conclusion as to the original legislative intent.

59 Section 80ZD was amended such that the focus was not simply on whether there was a sentence of imprisonment imposed, but whether the offender was subject to a particular form of sentencing order, being an order plainly inconsistent with meeting the obligations of a Treatment Order. Explanatory Statement, *Sentencing (Drug and Alcohol Treatment Orders) Legislation Amendment Bill 2023* (ACT) (2023 Explanatory Statement) provides in respect to this particular amendment —

> The Bill proposes the following amendments to the Sentencing Act and Sentence Administration Act:
>
> …
>
> h. Clarify that section 80ZD of the Sentencing Act only applies to offences committed during the treatment order.
>
> i. Allow the court discretion to cancel a treatment order and resentence the offender for each offence; and
>
> j. Clarify the inconsistency between sections 80ZD and 12A(1)(c) and (9) of the Sentencing Act with respect to terminology for sentencing orders.

60 As to (i) above, the 2023 Explanatory Statement provides —

> Sections 80ZD(2) and (3) of the Sentencing Act empower the court to cancel an offender's treatment order if an offender has breached their treatment order by conviction for an offence punishable by imprisonment.
>
> This Bill inserts the new subsection (3A) to section 80ZD to *increase the flexibility* of the court when cancelling a treatment order under subsection (2) or (3). This Bill provides that where the court cancels the treatment order under subsection (2) or (3), the court may either impose the sentence of imprisonment that was suspended under the custodial part of the treatment order; or if the court considers it appropriate in the circumstances, resentence the offender for each offence under the treatment order in any way in which the court could deal with the offender if it had convicted the offender of each offence at the time of resentencing.

(Emphasis added.)

61 Further as to this aspect of the amendment, it is provided —

> This clause omits "sentence imposed on the offender for the further offence is not a sentence of imprisonment" and substitutes "offender is not subject to a sentencing order for a further offence".
>
> This clause *improves consistency* between the provisions relating to treatment orders within the Sentencing Act, as it replaces the phrase "sentence of imprisonment" with "sentencing order". Clause 37 provides a definition for "sentencing order" with reference to section 12A(9).
>
> A risk associated with this clause is that a "deferred sentence order" is listed as a "sentencing order" under section 12A(9), which may impact a specific cohort of offenders who receive a deferred sentence order in another jurisdiction.
>
> In the ACT, a deferred sentence order cannot be imposed on an individual that is already liable to a sentence of imprisonment, which means that an offender subject to a treatment order cannot also be subject to a deferred sentencing order for a further offence. Accordingly, there is no conflict between this clause and the existing operation of section 80ZD within the ACT.
>
> However, there is a risk that a deferred sentence order may be imposed on an offender who is subject to a treatment order in another State or Territory. If a deferred sentence order is imposed in another jurisdiction, the offender may be at risk of having their treatment order cancelled under section 80ZD(3).

(Emphasis added.)

62 As to (j) —

> This Bill amends section 80ZD of the Sentencing Act to replace the term "sentence of imprisonment" with "sentencing order" as defined in section 12A(9), to increase consistency within the Sentencing Act.

63 This amendment was further explained in the 2023 Explanatory Statement as —

> The new subsection (3A) [subsection (4) once amended] provides the court with the option to resentence the offender instead of automatically imposing the sentence of imprisonment suspended under the treatment order, *increasing the range of orders* the court may make other than a sentence of imprisonment.
>
> …
>
> This clause inserts subsection (8), which defines sentencing order with reference to section 12A(9), to *improve consistency* between the provisions relating to treatment orders in the Sentencing Act.

(Emphasis added.)

64 While there is, as the prosecution submitted, an apparent intention to address consistency of orders where a deferred sentence order is involved, as shown above at [60]-[61], there is otherwise an emphasis on improving general consistency for the Treatment Order provisions, while also promoting the availability of discretion for the court.

Consideration of "subject to" under s 80ZD

65 Having had regard to the legislative history of the provision, it is apparent that the legislature has been concerned to ensure a DASL participant is not required to comply with orders that are inconsistent with meeting the therapeutic requirements and goals of a Treatment Order. The apparently deliberate inclusion that a participant be "subject to" certain orders, and the legislative intent as to when and why such orders are relevant, cannot be subject to a form of bowdlerisation, nor ignored. The issue is not, as the prosecution submitted, one of the quality of the order imposed, but the quality of the order an offender is subject to.

66 The intention is not to render a participant unable to comply with a Treatment Order if the further offending warrants a term of imprisonment. The focus is not on the seriousness of the further offending, but rather, on the likelihood of operative inconsistency in orders. The "mechanical feature" of the order an offender is subject to is relevant.

67 Subject to the discussion below at [68], all of the forms of sentencing orders that exclude imposition of, or continuation on, a Treatment Order, are concerned with a form of order that limits the availability and practicality for effective engagement with a Treatment Order.

68 Nonetheless, it might be considered that a suspended sentence order may not always be of this character: s 12 of the Sentencing Act. It is conceivable that a good behaviour order imposed with a suspended sentence may not, in practice, involve onerous requirements inconsistent with a Treatment Order if the good behaviour order imposed only core conditions. There would though still be a requirement to comply with directions (see s 86 of the *Crimes (Sentence Administration) Act 2005* (ACT)) and, on a practical application of such orders,

an inconsistency in administrative oversight by Community Corrections. The inclusion of this form of order in the meaning of "sentencing orders" under s 12A(9)(b) does not alter my view.

69 This is not to say that the seriousness of the further offending is not a relevant consideration in determining the appropriateness of a participant's continuation on a Treatment Order where such offending has occurred. But this is not necessarily determinative of what is to occur. Rather, the provisions are intended to afford the Court a discretion as to the appropriate order for a participant, having regard to any other orders that they may be subject to at a particular point in time.

70 Here, it comes back to whether, at the time of review of the Treatment Order arising from the breach of the order by way of offending, Mr John is subject to a sentencing order that precludes him from engaging with a Treatment Order. Having considered the statutory framework and legislative intent within which s 80ZD operates, there is no textual or purposive reason why a term of imprisonment, which has been served by the time the s 80ZD review occurs, enlivens mandatory cancellation of the Treatment Order.

71 This interpretation does not preclude the court from retaining an ability to cancel the order if the further offending warrants such a conclusion (see below at [76]). It simply gives effect to the legislative intent that there is a temporal co-existence between the sentencing order for any further offending and the stage at which the review is undertaken.

72 I have given careful consideration as to whether such an interpretation is contrary to best achieving the purpose of the Sentencing Act and specifically the Drug and Alcohol Treatment Order provisions, given the risk of contortion and unfairness as submitted by the prosecution. I am not satisfied that it ultimately is. Such a risk is present for any offender wishing to participate in the DASL. For example, they may have outstanding summary charges at the time their Supreme Court sentence comes to be finalised such that they could be precluded from being eligible or suitable for a Treatment Order: ss 80S and 80T of the Sentencing Act. Or an offender may be subject to a sentencing order for previous offending by the time they come to be considered for threshold eligibility for a Treatment Order under s 12A(1)(c) of the Sentencing Act and this precludes them from such an order.

73 Such circumstances, that can arise as a result of court processes, are not without precedent in the DASL. Nor are examples of participants who have committed further offences but not been exposed to cancellation given the form of sentencing order imposed. The approach of the Court has been, appropriately, to apply the legislative provisions, giving effect to their intent, to the individual circumstances as they arise. This ensures that, to the extent possible, the provisions are applied fairly, consistently, and in accordance with the legislature's intention. What will occur here with Mr John is simply another example of this.

74 I also observe that I do not accept the prosecution submission that the interpretation as determined by the Court in this decision risks "inspiration" in

DASL participants to delay finalisation of fresh charges to potentially secure an outcome that enables them to continue on a Treatment Order where there has been further offending behaviour.

75 Firstly, this is not a basis to favour one interpretation over another, particularly in the absence of such a clear legislative intent. Secondly, for this to occur, the parties would be ignoring their obligation to assist the Court. Thirdly, the prosecution can seek a review of a Treatment Order where the treatment and supervision part has been provisionally suspended pursuant to s 80ZC at any time: see s 80ZH(2)(b)(ii) of the Sentencing Act.

76 For example, here, there was no impediment for the prosecution to initiate a review and seek that the Court cancel the Treatment Order at any time following Mr John having been charged. It was not necessary that the proceeding for the sentence of the offences be finalised before the Court, but rather, that the Court be satisfied that the review is in the interests of justice. While s 80ZD would not be available in the absence of a conviction, a variety of basis for cancellation are available for the Court to consider where unsatisfactory circumstances arise: see s 80ZE of the Sentencing Act.

77 The prosecution did not do so, and accordingly, the Court is left here to determine the appropriate outcome having regard to the circumstances as they now arise. For Mr John, the appropriate orders for the sentence offences will be periods of imprisonment that have been served. Accordingly, at the review and determination of his Treatment Order pursuant to ss 80ZH and 80ZD of the Sentencing Act following the imposition of the orders for the sentence offences, Mr John is not subject to a sentencing order. Section 80ZD(3) thus does not apply.

Section 80ZD(2) of the Sentencing Act

78 That does not though finalise the determination in this matter. The Court must still consider which of the discretionary orders available under s 80ZD(2) is appropriate.

79 Initially during the hearing of this proceeding, Mr John, through his counsel, did not seek an opportunity to continue on the Treatment Order, indicating an intention to secure full-time employment upon his release from custody. He, quite properly, recognised that such a course would not enable him to meet his Treatment Order obligations.

80 Subsequent to that appearance, Mr John, again through his counsel, indicated that he did seek an opportunity to continue on the Treatment Order. In accordance with the procedural fairness that s 80ZH envisages for a review (see *R v Burge (No 2)* [2024] ACTSC 20 at [11]), evidence was adduced from Mr John and the treatment and supervision team as to the appropriate order.

81 Mr John expressed that he made a quick decision against continuation on the Treatment Order in the context of the court proceeding. He said that as soon as court finished, he thought he had made the wrong choice and he contacted his lawyer about this. He said that he was confident that he would benefit from the counselling available under the Treatment Order, and that he has available to him a prosocial environment with his sister. He is interested to engage in employment but understands the importance of complying with the Treatment

Order as a priority initially. Mr John said that he has not used substances while in custody and that there is value for his being on a Treatment Order as he doesn't "want drugs in [his] life anyway".

82 Health Services supported the continuation of the Treatment Order, with no contrary views expressed by other therapeutic members of the treatment and supervision team. It was recommended that there be a strong warning as to the need to comply with the order, and that there be an extension of the treatment and supervision part of the order. It was proposed that Mr John be required to participate in a day rehabilitation program.

83 From the outset, the prosecution submitted that it is appropriate that there be cancellation of the Treatment Order for the following reasons —

(a) The offender was less than four months into the order at the time of the offending;

(b) The offender had graduated from residential rehabilitation less than two weeks prior to the offending, and so it is difficult to see what confidence the Court and the community could have in the efficacy of treatment for this offender; and

(c) The further offending was by no means trivial.

84 The prosecution emphasised that the period of time remaining on the Treatment Order is such that there is a compression of time for treatment and supervision that limits the ability to achieve the therapeutic goals.

85 It was submitted that if the Treatment Order was not cancelled, that any amended order should include a requirement for a day program, a transitional opportunity that Mr John did not have previously. Further, it was submitted that Mr John, having sought an opportunity to continue on the Treatment Order, has demonstrated a willingness to "not take the easy road … [but] to take the hard road" with rehabilitation rather than imprisonment.

86 On behalf of Mr John, it was emphasised that prior to the offending behaviour, he had been doing very well with his progress on the Treatment Order. He completed residential rehabilitation with no sanction points or substance use. He has then engaged with rehabilitation programs available to him while in custody and has expressed his willingness to recommence at Phase 1 of the Treatment Order.

Determination: s 80ZH of the Sentencing Act

87 I accept the prosecution submission that the offending occurring a short time after release from residential rehabilitation is of concern. However, this factor, and that it occurred within four months of the imposition of the order, are not necessarily indicative of unsuitability for a Treatment Order. The non-linear nature of rehabilitation is something very familiar to this Court.

88 Of more relevance is the nature and circumstances of the offending behaviour. I accept that it was not trivial, but it was of low objective seriousness and not a nature similar to the original offending. The circumstances in which it occurred are indicative of a rehabilitation lapse that, again, is reflective of the non-linear nature of rehabilitation. It is not demonstrative of Mr John having an inability to rehabilitate.

89 Mr John demonstrates a level of insight into the circumstances that led to the offending behaviour and commitment to continuing his rehabilitative efforts with the support available through a Treatment Order.

90 The community's interest in achieving the objects of a Treatment Order for Mr John remain, and there is no reason why the objects cannot still be achieved: see s 80O of the Sentencing Act. I conclude that this is so even in circumstances where the recommendation for an extension of the treatment and supervision part of the order cannot be applied as Mr John's original sentence involved only a Treatment Order with no period of a good behaviour order.

91 While plainly the period of time remaining, eight months and 22 days, is less than might be therapeutically preferred, it is not an insignificant period, and it is a period that still enables opportunity for solid rehabilitative progress before the completion of the sentence order.

92 Mr John has already engaged successfully in a residential rehabilitation program, he has engaged with some rehabilitation activities while in custody, and he has prosocial supports available to him. There is a basis upon which to have optimism that Mr John can still achieve successful completion of the objectives of the Treatment Order in the period of time remaining.

93 I conclude that in all the circumstances it is appropriate that Mr John be warned about the need to comply with his Treatment Order obligations: s 80ZD(2)(b) of the Sentencing Act. Consequential orders will be made that will have the Treatment Order reinstated with necessary amendments: ss 80ZC and 80ZH(6) of the Sentencing Act.

Orders

94 For those reasons the following orders are made:

95 In the proceeding of SCC 62 of 2024:

(1) Matthew John be convicted of take motor vehicle without authority (CAN 12117/2023) and he be sentenced to 4 months imprisonment to commence from 8 December 2023 and end on 7 April 2024.

(2) Matthew John be convicted of damage property (CAN 12118/2023) and he be sentenced to 2 months imprisonment to commence from 8 March 2024 and end on 7 May 2024.

96 In the proceeding of SCC 318 of 2022:

(3) Pursuant to s 80ZD(2)(b) of the *Crimes (Sentencing) Act 2005* (ACT), Matthew John be given a warning on the need to comply with the offender's treatment order obligations.

(4) Pursuant to s 80ZD(2)(c) of *Crimes (Sentencing) Act 2005* (ACT), the Drug and Alcohol Treatment Order made on 28 August 2023 be amended as follows:

(a) Omit conditions 4, 5 and 6.

(b) Add at the end of the Order the following conditions:

"10. Matthew John not consume alcohol, cannabis, illicit substance and prescription drugs not prescribed to him.

11. Matthew John reside at [redacted] and he not leave his place of residence between the hours of 6:00 pm each day and 8:00 am the next day other than for a medical emergency and present himself to the front door of his residence if required by an officer of ACT Policing.

12. Matthew John admit himself into the drug rehabilitation day program at Canberra Recovery Hub in Braddon, ACT no later than Monday 1 July 2024, and he complete the program and obey all rules and obligations of the program and the facility, and obey all reasonable directions of the person in charge of his program."

(c) Matthew John return for DASL Review in person on Tuesday 2 July 2024 at 12:30 pm before Christensen AJ.

(5) It be noted that availability for transitional housing at the Canberra Recovery Services for Matthew John is to be ascertained should the residence in [redacted] be found not suitable for accommodation.

Sentences imposed and treatment order reinstated with amendment

Solicitors for the prosecution: *ACT Director of Public Prosecutions*.

Solicitors for the offender: *Legal Aid ACT*.

RICHARD DAVIES

SUPREME COURT OF THE AUSTRALIAN CAPITAL TERRITORY

Rutzou v Campbell

[2024] ACTSC 217

Baker J

19 June, 10 July 2024

Traffic Law — Appeal against sentence — Driving with a prescribed concentration of alcohol in breath as a first offender — Good behaviour order without conviction — Condition of good behaviour order prohibiting appellant from driving for six months except in limited circumstances — Whether court empowered to impose driving restriction as a condition of good behaviour order — Crimes (Sentencing) Act 2005 (ACT), ss 13, 17, 18.

Section 17 of the *Crimes (Sentencing) Act 2005* (ACT) (the Sentencing Act) provides, *inter alia*:

> **17 Non-conviction orders — general**
>
> (1) This section applies if an offender is found guilty of an offence.
>
> (2) Without convicting the offender of the offence, the court may make either of the following orders (each of which is a non-conviction order):
>
> (a) an order directing that the charge be dismissed, if the court is satisfied that it is not appropriate to impose any punishment (other than nominal punishment) on the offender;
>
> (b) a good behaviour order under section 13.
>
> …

Section 18 of the Sentencing Act provides, *inter alia*:

> **18 Non-conviction orders — ancillary orders**
>
> (1) This section applies if the court makes a non-conviction order for an offender for an offence.
>
> (2) The court may make any ancillary order that it could have made if it had convicted the offender of the offence.
>
> …
>
> (5) In this section:
>
> ***ancillary order*** means an order or direction in relation to any of the following:

…

(f) disqualification or loss or suspension of a licence or privilege.

Examples

…

2 a driver licence disqualification order

Section 13 of the Sentencing Act provides, *inter alia*:

13 Good behaviour orders

(1) This section applies if an offender is convicted or found guilty of an offence.

Note If a good behaviour order is made without convicting the offender (see s 17), it is also a non-conviction order (see s 17 (2)).

(2) The court may make an order (a good behaviour order) requiring the offender to sign or give an undertaking to comply with the offender's good behaviour obligations under the *Crimes (Sentence Administration) Act 2005* for a stated period.

…

(4) A good behaviour order may include 1 or more of the following conditions:

…

(g) any other condition, not inconsistent with this Act or the *Crimes (Sentence Administration) Act 2005*, that the court considers appropriate.

Examples of conditions for par (g)

…

4 that the offender not drive a motor vehicle or consume alcohol or non-prescription drugs or medications

…

The appellant pleaded guilty in the Magistrates Court to a charge of driving with a prescribed concentration of alcohol in breath as a first offender, contrary to s 19(1) of the *Road Transport (Alcohol and Drugs) Act 1977* (ACT). The magistrate sentenced the appellant to a good behaviour order for a period of 24 months, without conviction, pursuant to s 17(2)(b) of the Sentencing Act. The good behaviour order included a condition which prohibited the appellant from driving, except for limited purposes, for a period of six months (the driving condition). The appellant appealed from this sentence on the following grounds:

1. That the sentence given by the learned Magistrate, and in particular, the twenty-four-month good behaviour order and the restricted licence conditions, are manifestly excessive.
2. That the Magistrate made an order she was not legally empowered to make, by imposing restricted licence conditions as part of a sentence in circumstances where;
   (i) There was no application before the Court below for a restricted licence pursuant to reg 45 of the *Road Transport (Driver Licensing) Regulation 2000* (ACT); and
   (ii) Section 18 of the Sentencing Act does not empower the

learned Magistrate to make a "restricted licence" as part of a good behaviour order imposed pursuant to that section.

The Director of Public Prosecutions (the respondent) conceded that the driving condition was an order made contrary to law.

Held, not accepting the respondent's concession, and dismissing the appeal:

(1) The magistrate did not purport to make an ancillary order under s 18 of the Sentencing Act. Rather, the order prohibiting the appellant from driving was made as a condition of the good behaviour order. [5], [24]

Miller v Tighe [2017] ACTSC 185; (2017) 267 A Crim R 540, distinguished.

(2) While a court cannot impose a disqualification order as a condition of a good behaviour order, the condition imposed by the magistrate was qualitatively different from a disqualification order. Whereas a disqualification order prohibited a person from holding or obtaining a driver's licence, the condition imposed by the magistrate precluded the appellant from driving, except for specified purposes. [31]

(3) The question to be addressed was not whether a driving restriction could be made under s 18 of the Sentencing Act but whether such a restriction could be made as a condition of a good behaviour order imposed under s 13. [5], [26]

(4) Section 13(1)(g) conferred a broad power to make any condition "not inconsistent" with the Sentencing Act or the *Crimes (Sentence Administration) Act 2005* (ACT) (the Sentence Administration Act), which will best meet the competing (and often contradictory) purposes of sentencing. The statutory example provided in s 13(4)(g), "that the offender not drive a motor vehicle or consume alcohol or non-prescription drugs or medications" was a strong indication that the legislature did not intend the existence of s 18 to limit the power of a court to make a condition under s 13 which prohibited an offender from driving a motor vehicle either generally or in specific circumstances. [5], [39]

Anthony Hordern & Sons Ltd v Amalgamated Clothing and Allied Trades Union of Australia (1932) 47 CLR 1; *Director of Public Prosecutions (Cth) v Evans* [2022] FCAFC 182; (2022) 294 FCR 512, referred to.

(5) The driving condition imposed by the magistrate was not inconsistent with the Sentencing Act or the Sentence Administration Act. Rather, it positively facilitated the principles which underlie both enactments, to achieve the objectives of sentencing, including punishment, deterrence and rehabilitation. Accordingly, the second ground of appeal should be dismissed. [5], [40]-[41]

Director of Public Prosecutions (Cth) v Evans [2022] FCAFC 182; (2022) 294 FCR 512, referred to.

(6) The appellant had not demonstrated that the sentence imposed was manifestly excessive and accordingly the first ground of appeal should be dismissed. [5], [50]

Cases Cited

Anthony Hordern & Sons Ltd v Amalgamated Clothing and Allied Trades Union of Australia (1932) 47 CLR 1.

Attorney-General's Application (No 3 of 2002) (NSW), Re (2004) 61 NSWLR 305.

Hawker v The Queen [2020] ACTCA 40.

Hili v The Queen (2010) 242 CLR 520.

Lowndes v The Queen (1999) 195 CLR 665.

Markarian v The Queen (2005) 228 CLR 357.

Miller v Tighe (2017) 267 A Crim R 540.

Porter v The Queen (2024) 21 ACTLR 122.

Public Prosecutions (Cth), Director of v Evans (2022) 294 FCR 512.

R v Pham (2015) 256 CLR 550.

Wong v The Queen (2001) 207 CLR 584.

Appeal

The appellant appealed against the sentence imposed in the Magistrates Court.

A Byrnes, for the appellant.

K McCann, for the respondent.

Cur adv vult

10 July 2024

Baker J.

Introduction

1 The appellant, Sophie Rutzou, pleaded guilty in the Magistrates Court to a charge of driving with a prescribed concentration of alcohol in breath as a first offender, contrary to s 19(1) of the *Road Transport (Alcohol and Drugs) Act 1977* (ACT) (RT(AD) Act).

2 On 21 February 2024, the Magistrate sentenced the appellant to a good behaviour order for a period of 24 months, without conviction, pursuant to s 17(2)(b) of the *Crimes (Sentencing) Act 2005* (ACT) (Sentencing Act). The good behaviour order included a condition which prohibited the appellant from driving, except for limited purposes, for a period of six months (the driving condition).

3 By way of a Notice of Appeal filed on 19 March 2024, the appellant appeals from this sentence. The specific grounds of the appeal are as follows:

(a) That the sentence given by the learned Magistrate, and in particular, the twenty-four-month good behaviour order and the restricted licence conditions, are manifestly excessive.

(b) That the learned Magistrate made an order she was not legally empowered to make, by imposing restricted licence conditions as part of a sentence in circumstances where:

(i) There was no application before the Court below for a restricted licence pursuant to reg 45 of the *Road Transport (Driver Licensing) Regulation 2000* (ACT); and

(ii) Section 18 of the Sentencing Act does not empower the learned Magistrate to make a "restricted licence" as part of a good behaviour order imposed pursuant to that section.

4 The Director of Public Prosecutions (the Director) conceded that the driving condition was an order made contrary to law. She submitted that the Court should vary the order by removing the condition pursuant to s 218(1)(a) of the *Magistrates Court Act 1930* (ACT), and that the appeal should be otherwise dismissed.

5 For the reasons outlined below, I have not accepted the Director's concession concerning the validity of the driving condition. Contrary to the appellant's contention, the driving condition was not an order made under s 18 of the Sentencing Act, but was simply a condition of a good behaviour order made under ss 13 and 17 of the Sentencing Act. It was open to the Magistrate to make the driving condition under those provisions. The appellant has not demonstrated that the penalty imposed was manifestly excessive. Accordingly, the appeal should be dismissed.

Background

The offending

6 On 30 September 2023, police were conducting Random Breath Testing on Parkes Way. At about 10:40 pm, the appellant, the driver of the vehicle, was directed to pull over into the random breath test lane. At the time, the appellant had two children in the car. Police conducted an alcohol screening test on the appellant, which returned a positive result. A secondary test with an approved screening device was conducted, which also returned a positive result. The appellant was taken into police custody. She later underwent a breath analysis which returned a reading of 0.078 grams of alcohol per 210 litres of breath, constituting a level 2 driver: s 4E of the RT(AD) Act. The appellant told police she was driving from Ngunnawal to Nightfest in the city.

The sentence proceedings

7 The proceedings were first listed in the ACT Magistrates Court on 22 November 2023. The appellant entered a plea of guilty to the charge on 13 December 2023.

8 The appellant's sentence proceedings were heard on 21 February 2024. On that occasion, the appellant's solicitor tendered several character references, a letter of apology from the appellant and psychological material. The appellant's lawyer noted that the appellant was a first-time offender, and referred to the appellant's remorse. She also referred to the stress that the appellant was suffering as a result of a relationship breakdown. The appellant's lawyer urged the Magistrate to proceed without conviction. In this respect, she particularly emphasised the effect that a loss of licence would have upon the appellant's children (then aged 10 and 13 years), and upon the prospects of that affecting the custody arrangements for the care of the children.

9 In response, the prosecutor stated that he "wouldn't necessarily be heard" against the Magistrate proceeding by way of a non-conviction order under s 17 of the Sentencing Act.

10 After hearing these submissions, the Magistrate informed the parties that if she were to consider dealing with the matter by way of a non-conviction order, she would "impose some restrictions on [the appellant's] licence".

11 The appellant's lawyer responded:

> My understanding is that when a non-conviction is imposed … restrictions can't be made however, I am very happy to take instruction if your Honour is of the view that they can be.

12 After the Magistrate informed the appellant's lawyer that she was proposing to restrict the appellant from driving except "for the purpose of attending work or transporting the children or caring for the children", the appellant's lawyer indicated that the appellant had "no issue" with an order in this form. The prosecutor also did not seek to be heard on this issue.

The Magistrate's decision

13 The Magistrate then delivered an *ex tempore* decision. In that decision, the Magistrate referred to the risk of accident or death that the appellant had placed her children in by driving whilst affected by alcohol. Her Honour stated that she took into account the appellant's early plea of guilty and that the appellant was otherwise a person of good character. Taking into account these matters, her Honour concluded:

> HER HONOUR: … Anyway, I'm going to treat it is a one-off mistake and obviously if you come back to the court then you would be in a different position. I am, with reservation, going to deal with you by way of a without conviction bond. It's going to require that you be of good behaviour for a period of two years.
>
> It's also going to have a special condition that between today and 21 August — did you drive to court today?
>
> THE DEFENDANT: Yes I did.
>
> HER HONOUR: Which is a six-month period. Which I might say is the default period that you would be taken off the road entirely if I didn't make any order about your licence. I am restricting the reasons why you can drive. So I am saying that you may drive a motor vehicle if you are licenced to do so in the following circumstances: to travel to or from work; or for the purpose of caring for your children and taking them to activities; or for the purpose of attending court. So, I am restricting that ability.
>
> In one way, Ms Rutzou, given that your children had to go with you in the police car, I've thought it may be better for them to see the lesson that there is a consequence and that you can't drive. But I am extending this leniency to you today because you do seem to have taken responsibility for the matter and you've undertaken the course yourself and I've read the character material. All right.

14 The good behaviour order, which was signed by the appellant on 21 February 2024, states as follows:

> The Court has, without proceeding to a conviction, made a good behaviour order in relation to you for the above offence(s). The term, condition and requirements are set out below.

15 The term of the good behaviour order is recorded as 2 years, with a commencement date of 21 February 2024.

16 The conditions of the good behaviour order are as follows:

> (1) To be of good behaviour for a period of 2 year(s).

(2) To comply with the offender's good behaviour obligations, including the core conditions of the order under sections 85 and 86 of the *Crimes (Sentence Administration) Act 2005* (ACT).

(3) Between 21/2/24 and 21/8/24 may drive or ride a motor vehicle if licenced to do so in the following circumstances only: to travel to work or for the purposes of caring for her children and taking them to activities, or for the purpose of attending court.

Relevant legislation

17 A non-conviction order may be made under s 17 of the Sentencing Act, which provides as follows:

17 Non-conviction orders — general

(1) This section applies if an offender is found guilty of an offence.

(2) Without convicting the offender of the offence, the court may make either of the following orders (each of which is a non-conviction order):

(a) an order directing that the charge be dismissed, if the court is satisfied that it is not appropriate to impose any punishment (other than nominal punishment) on the offender;

(b) a good behaviour order under section 13.

Note A good behaviour order for a non-conviction order cannot include a community service condition because the offender is not convicted of the offence (see s 87).

(3) In deciding whether to make a non-conviction order for the offender, the court must consider the following:

(a) the offender's character, antecedents, age, health and mental condition;

(b) the seriousness of the offence;

(c) any extenuating circumstances in which the offence was committed.

(4) The court may also consider anything else the court considers relevant.

Note An appeal may lie to the Supreme Court from a decision of the Magistrates Court to make a non-conviction order for an offender in the same circumstances as an appeal from a decision of the Magistrates Court in relation to an offender's conviction for an offence (see *Magistrates Court Act 1930*, pt 3.10).

(5) If the court makes a non-conviction order under subsection (2) (a) for the offender, the court must, as soon as practicable after the order is made, ensure that written notice of the order, together with a copy of the order, is given to the offender.

Note 1 For notice of a good behaviour order under s (2) (b), see s 103.

Note 2 For a young offender who is under 18 years old, the notice and order must also be given to a parent or person with parental responsibility (see s 133J).

(6) Failure to comply with subsection (5) does not invalidate the non-conviction order.

(7) If the court makes a non-conviction order under subsection (2) (b), the good behaviour order must be for a term of no longer than 3 years.

(8) This section (other than subsection (7)) is subject to section 13 and chapter 6 (Good behaviour orders).

18 Where a non-conviction order is made under s 17, a court may also make ancillary orders under s 18 of the Sentencing Act, which provides as follows:

18 Non-conviction orders — ancillary orders

(1) This section applies if the court makes a non-conviction order for an offender for an offence.

(2) The court may make any ancillary order that it could have made if it had convicted the offender of the offence.

(3) The offender has the same rights of appeal in relation to the making of the ancillary order as the offender would have had if the order had been made on the conviction of the offender for the offence.

(4) This section is subject to section 134 (Operation of ancillary and restitution orders).

(5) In this section:

ancillary order means an order or direction in relation to any of the following:

(a) restitution;

(b) compensation;

(c) costs;

(d) forfeiture;

(e) destruction;

(f) disqualification or loss or suspension of a licence or privilege.

Examples

1 a reparation order

2 a driver licence disqualification order

19 As extracted above, s 17(2) provides that where no conviction order is made, the court may either dismiss the charge, or the court may impose a good behaviour order under s 13 of the Sentencing Act. Section 13 of the Sentencing Act provides as follows:

13 Good behaviour orders

(1) This section applies if an offender is convicted or found guilty of an offence.

Note If a good behaviour order is made without convicting the offender (see s 17), it is also a non-conviction order (see s 17 (2)).

(2) The court may make an order (a good behaviour order) requiring the offender to sign or give an undertaking to comply with the offender's good behaviour obligations under the *Crimes (Sentence Administration) Act 2005* for a stated period.

(3) An undertaking —

(a) may be signed or given before the court; and

(b) if given before the court, must be recorded by the court.

(4) A good behaviour order may include 1 or more of the following conditions:

(a) that the offender give security for a stated amount, with or without sureties, for compliance with the order;

Note This paragraph does not apply to a young offender (see s 133M).

(b) a community service condition;

Note A community service condition must not be included in the order unless the offender is convicted of the offence (see s 87).

(c) a rehabilitation program condition;

Note A good behaviour order that includes a rehabilitation program condition must also include a probation condition or supervision condition (see s 95 and s 133V).

(d) a probation condition;

(e) that the offender comply with a reparation order;

(f) a condition prescribed by regulation for this paragraph;

(g) any other condition, not inconsistent with this Act or the *Crimes (Sentence Administration) Act 2005*, that the court considers appropriate.

Examples of conditions for par (g)

1 that the offender undertake medical treatment and supervision (eg by taking medication and cooperating with medical assessments)

2 that the offender supply samples of blood, breath, hair, saliva or urine for alcohol or drug testing if required by a corrections officer

3 that the offender attend educational, vocational, psychological, psychiatric or other programs or counselling

4 that the offender not drive a motor vehicle or consume alcohol or non-prescription drugs or medications

5 that the offender regularly attend alcohol or drug management programs

Note See s 133M for additional conditions available for young offenders (education and training conditions and supervision conditions).

(5) If the offence is punishable by imprisonment, a good behaviour order —

(a) may be made instead of imposing a sentence of imprisonment or as part of a combination sentence that includes imprisonment; and

(b) may apply to all or part of the term of the sentence.

(6) Subsection (5) does not, by implication, limit the sentences that a court may impose under this Act or another territory law.

(7) If the good behaviour order includes a community service condition, it is a community service order.

(8) If the good behaviour order includes a rehabilitation program condition, it is a rehabilitation program order.

(9) This section is subject to chapter 6 (Good behaviour orders).

Determination

Did the Magistrate err by imposing a condition of the GBO restricting the appellant's licence?

The appellant's contention

20 The appellant contended that the Magistrate erred by imposing a "restricted licence condition" under s 18 of the Sentencing Act, relying on the decision of this Court in *Miller v Tighe* [2017] ACTSC 185; (2017) 267 A Crim R 540.

21 In *Miller*, Mossop J held that s 18 of the Sentencing Act did not authorise an order that an offender not drive "other than to or from work by the most direct route". Central to his Honour's reasoning was s 18(2), which provides that "the court may make an ancillary order that it could have made if it had convicted the offender of the offence", and s 18(5)(f) which defines an ancillary order to mean "an order or direction in relation to any of the following: … disqualification or loss or suspension of a licence or privilege" (emphasis added).

22 His Honour held that an order "restricting" the offender's licence could not have been made if the Court had "convicted" the offender: *Miller* at [6]. His Honour observed that there is no statutory provision that permits a court to partially suspend the operation of the licence of a driver who has been convicted of a drug driving offence. Rather, his Honour observed (at [7]):

> The effect of the orders made in the present case was similar to that which might have arisen had the respondents been disqualified from driving and then made an application to the Magistrates Court for an order permitting the grant of a restricted licence. That is a course permitted by s 45 of the *Road Transport (Driver Licensing) Regulation 2000* (ACT) (RTDL Regulation). There are restrictions on the category of person who is entitled to so apply: *Road Transport (General) Act 1999* (ACT) ss 66A, 67, 67A(2), 67B, 67C, 88(4). If an application is made and the threshold of "exceptional circumstances" is met then it is open to the Court to include in the order the conditions to which the restricted licence is to be subject: RTDL Regulation s 48(4). Those conditions include "the journeys that the person may undertake": RTDL Regulation s 48(5)(b) and "the purposes for which the person may drive": RTDL Regulation s 48(5)(c). It is not unusual for magistrates to include, in an order permitting the grant of a restricted licence, conditions that the licence holder drive only for the purposes of the person's employment or to and from their place of employment by the most direct route. However, the fact that such conditions may be imposed as a result of a separate statutory process that only becomes available after a person is disqualified from holding a licence, does not mean that equivalent conditions may be imposed under s 18 of the *Sentencing Act*. That is because the imposition of conditions upon a licence is not a power which the court could have exercised had the person been convicted. Rather it was a separate statutory power which only existed in circumstances where there had been a disqualification, where there was a separate application made by the person to the Magistrates Court and where the various preconditions to and qualifications upon the power to make an order had been met.

23 There are two related impediments to applying the decision in *Miller* to the present case.

24 First, in contrast to *Miller*, the Magistrate in the present case did not purport to make a restriction under s 18 of the Sentencing Act. Rather, as is clear both from the *ex tempore* sentencing reasons, and the good behaviour order itself, the order prohibiting the appellant from driving was made as a condition of the good behaviour order, rather than as an ancillary order under s 18.

25 Second, in *Miller*, Mossop J expressly left open the question whether it would be permissible to impose a driving restriction as a condition of a good behaviour order. Specifically, after noting that there was a discrepancy between the perfected orders that had been entered by a Deputy Registrar (which correctly recorded that an order had been made under s 18, separate to the good behaviour order), and the "Official Notice" of the good behaviour order (which suggested that the s 18 order was in fact a condition of the good behaviour order), his Honour continued (at [10]):

> However these matters do draw attention to the question of whether a restriction on the purpose for which a person may drive could have been imposed as a condition upon each respondent's good behaviour order. Section 13(3)(g) of the *Sentencing Act* permits, as a condition upon a good behaviour order, "(g) any other condition, not inconsistent with this Act or the *Crimes (Sentence Administration) Act 2005*, that the court considers appropriate". The examples to s 13(3)(g) include "4 that the offender not drive a motor vehicle …" It is not necessary in the present case to determine whether her Honour could have achieved the outcome that she intended to achieve by imposing a condition similar to that which she purported to make under s 18 by means of a condition upon the good behaviour order.

26 Accordingly, the question to be addressed is not (as identified in the Notice of Appeal) whether a driving restriction can be made under s 18 of the Sentencing Act, but whether such a restriction can be made as a condition of a good behaviour order imposed under s 13 of the Sentencing Act. It is to that question that I now turn.

Can a driving restriction be imposed as a condition of a good behaviour order?

27 The power to impose conditions on a good behaviour order is broad. Section 13(4)(g) of the Sentencing Act states that:

> (4) A good behaviour order may include 1 or more of the following conditions:
>
> …
>
> (g) any other condition, not inconsistent with this Act or the *Crimes (Sentence Administration) Act 2005*, that the court considers appropriate.
>
> **Examples of conditions for par (g)**
>
> 1 that the offender undertake medical treatment and supervision (eg by taking medication and cooperating with medical assessments)
>
> 2 that the offender supply samples of blood, breath, hair, saliva or urine for alcohol or drug testing if required by a corrections officer

> 3 that the offender attend educational, vocational, psychological, psychiatric or other programs or counselling
> 4 that the offender not drive a motor vehicle or consume alcohol or non-prescription drugs or medications
> 5 that the offender regularly attend alcohol or drug management programs
>
> *Note* See s 133M for additional conditions available for young offenders (education and training conditions and supervision conditions).

28 The only restriction on the conditions that may be imposed is that a condition must not be "inconsistent" with the Sentencing Act or the *Crimes (Sentence Administration) Act 2005* (ACT) (Sentence Administration Act).

29 The appellant's solicitor, and counsel for the Director each contended that the driving condition imposed by the Magistrate was inconsistent with s 18 of the Sentencing Act.

30 Counsel for the Director put the argument most succinctly. She submitted that a court cannot make a condition of a good behaviour order where that condition is an ancillary order under s 18. For example, she submitted, a court could not impose a condition of a good behaviour order which required an offender to pay a fine, or to pay compensation or restitution.

31 It is clear that a court cannot impose a "disqualification order" as a condition of a good behaviour order. However, the condition imposed by the Magistrate was qualitatively different from a disqualification order. A disqualification order prohibits a person from holding or obtaining a driver's licence. In contrast, the condition imposed by the Magistrate precludes the appellant from driving, except for specified purposes.

32 The difference may be subtle, but it is legally significant. A raft of provisions apply to disqualification orders which have no application to the order that was imposed by the Magistrate. Most significantly, where a person drives in breach of a disqualification order, the person will be guilty of a criminal offence: s 32(1) of the *Road Transport (Driver Licensing) Act 1999* (ACT). Further mandatory periods of disqualification will follow: s 32(5) of the Driver Licensing Act. In contrast, if the appellant were to contravene the condition imposed by the Magistrate (for example, by driving to a friend's house to socialise), the appellant would be in breach of the good behaviour order, but would not have committed an offence of driving whilst disqualified, nor would any mandatory period of disqualification follow from that conduct.

33 An analogous issue was considered by the Full Federal Court in *Director of Public Prosecutions (Cth) v Evans* [2022] FCAFC 182; (2022) 294 FCR 512. *Evans* concerned an offender who was sentenced in the Supreme Court of Norfolk Island for Commonwealth drugs and firearms offences. In Norfolk Island, no formal arrangements have been entered into to permit home detention for federal offenders to take place. As a result, s 20AB of the *Crimes Act 1914* (Cth), which permits, *inter alia*, the imposition of a home detention order where the offender is being sentenced in a "participating" State or

Territory could not apply. The primary judge in *Evans* held that there was power to "achieve the same result" by making home detention a condition of a recognisance imposed under s 20(1)(a)(iv) and (b) of the *Crimes Act*.

34 The Commonwealth Director of Public Prosecutions (Commonwealth DPP) appealed, contending that the Supreme Court did not have power under s 20(1)(a) to make a home detention order, or an order which was "substantially similar" to a home detention order. The Commonwealth DPP, relying on *Anthony Hordern & Sons Ltd v Amalgamated Clothing and Allied Trades Union of Australia* (1932) 47 CLR 1, submitted that "as s 20AB of the *Crimes Act* explicitly provides the power and mechanism by which State based alternatives to imprisonment, such as home detention, can be imposed on federal offenders, the broad and general power in s 20(1)(a)(iv), as picked up by s 20(1)(b), cannot be relied on to bypass that regime": *Evans* at [33].

35 In dismissing the Commonwealth's appeal, Bromwich J (with whom Allsop CJ and Wigney J agreed) accepted that "it is not for a court to bypass the legislative choice as to the steps that must be taken before such a regime becomes available, for to do so is contrary to the principle laid down in *Anthony Hordern*": *Evans* at [36].

36 However, his Honour continued, this conclusion did not determine the outcome of the appeal. Rather, "[it] remain[ed] a question of characterisation of precisely what it was that his Honour did by making order 2(d) and the facilitative orders 2(e)-(g)": *Evans* at [37]. His Honour concluded (at [37]):

> While the primary judge considered himself to be imposing an effective sentence of home detention, and erroneously reasoned that to do this was permissible, that is not in fact what the impugned conditions did. Read carefully, his Honour imposed conditions on the recognisance release as was authorised by s 20(1)(a) and (b), not a further or different sentence, which was not authorised except by s 20AB when it applied.

37 In a concurring judgment, Wigney J found that the "narrow and restrictive construction" of s 20(1) which had been advanced by the Commonwealth DPP was "not supported by the text, context and evident purpose" of the provision: *Evans* at [13]. His Honour held (at [13]-[14]) that the Commonwealth's construction:

> … would have unreasonable consequences because it could preclude a sentencing judge from ordering the release of an offender on conditions which would otherwise be entirely appropriate to achieve the objectives of sentencing, including punishment, deterrence and rehabilitation. It would have impracticable consequences because it would effectively mean that, before ordering the conditional release of a federal offender under s 20(1), a sentencing judge would have to somehow ensure that the order was not substantially similar to an order that could possible be made, including in a different state or territory, by virtue of s 20AB of the *Crimes Act*.
>
> The words "such other conditions (if any) as the court thinks fit to specify in the order" in s 20(1)(a)(iv) are very wide and not amenable to the narrow construction of s 20(1) of the *Crimes Act* proposed by the Director.

38 The same reasoning applies with equal force to the present appeal. To

succeed on this ground of appeal, the appellant must establish that s 18 has the effect of carving out matters which would otherwise be within the scope of s 13. She must not only demonstrate that a court cannot make a "disqualification order" as a condition under s 13; she must also demonstrate that s 13 precludes the making of a condition which is *in substance* the same as a disqualification order. As in *Evans*, there is no textual, contextual or purposive support for such a construction of s 13.

39 Section 13(1)(g) confers a broad power to make any condition which is "not inconsistent" with the Act or the Sentence Administration Act. The statutory example provided in s 13(4)(g), namely "that the offender not drive a motor vehicle or consume alcohol or non-prescription drugs or medications" is a strong indication that the legislature did not intend the existence of s 18 to limit the power of a court to make a condition under s 13 which prohibits an offender from driving a motor vehicle (either generally, or in specific circumstances). The Explanatory Statement to the *Crimes (Sentencing) Bill 2005* (ACT) confirms that cl 13(3)(g) (now s 13(4)(g)), "authorises the Court to impose any conditions the Court considers appropriate and consistent [with the Act and the Sentence Administration Act]". In short, s 13 confers a flexible power on a court to craft conditions which will best meet the competing (and often contradictory) purposes of sentencing in the individual case: see s 7 of the Sentencing Act; see similarly *Evans* at [1] (Allsop CJ).

40 As in *Evans*, the order made by the Magistrate in the present case was an example of precisely the kind of careful crafting which the legislature intended to facilitate when it enacted s 13. By precluding the appellant from driving except for specific purposes, the condition met the need for deterrence (both general, and specific), and the need for the protection of the community. However, by expressly permitting the appellant to continue to drive to work, to court, and when otherwise required for her children, the condition ensured that the appellant and her children would not suffer the significant further adverse consequences which might otherwise follow from disqualification of the appellant's driver's licence (in particular the risk to the appellant's custody of the children if disqualification were ordered).

41 The driving condition imposed by the Magistrate was not inconsistent with the Sentencing Act or the Sentence Administration Act. Indeed, it positively facilitated the principles which underlie both enactments: see similarly *Evans* at [14]. This ground of appeal must be dismissed.

A further comment

42 Before leaving this ground of appeal, it is important to note that nothing in the reasoning outlined above is intended to condone the imposition of a non-conviction order for the sole purpose of avoiding a mandatory disqualification period: cf *Re Attorney-General's Application (No 3 of 2002) (NSW)* [2004] NSWCCA 303; (2004) 61 NSWLR 305 at [132]. Counsel for the Director expressly disclaimed any suggestion that this had occurred in the present case.

Was the sentence imposed manifestly excessive?

43 The principles to be applied where a ground of appeal alleges that a sentence is manifestly excessive are well established. In *Porter v The Queen* [2024] ACTCA 9; (2024) 21 ACTLR 122 at [133], citing *Hawker v The Queen* [2020] ACTCA 40 at [14], the principles were summarised as follows:

> The principles in relation to assessing whether a sentence is manifestly excessive are well established. Appellate intervention is not justified simply because an appellate court may have a different view as to the appropriate sentence than the sentencing judge: *Lowndes v R* [1999] HCA 29; 195 CLR 665 at [15]; *Markarian v R* [2005] HCA 25; 228 CLR 357 at [28], or where the result arrived at below is markedly different from other sentences that have been imposed in other cases: *Wong v The Queen* [2001] HCA 64; 207 CLR 584 (*Wong*) at [58]; *Hili v R; Jones v The Queen* [2010] HCA 45; 242 CLR 520 (*Hili*) at [58]. Rather, the appellant must demonstrate that the sentence is such that it may be inferred that there was some misapplication of principle in the sentencing of the appellant, even though when and how is not apparent from the statement of the sentencing judge's reasons: *Wong* at [58]; *Hili* at [58]-[59], [75]-[76].

44 The appellant's solicitor placed before the Court an ACT Sentencing Snapshot providing an overview of sentencing patterns in the ACT Magistrates Court and Children's Court between 1 July 2012 and 31 August 2015 which was said to indicate that a good behaviour order of 2 years was of a longer duration than most good behaviour orders that are imposed for like offending.

45 The limitations of statistics are well recognised: *R v Pham* [2015] HCA 39; (2015) 256 CLR 550; *Hili v The Queen* [2010] HCA 45; (2010) 242 CLR 520 at [55]. In the present case, those limitations are pronounced. The statistics contain no information concerning the objective circumstances of the offending (in particular, as to whether the offending was aggravated by the presence of children, as in the present case). Nor do the statistics provide any information as to whether the good behaviour orders there reported were made following conviction, or whether any associated disqualification followed from such convictions. In these circumstances the statistics did not demonstrate that the sentence imposed was manifestly excessive.

46 At the time of the offending, the offence carried a maximum penalty of a fine of $800 when committed by a first offender: s 26(1) of the RT(AD) Act.[1]

47 As counsel for the Director submitted, the offending could not be described as low end. The appellant was driving with two children in her car. This significantly aggravated the seriousness of the offence. Even taking into account the appellant's remorse, and the unlikelihood of reoffending, there remained a need for specific and general deterrence. Denunciation and the protection of the community were also relevant considerations to be taken into account.

48 The appellant was afforded the leniency of a non-conviction order. Other than

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1 The fine and disqualification periods that applied to the offending were amended whilst the present appeal was pending. The maximum penalty for a level 2 offence contrary to s 19 committed by a first offender is now $4000. Pursuant to s 84A(2) of the *Legislation Act 2001* (ACT), the increased penalty does not apply to the present appeal.

the condition relating to the appellant's driving, which was limited to 6 months' duration, the good behaviour order was subject only to the core conditions contained in s 86(1) of the Sentence Administration Act. Section 86(1) provides:

> **86 Good behaviour — core conditions**
>
> (1) The core conditions of an offender's good behaviour order are as follows:
>
> (a) the offender must not commit —
>
> (i) an offence against a territory law, or a law of the Commonwealth, a State or another Territory, that is punishable by imprisonment; or
>
> (ii) an offence outside Australia against a law of a place outside Australia that, if it had been committed in Australia, would be punishable by imprisonment;
>
> (b) if the offender is charged with an offence against a law in force in Australia or elsewhere — the offender must tell the director-general about the charge as soon as possible, but within 2 days after the day the offender becomes aware of the charge;
>
> (c) if the offender's contact details change — the offender must tell the director-general about the change as soon as possible, but within 2 days after the day the offender knows the changed details;
>
> (d) the offender must comply with any direction given to the offender by the director-general under this Act or the *Corrections Management Act 2007* in relation to the good behaviour order;
>
> (e) any test sample given by the offender under a direction under section 95 (Good behaviour orders — community service work — alcohol and drug tests) must not be positive;
>
> (f) if the good behaviour order is subject to a probation condition or supervision condition — the offender must not leave the ACT for more than the defined period without the director-general's approval;
>
> (g) the offender must comply with any agreement made by the offender under section 105 (Good behaviour — agreement to attend court);
>
> (h) any condition prescribed by regulation that applies to the offender.

49 As the appellant's solicitor acknowledged, these conditions do not impose any practical restriction on the appellant's liberty.

50 The appellant has not demonstrated that the sentence imposed was manifestly excessive. This ground of appeal must also be dismissed.

Orders

51 For the above reasons, the following orders are made:

(1) The appeal is dismissed.

Appeal dismissed

Solicitors for the appellant: *Andrew Byrnes Law Group*.

Solicitors for the respondent: *ACT Director of Public Prosecutions*.

RICHARD DAVIES

SUPREME COURT OF THE AUSTRALIAN CAPITAL TERRITORY

Re Estate of Cervo

[2024] ACTSC 253

McWilliam J

7, 15 August 2024

Equity — Trusts and trustees — Administration of estates — Application to the court for judicial advice — Whether administrator of deceased estate justified in taking steps against deceased's former solicitor — Where former solicitor asserted a lien over the deceased's files for outstanding fees — Judicial advice given — Trustee Act 1925 (ACT), s 63.

Section 63 of the *Trustee Act 1925* (ACT) provides:

> **63 Advice**
>
> (1) A trustee may apply to the Supreme Court for an opinion, advice or direction on any questions respecting the management or administration of the trust property, or respecting the interpretation of the trust instrument.
>
> …

A "trust" is defined in s 4(1)(b) to include the duties of a legal representative of a dead person.

The plaintiff is the administrator *pendente lite* appointed over the deceased estate of Margaret Cervo pending the resolution of litigation in relation to the grant of probate in respect of the deceased's will. The deceased estate includes a property in Belconnen. In December 2021, before the deceased's death, there was an explosion and fire at the Belconnen property. The deceased was represented by a solicitor in respect of an insurance claim in relation to the Belconnen property. The solicitor and deceased's insurer negotiated a partial release and the deceased engaged a builder to complete the works at the Belconnen property, to be paid for by the insurer. There is now a dispute with the insurer as to the scope of the agreement for payment of works, such that the insurer refuses to pay for further works until the plaintiff executes a final release in respect of the insurer's liability for the claim.

The plaintiff sought the solicitor's file in respect of the insurance claim in order to form a view about the scope of the agreement with the insurer. The solicitor refuses to produce the files and asserts a lien over the files on the basis of outstanding legal costs for files that relate solely to the deceased's husband. The plaintiff deposed as having paid all outstanding fees in relation to the deceased's

files. The plaintiff brought an application in the Supreme Court for judicial advice on the question of whether the plaintiff is justified in taking steps against the solicitor to compel the production of the deceased's files.

Held, answering the question for judicial advice:

(1) There is an ordinary, albeit not mandatory, practice in applications for judicial advice that the Court is provided with an opinion of counsel proffered by the applicant to facilitate the exercise of the Court's jurisdiction under s 63 of the *Trustee Act*. The Court could proceed in the present case without such an opinion because of the urgent and discrete nature of the application. [24]-[28]

Re Estate of Chow Cho-Poon [2013] NSWSC 844; (2013) 10 ASTLR 251, referred to.

(2) The Court's jurisdiction under s 63 is enlivened by the existence of a question with respect to the management or administration of trust property, or a question regarding the interpretation of the trust instrument. Whether estate funds should be expended on attempting to recover legal files to resolve a separate legal dispute falls within the former category. [30]-[32]

Macedonian Orthodox Community Church St Petka Inc v His Eminence Petar the Diocesan Bishop of the Macedonian Orthodox Diocese of Australia and New Zealand [2008] HCA 42; (2008) 237 CLR 66, referred to.

(3) The power to give judicial advice under s 63 is a discretion which is guided by the purpose of the provision in protecting the interests of a trust and enabling a trustee to be advised about the nature and extent of their powers and duties. [33]-[36]

Re Estate of Chow Cho-Poon [2013] NSWSC 844; (2013) 10 ASTLR 251; *Re BTA Institutional Services Australia Ltd* [2009] NSWSC 1294; (2009) 3 ASTLR 207, referred to.

(4) The existing litigation in relation to the deceased's will and the dispute with the insurer and builder over the works to the Belconnen property render it in the best interests of the estate for the Court to exercise its discretion to answer the questions asked. It is also of utility for the plaintiff to be advised as to the appropriateness of the proposed expenditure by the estate. [37]-[38]

(5) A solicitor's lien upon documents of their client in their possession to meet general costs ceases when the solicitor's costs are paid or entitlement to costs are secured. There is a real question as to whether any lien claimed by the solicitor has ceased by way of full payment. [41]-[46], [50]

Bechara v Atie [2005] NSWCA 268; *Re Long* [1929] VLR 318; *White v Bini* [2003] FCA 669, referred to.

(6) The solicitor cannot claim a lien over the deceased's files because of money owed in respect of files pertaining to another person. The solicitor's conduct in wrongfully claiming amounts beyond the scope of any lien likely extinguished the lien. The plaintiff is therefore justified in taking steps to compel production. [50]-[51], [53], [56], [59]

(7) Discussion of costs. [61]-[63]

Cases Cited

Albemarle Supply Company Ltd v Hind & Company [1928] 1 KB 307.

Automobile & General Finance Company Ltd v Cowley-Cooper (1948) 49 SR (NSW) 31.

Bechara v Atie [2005] NSWCA 268.

Bolger v Bolger (1985) 82 FLR 46.

Bolster v McCallum [1966] 2 NSWR 660.

BTA Institutional Services Australia Ltd, Re (2009) 3 ASTLR 207.

Castle Hill Joinery & Interiors Pty Ltd, Re [2013] NSWSC 1525.

Chow Cho-Poon, Re Estate (2013) 10 ASTLR 251.

Conroy, In Marriage of (1990) 103 FLR 233.

Cottee, Re Application by [2013] NSWSC 47.

Gnitekram Marketing Pty Ltd, Re Application of [2010] NSWSC 1328.

Jalmoon Pty Ltd, Re [1986] 2 Qd R 264.

Johns v Law Society (NSW) [1982] 2 NSWLR 1.

Jones v Matrix Partners Pty Ltd; Re Killarnee Civil & Concrete Contractors Pty Ltd (in liq) (2018) 260 FCR 310.

Jones v Tarleton (1842) 152 ER 285.

Kerford v Mondel (1859) 28 LJ Ex 303.

LM Investment Management Ltd (in liq), Re [2022] QSC 132.

Long, Re [1929] VLR 318.

Macedonian Orthodox Community Church St Petka Inc v His Eminence Petar the Diocesan Bishop of the Macedonian Orthodox Diocese of Australia and New Zealand (2008) 237 CLR 66.

Mizon, Re Estate of [2021] ACTSC 240.

National Australia Bank Ltd v Kiss [2006] NSWSC 1426.

Perpetual Trustee Company Ltd, Re Application of [2003] NSWSC 1185.

R v Dunstan (No 2) (2000) 112 A Crim R 63.

R v Storer (1993) 65 A Crim R 130.

Suttor, Re (1890) 11 LR (NSW) 401.

White v Bini [2003] FCA 669.

Application

The plaintiff made an application for the Supreme Court to answer a question for judicial advice in relation to whether an administrator is justified in bringing proceedings against the deceased's former solicitors.

T Morton, for the plaintiff.

Cur adv vult

15 August 2024

McWilliam J.

1 This is an urgent *ex parte* application for judicial advice pursuant to s 63 of the *Trustee Act 1925* (ACT) (***Trustee Act***) arising in the context of the administration of the estate of the late Margaret Anne Cervo (**the Deceased**), who died on 30 August 2023. The Deceased's husband had previously died in late 2022.

2 The originating application (filed on 6 August 2024 and amended with leave on 8 August 2024) sought advice in respect of three matters. This judgment only deals with the most urgent part of the application, being whether the administrator of the estate is justified in taking steps to compel production of a number of solicitor's files and associated documents. Those documents are currently retained by a different solicitor in purported exercise of a solicitor's lien for non-payment of fees.

3 The remaining two questions concern an insurance claim and variations to a building contract. While they also have a degree of urgency about them, upon hearing the application, it emerged that they may be resolved by the production of the documents that are the subject of the claimed lien.

The plaintiff

4 There is a dispute about the last will of the Deceased and there is separate litigation relating to the grant of probate being pursued in this jurisdiction. In the meantime, an independent solicitor, Ms Tamara Goodwin (**the plaintiff**), was appointed on 15 November 2023 as the administrator *pendente lite* (pending the litigation). This means that she has a limited grant of representation enabling the estate of the Deceased to be administered while the litigation is resolved.

Genesis of the application for judicial advice

5 The Deceased's estate includes property assets and has limited liquid assets. One of the assets of the estate is a property in Belconnen (**Belconnen property**), the title to which is solely in the name of the Deceased.

6 In December 2021, there was an explosion and fire at the Belconnen property. Before the Deceased died, an insurance claim had been made in relation to the damage to the Belconnen property. The solicitor who acted for the Deceased in respect of that claim is Mr Ian Julien.

7 Mr Julien entered into negotiations with the insurer on behalf of the Deceased. Following those negotiations, the Deceased signed a document titled, "Partial Form of Release", which was witnessed by Mr Julien. Following the execution of that document, the Deceased engaged a builder to complete works at the Belconnen property, with the insurer to pay for the works that were to be completed.

8 A building contract for the works at the Belconnen property was signed and executed by the parties, again with Mr Julien witnessing the Deceased's signature.

9 There is now some uncertainty about what was agreed as between the Deceased and the insurer, and whether the scope of the agreement included that the insurer would pay for all works completed under variations to the building contract.

10 The insurer has declined to pay any further funds to the estate for the purpose of paying the builder until the plaintiff executes a final release in respect of the insurer's liability for the claim.

11 As a result, the builder has ceased work at the Belconnen property and has threatened legal action, including taking proceedings and/or terminating their

contract. In the meantime, the estate is also incurring substantial weekly delay fees, while the issue of whether the insurer is to pay for the works being carried out is resolved.

12 The plaintiff believes that Mr Julien's file in respect of the insurance claim is required to enable her to form a view about what the agreement between the Deceased and the insurer was. She will then be in a position to determine whether to sign the deed of final release requested by the insurer.

13 More generally, in relation to the Deceased's files concerning her personal and business affairs, the plaintiff believes they will permit the proper administration of the Deceased's estate.

14 The plaintiff has sought such files and accompanying original documents or safe custody documents of the Deceased from Mr Julien and his firm, ILJ legal.

15 As at the date of the present application, Mr Julien had refused to produce the Deceased's files. The reason for the refusal appears to be that he has claimed a lien over the files on the basis of outstanding legal costs, including costs incurred in relation to work he performed for the Deceased's husband on other matters.

16 In the second affidavit affirmed in support of the application, the plaintiff deposes to having paid any outstanding fees in respect of the Deceased's files. The relevant evidence is as follows:

> 4. On 6 June 2024, the amount of $26,718.30 was paid to Mr Julien for the payment of the invoices in relation to the Deceased. This was a discounted amount as agreed with Mr Julien. … On that day, a further amount of $3,600 was paid to Mr Julien's solicitors, Elringtons Lawyers, for the costs incurred in negotiating the issue of his invoices.
> 5. All invoices relating to the Deceased have been paid.

17 The plaintiff further deposes to having given an undertaking to pay the solicitor's invoices in respect of the files relating to the Deceased's husband, from the proceeds of sale of another property that is yet to be sold.

The present application

18 These issues have caused the plaintiff to make the application for judicial advice pursuant to s 63 of the *Trustee Act*. Section 63(1) provides:

> A trustee may apply to the Supreme Court for an opinion, advice or direction on any question respecting the management or administration of the trust property, or respecting the interpretation of the trust instrument.

19 Under s 4(1)(b) of the *Trustee Act*, a "trust" includes the duties of a legal representative of a dead person.

Question for which advice is sought

20 The question presently before the Court for determination is as follows:

> Whether the plaintiff is justified in taking steps against Mr Ian Julien, solicitor, to compel the production of the Deceased's files and any original documents or safe custody documents of the Deceased held by him or his firm ILJ Legal.

21 The plaintiff also sought an order that the plaintiff's costs of the proceeding be paid out of the Deceased's estate on an indemnity basis.

Evidence before the Court

22 The plaintiff relied upon two affidavits affirmed by the plaintiff on the application. Confidential correspondence was included in one of the affidavits put before the Court. I have read that material, subject to confidentiality orders, being a course adopted by Justice Kelly in *Re LM Investment Management Ltd (in liq)* [2022] QSC 132 at [20]-[21] in the Supreme Court of Queensland, for reasons explained therein. Where reference to the confidential communications is required in the reasons below, those parts are redacted to the extent necessary to protect the confidential material.

23 The evidence discloses that the plaintiff notified Mr Julien on 7 August 2024 of the plaintiff's intention to seek judicial advice, although not that the application itself was served on Mr Julien. That does not pose a difficulty, because advice may be given without any affected parties being given notice of the application: s 63(4) of the *Trustee Act*.

24 Ordinarily in an application for judicial advice, it is appropriate that the application be accompanied by an opinion of counsel, directed to the substance of the question identified for the Court's consideration, and "going beyond a mere statement about the availability of protection for a trustee from a court order": *Re Estate of Chow Cho-Poon* [2013] NSWSC 844; (2013) 10 ASTLR 251 (*Cho-Poon*) at [108]. That case considered s 63 of the cognate legislation in New South Wales.

25 At [45]-[49], Lindsay J discussed the utility of providing an opinion of counsel:

> 45. The Court must be guided by what it perceives to be in the best interests of the trust estate: *Re Application by Cottee* [2013] NSWSC 47 at [35].
> 46. In any case falling within the broad jurisdictional limits of s 63, a discretionary judgement must be made about whether the "summary" procedure for which the section provides is a suitable vehicle for the determination of questions stated by a trustee for consideration: *Macedonian Orthodox Community Church St Petka Inc v His Eminence Petar Diocesan Bishop of Macedonian Orthodox Diocese of Australia and New Zealand* (2008) 237 CLR 66; 1 ASTLR 1 at [60]. These proceedings call for an exploration of this topic.
> 47. The proceedings also call for a consideration of **the important role played by the legal profession in facilitating the due exercise by the Court of its jurisdiction to provide judicial advice to trustees**.
> 48. **The practice of the Court over many years** (as a matter of practice, not compelled by legislative edict) **has been to look for, and in an appropriate case rely upon, a memorandum of opinion of counsel**, proffered by an applicant for s 63 relief, directed to the substance of questions arising for consideration on the application: see, for example, *Re Gnitekram Marketing Pty Ltd* [2010] NSWSC 1328 at [17].
> 49. The absence of a well-considered memorandum of opinion may compel the Court to explore possibilities, of fact and law, that might not otherwise need exploration. **A well-considered memorandum should anticipate lines of inquiry that a judge might be bound to identify and, one way**

> **or another, address them so as to focus attention on real problems in need of a solution**.

(Emphasis added.)

26 What his Honour meant by the "summary" jurisdiction is that it permits a trustee to obtain the opinion, advice or direction of the Court without commencement of a suit for the general administration of a trust: *Cho-Poon* at [189], citing the *Macedonian Orthodox Community Church St Petka Inc v His Eminence Petar the Diocesan Bishop of the Macedonian Orthodox Diocese of Australia and New Zealand* [2008] HCA 42; (2008) 237 CLR 66 (*Macedonian Church*) at [61]-[63].

27 Later in *Cho-Poon*, Lindsay J went on to repeat at [109] what his Honour had said at [48] (extracted above), namely that the requirement is not mandatory. However, his Honour again emphasised the utility of obtaining an opinion, including at [117]:

> … an efficient administration of the "summary" jurisdiction exercised by the Court by reference to s 63 is aided by the availability of a considered opinion, by competent counsel upon whose judgement the Court is entitled to rely, whether or not (upon due consideration) it decides to agree with, or differ from, counsel's conclusions.

28 In the present case, due to the urgency of the present aspect of the application, no opinion was provided to the Court. This aspect of the application is discrete, and the advice required was relatively straightforward on the particular facts as presented to the Court. Accordingly, I was prepared to proceed without a formal opinion from competent counsel. However, the position may be different if the remainder of the application is pursued at a later date.

29 I have endeavoured to explain the practice above to assist those trustees who seek the judicial advice of the Court to understand what is ordinarily expected of them when they make such an application. Practitioners who seek the advice of the Court without following the practice referred to above may face delays in receiving the advice requested. That may be because the matter is adjourned to ensure that the relevant applicant obtains counsel's advice on the issues, or because the Court is required to take the time to identify the issues and the legal principles involved in the matter without the assistance contemplated above. The discipline of obtaining counsel's advice is also likely to assist trustees in working out what evidence should be put before the Court on the application.

The Court's power to give advice

30 For the Court's jurisdiction to be enlivened under s 63 of the *Trustee Act*, the applicant for judicial advice must point to the existence of a question with respect to the management or administration of trust property or a question regarding the interpretation of the trust instrument: *Macedonian Church* at [58].

31 The phrase "management or administration of property" is not a term of art. It refers to both the manner in which the trust property is managed or administered and the actual carrying out of those functions: *Re Application of Gnitekram Marketing Pty Ltd* [2010] NSWSC 1328 at [13].

32 Here, the nature of the advice sought by the question set out above concerns how the estate is to be managed and administered, in that it involves the carrying out of the function of administrator. Specifically, the question deals with whether to expend estate funds on attempting to recover legal files in order to resolve a separate dispute about the terms of an agreement which also ultimately affects the administration of estate funds in two ways. First, understanding the claim and the agreement made with the insurer will assist in the execution of the necessary paperwork that is required to release funds to meet contracted building costs. Second, without the completion of the necessary paperwork, the estate may suffer loss as a result of litigation being commenced against it for payment of invoices and interest charged by the builder. The jurisdictional hurdle is thus overcome.

Is it appropriate to give judicial advice?

33 The Court has a discretion under s 63 of the *Trustee Act* whether to give judicial advice. As observed in *Cho-Poon* at [43], the Court is not bound to give judicial advice merely because a trustee has a right to apply for it: *Re Application of Perpetual Trustee Company Ltd* [2003] NSWSC 1185 at [8]-[9].

34 In exercising the discretion, the Court should be guided by the scope and purpose of the section. The section's primary purpose, and the advice given under it, is to protect the interests of the trust (in this case, the estate). The cardinal purpose in giving advice is to determine what should be done in the best interests of the trust estate: see *Re Estate of Mizon* [2021] ACTSC 240 at [14] and the authority there-cited; *Re Castle Hill Joinery & Interiors Pty Ltd* [2013] NSWSC 1525 at [18] per Darke J.

35 A practical motivation may also be the protection of the trustee (here, the plaintiff) who acts upon the advice: *Macedonian Church* at [196] per Kiefel J (as her Honour then was).

36 An application for judicial advice is primarily for the purpose of enabling the trustee to be advised as to the nature or extent of their powers and duties of management or administration of the trust property: *Re BTA Institutional Services Australia Ltd* [2009] NSWSC 1294; (2009) 3 ASTLR 207 at [6].

37 Given the estate is already the subject of litigation in respect of the will, as well as the threatened litigation in respect of the builder, and the escalating dispute with the insurer that may also result in litigation if not resolved in a timely manner, the interests of the estate will be best served by the Court exercising its discretion to provide an opinion on the question asked.

38 Further, the obtaining of judicial advice is a way of resolving any doubt about whether it is proper for a trustee to incur the costs and expenses of prosecuting or defending litigation, as those costs might carry a risk of being outside the indemnity: *Macedonian Church* at [70]-[71]. The advice may remove a concern of the plaintiff about exposure beyond the usual indemnity provided to trustees (to use the phraseology of Kiefel J in the *Macedonian Church case* at [196]).

39 Accordingly, I accept that it is appropriate for the Court to exercise its discretion to give the requested advice.

Is the plaintiff justified in taking steps against Mr Ian Julien, solicitor, to compel the production of the Deceased's files and documents held by him or his firm?

40 The question for resolution involves consideration of the solicitor's communicated reasons for refusing to provide the Deceased's files to the plaintiff. The evidence established that the solicitor was claiming a lien over the files. A solicitor may exercise a lien in two ways. The first may be described as a general lien, or a "retaining" or possessory lien. The second is a particular lien, or a "fruits of the action" lien. The circumstances of this case involve only the first category.

Principles applying to the existence of a retaining lien

41 Applicable principles have been set out by Rothman J in *National Australia Bank Ltd v Kiss* [2006] NSWSC 1426 at [6]-[8]:

> **General Lien**
>
> 6. It is trite that an attorney has a general lien on all the documents of his client in his possession to meet his general costs: *Re Suttor* (1890) 11 LR(NSW) 401. I have been referred by the applicant to the judgment of Asprey J in *Bolster v McCallum* (1966) 85 WN (Part 1) 281 [at] 286. His Honour there said:
>
> > At common law a solicitor has a lien upon any documents which come into his possession in the course of his employment and in his capacity as a solicitor with the sanction of his clients and which are the property of his clients (see *Halsbury's Laws of England*, 3rd ed, vol 36, par 238). **The lien only extends to the solicitor's taxable costs, charges and expenses incurred on the instructions of the clients against whom the lien is claimed and for which those clients are personally liable**; and the lien is a general lien extending to all costs due to the solicitor and is not limited to the costs incurred in relation to the particular documents in question or upon the particular instructions in consequence of which the documents came into the possession of the solicitor … A solicitor having a retaining lien over the documents in his possession is entitled to retain the documents against the clients **until the full amount of the solicitor's taxed costs payable by the clients is paid**; and the clients have no right to inspect the documents or to take copies of them.
>
> 7. Further it has been held that the failure to render a bill or the unreasonableness of the bill (or the absence of taxation, assessment or agreement as to the amount) does not stand in the way of a general lien of the kind here claimed: *Re Jalmoon Pty Ltd* (1986) 2 QdR 264.
> 8. Notwithstanding the existence of the lien, a court is entitled to order the production to the Court, and access to the documents, if the production of the documents is necessary in the interests of the administration of justice in a particular case. That will certainly be the case if the interests of third parties are prejudiced: in *Re Marriage of Conroy* (1990) 103 FLR 233, per Elliot J, Family Court of Australia.

(Emphasis added.)

When does a retaining lien cease, or when may it be lost?

42 Perhaps the most obvious principle is that a retaining or possessory lien ceases when the solicitor's costs are paid or satisfactory arrangements are made to secure the solicitor's costs entitlement. In *Bechara v Atie* [2005] NSWCA 268 (*Bechara*) at [47]-[50], McColl JA (with whom Ipp and Tobias JJA agreed) referred to a number of English and Australian authorities in the course of stating that the right to retain documents existed for the protection of the solicitor's claim for costs and disbursements and for no other purpose, operating only until the solicitor is satisfied or it is shown that the claim is unfounded. Once the client satisfies the solicitor's legitimate demands for which the lien is claimed, the lien expires, and the client is entitled to an order for the delivery up of the items: *Johns v Law Society (NSW)* [1982] 2 NSWLR 1 at 18-19; *Bolger v Bolger* (1985) 82 FLR 46 at 49.

43 However, a lien may also cease or be lost in a variety of other circumstances. The following circumstances are those bearing upon the facts under consideration here, noting that what follows is not an exhaustive list of when a retaining lien ceases or is lost.

44 A solicitor who overreaches on the scope of the lien may cause the lien to be extinguished. It is therefore important to understand the limits of a general retaining lien. A detailed discussion of what items fall within the lien may be found in GE Dal Pont, *Lawyers' Professional Responsibility* (Thomson Reuters, 7th ed, 2021) at 542-546. Of significance here, the lien does not extend to costs incurred at a stage where the solicitor acts as an adverse party to a client: *Re Long* [1929] VLR 318 (*Long*) at 321 per Lowe J. The rationale is that the lien does not extend to costs a solicitor has incurred for her or his own benefit and not on the client's instructions: see *White v Bini* [2003] FCA 669 (*White*) at [8]-[9] and the cases there-cited, which include *Long*.

45 In *White* at [10], Finkelstein J said:

> … It is trite law that **a lien will be lost if it is claimed for the wrong cause or the wrong amount**: *Automobile & General Finance Co. Ltd v Cowley-Cooper* (1948) 49 SR (NSW) 31, 37. **A lien will also be lost if a person claims it for two debts (one due and one not due) and intimates that he will not part with possession unless both debts are satisfied**: *Jones v Tarleton* (1842) 152 ER 285; *Kerford v Mondel* (1859) 28 LJ (Ex) 303. In *Albemarle Supply Company, Limited v Hind and Company* [1928] 1 KB 307, 318-319, Scrutton LJ said:
>
> > A person claiming a lien must either claim it for a definite amount, or give the owner particulars from which he himself can calculate the amount for which the lien is due. The owner must then in the absence of express agreement tender an amount covering the lien really existing. If he does not, unless excused, he has no answer to a claim of lien. He may be excused from tendering (1.) if he has no knowledge or means of knowledge of the right amount; **(2.) if the person claiming the lien for a wrong cause or amount makes it clear that he will not release the goods unless his full claim is satisfied, and that amount is wrongful**. The fact that the claim is made for more that the right amount does not matter unless the claimant gives no particulars from which the right amount can be calculated, or **makes it clear that he insists on the full amount of the**

right claimed.

…

(Emphasis added.)

46 The circumstance arising in *White* was that the solicitor insisted that he would only release the client's file if both his conveyancing costs *and* the costs incurred by him following the order substituting the trustees were paid. Finkelstein J found (at [10]) that the solicitor's refusal to release the file by claiming a lien for a wrong cause (the costs incurred following the removal of the trustee) was sufficient to extinguish his lien.

47 A lien may also cease in the following circumstances:

(a) Where satisfactory security is given for the solicitor's costs. Satisfaction may take a number of forms, including payment of money into court or giving other adequate security. An example is *R v Storer* (1993) 65 A Crim R 130, where Gallop J ordered delivery of the file to the new solicitors subject to payment into court of a certain sum and conditions preserving the former solicitor's lien. However, an undertaking by the incoming solicitor to pay the former solicitor's costs does not constitute security for the former solicitor's costs: *Bechara* at [58].

(b) Where the solicitor parts with possession of the documents without making any reservation as to the lien: *Bechara* at [48].

(c) Where a subpoena is issued in respect of the solicitor's file: *Bolster v McCallum* [1966] 2 NSWR 660. See also r 15 of the *Legal Profession (Solicitors) Conduct Rules 2015* (ACT) (**Solicitors Rules**), which creates a regime for the production of essential documents, but it only applies to current proceedings.

(d) Where a court order requires production, where the interests of justice require it, and on conditions designed to protect the solicitor as far as possible: *Bechara* at [69].

48 As Miles CJ has stated in this jurisdiction in *R v Dunstan (No 2)* [2000] ACTSC 33; (2000) 112 A Crim R 63 at [10]:

> Solicitors are of course entitled to be paid by the clients for whom they act, but it is a mistake to assume that they have an unfettered right to keep clients' document until they get paid. …

49 A solicitor who improperly maintains a lien over a client's property may also be subject to disciplinary action. Rule 14 of the Solicitors Rules deals with the obligations on solicitors, including relevantly to the present circumstances, to give "any client documents … as soon as reasonably possible when requested to do so by the client, unless there is an effective lien".

The circumstances of the present case

50 There is a real question in this case as to whether any lien has either ceased, by full payment being made, or has otherwise been lost.

51 The salient facts have already been set out above. The position is that:

(a) There is a legal dispute with an insurer, which obtaining the previous solicitor's file and associated documents may resolve.

(b) Until that dispute is resolved, the estate will not be put into funds to meet debts arising under a building contract. That may result in the estate defending litigation against the builder or the insurer or both. However, any proceedings that may be brought by either the insurer or the builder are only in contemplation.

(c) On the evidence before the court, the previous solicitor, Mr Julien, has been fully paid in respect of the Deceased's files.

(d) Mr Julien refuses to provide the Deceased's files because money is owed in respect of files pertaining solely to the Deceased's husband.

52 Three additional matters derive from the confidential material, being correspondence dated 26 July 2024 which included the following statements (redacted below in the published reasons to preserve the confidence of without prejudice communications):

(a) [Redacted].

(b) [Redacted].

(c) The letter further stated:

> [Redacted].

53 On the authorities above and the current state of the evidence, it is likely that the lien expired upon payment of the solicitor's agreed costs in respect of the Deceased's files on 6 June 2024. As the plaintiff submitted, the Deceased is not entitled to claim a lien over the files of the Deceased, because in respect of those files, he has been paid what was agreed. The Deceased's assets (her estate) cannot be used to pay the debts of another, even if that person is a family member.

54 However, even if the lien had not expired, the right to claim the lien may have been lost or alternatively, the plaintiff may be excused from payment. One reason why it might be argued that the lien had not expired is if the Court found that the waiver or agreement to be paid a particular amount was conditional, and the condition being unfulfilled, there was no agreement to accept a reduced amount of the invoices in respect of the Deceased's files.

55 Even on that alternative scenario, that is unlikely to change the outcome, because on the authorities set out above, it is likely that the lien was then extinguished by the subsequent conduct of the solicitor. That is because the amounts claimed by Mr Julien for the moneys owing by the Deceased's husband's estate (moneys for which the Deceased was not personally liable) and [redacted] were each not properly claimable as part of the lien. The solicitor either claimed the lien for a wrong cause or claimed the wrong amount.

56 The solicitor then indicated [redacted]. Because it includes amounts that are beyond the scope of any lien, the amount claimed by the solicitor is wrongful. Accordingly, to the extent that the lien remained following 6 June 2024, it is likely that the lien was extinguished.

57 For completeness, there was evidence about arrangements that had been made as between the plaintiff and Mr Julien by way of solicitor's undertakings

to pay the total outstanding fees of both estates once a property in the estate of the Deceased's husband had been sold. In the absence of evidence to suggest that the Deceased was personally liable for work done in respect of her husband's affairs, that evidence is not relevant to whether Mr Julien or ILJ Legal has any equitable entitlement to retain the files of the Deceased. It is therefore unnecessary to consider whether satisfactory security was given (in light of the authorities above regarding a solicitor's undertaking to pay).

58 Because there are no legal proceedings currently on foot, it is also unnecessary to deal with whether the Court might separately make an order for production in the interests of justice, were the plaintiff to make such an application.

Conclusion

59 For the above reasons, the plaintiff is justified in taking steps to compel production. That is because there is a reasonable likelihood that either the lien expired from 6 June 2024 when he was paid what he agreed, or the lien was later extinguished by the solicitor's conduct in seeking amounts that were not within the scope of the lien before releasing the Deceased's files.

60 Finally, it should be made clear that if the matter proceeds to litigation between Mr Julien or ILJ Legal and the plaintiff, the above advice does not bind a future court called upon to decide the issue. The threshold for considering whether the plaintiff is justified in taking the steps proposed is different from a concluded finding that the lien which was claimed had expired. Moreover, the cause of action, joinder of issues and evidence may all be different from that identified and put before the Court in this application.

Costs

61 Subject to any express terms of a trust, a trustee is entitled to be indemnified against debts and liabilities incurred in the proper execution of its duties and powers under the trust out of the assets of the trust. This established principle was restated in *Jones v Matrix Partners Pty Ltd; Re Killarnee Civil & Concrete Contractors Pty Ltd (in liq)* [2018] FCAFC 40; (2018) 260 FCR 310 at [35] per Allsop CJ, with whom Siopis and Farrell JJ agreed.

62 Under s 59(4) of the *Trustee Act*:

> A trustee may reimburse himself or herself, or pay or discharge out of the trust property, all expenses incurred in or about the execution of his or her trusts or powers.

63 It follows that if the taking of steps to compel production is proper (justifiable), then the plaintiff is entitled to expend estate funds to pay for the legal costs of any reasonable steps taken, including if necessary, conducting litigation. Because of the operation of the above section, it may well be unnecessary to make an order to that effect, as it is already provided for by statute. However, as the plaintiff sought the order, I will make it out of an abundance of caution.

Orders

64 The Court makes the following orders:

(1) The questions for judicial advice should be answered as follows:

(a) Until further order, the Administrator *pendente lite* of the Estate of the late Margaret Anne Cervo (**Deceased**) is justified in taking steps against Mr Ian Julien, solicitor, to compel the production of the Deceased's files and any original documents or safe custody documents of the Deceased held by him or his firm ILJ Legal, including commencing proceedings in relation to any solicitor's retaining lien claimed.

(b) Until further order, it is proper for any costs and disbursements incurred in carrying out the said steps, or commencing the proceedings referred to in order 1 above, to be paid out of the Estate of the late Margaret Anne Cervo, on an indemnity basis.

(2) Confidential exhibits TJG-CON-20 and TJG-CON-35 are to be sealed in envelopes marked "Not to be opened without further order of a judge".

Question for judicial advice answered

Solicitors for the plaintiff: *Glass Goodwin*.

EMMA ROFF

SUPREME COURT OF THE AUSTRALIAN CAPITAL TERRITORY

Director of Public Prosecutions (ACT) v Chatfield

[2024] ACTSC 329

Taylor J

22 August, 18, 24 October 2024

Criminal Law — Sentencing — Aboriginal offender — Pilot Circle Sentencing List — Elders and Respected Persons Panel — Considerations relevant to process of Circle Sentencing — Supreme Court Practice Direction 1 of 2024.

The offender, a Gamilaroi and Barkendji man, pleaded guilty to several offences and agreed to engage in the circle sentencing process established by Supreme Court Practice Direction 1 of 2024 which commenced on 15 February 2024 and outlines the aims and procedures of the Pilot Circle Sentencing List (the Circle Sentencing List). The sentencing of the offender was the first to be dealt with in the Circle Sentencing List, and in doing so the court recorded some observations and considerations that informed the process of circle sentencing.

Held, sentencing the offender and making observations about the process of circle sentencing:

(1) The Circle Sentencing List is a specialised sentencing list, established to provide to the greatest extent possible, a culturally relevant and restorative sentencing process for First Nations offenders who have entered a plea of guilty to an eligible offence. The process is an attempt to recognise the strength and power to be found for First Nations people in cultural connection and accountability, respecting the objects and purposes of sentencing prescribed in ss 6 and 7 of the *Crimes (Sentencing) Act 2005* (ACT). [2], [12]

(2) The capacity of the Circle Sentencing List to achieve its objectives depends upon the critical participation of Elders and Respected Persons (the Elders panel), who sit alongside the sentencing judge during a sentencing conversation, though they do not sit in "judgment" of the offender. [2]

(3) The role of those who participate on the Elders panel as part of the sentencing conversation is reminiscent of First Nations earliest systems of law and seeks to honour the long-standing position of eminence assigned to those people within First Nations communities who possess wisdom and knowledge. It is the strength to be taken from that wisdom and knowledge that this process seeks to draw upon in an effort to genuinely deliver individualised justice to First Nations offenders. [7]

(4) The sentencing conversation provides the opportunity for the circumstances personal to an offender to be comprehensively explored and for the circumstances of their offending to be entirely uncovered. This necessarily includes recognition of the harm caused to a victim of offending conduct and a consideration of any statement that victim might contribute to the process. [8]

(5) The Elders panel lead the sentencing conversation drawing upon their cultural wisdom and authority, with the endorsement of Ngunnawal Traditional Owners. The sentencing conversation requires an offender to confront their criminal conduct and acknowledge the harm occasioned by their conduct to victims, to the community and to themselves. In addition, the sentencing conversation seeks to identify the strength inherent to cultural connection as well as the possibility of redemption through a commitment to rehabilitation and cultural wellbeing. [9]

(6) Through the sentencing conversation, First Nations offenders speak for themselves to First Nations knowledge holders. The offender is expected to directly engage with the Elders panel and the sentencing judge to answer for their conduct, to tell their personal story and to describe the challenges that are contributing to their engagement with the criminal justice system. [10]

(7) A sentencing process that seeks to understand the influence of the broad range of social issues experienced by First Nations peoples on the life of an individual First Nations offender, does not offend the requirement for justice to be individualised. [6]

Bugmy v The Queen [2013] HCA 37; (2013) 249 CLR 571, referred to.

(8) Like any sentencing exercise this process requires the sentencing judge to consider all the relevant factors and engage in a process of instinctive synthesis to determine the just and appropriate sentencing outcome. [11]

Cases Cited

Bugmy v The Queen (2013) 249 CLR 571.

Chatfield v Badman [2015] ACTSC 209.

Henry v The Queen (2019) 276 A Crim R 519.

Kelly v Ashby (2015) 73 MVR 360.

Markarian v The Queen (2005) 228 CLR 357.

Mill v The Queen (1988) 166 CLR 59.

MT v The Queen (2021) 17 ACTLR 22.

O'Brien v The Queen (2015) 19 ACTLR 244.

Pearce v The Queen (1998) 194 CLR 610.

Public Prosecutions (ACT), Director of v Djerke (No 2) [2023] ACTSC 341.

Public Prosecutions (ACT), Director of v Donohue (No 3) [2024] ACTSC 272.

Public Prosecutions (ACT), Director of v Joliffe-Cole [2024] ACTSC 256.

R v Barron [2020] ACTSC 281.

R v Bourne [2018] ACTSC 35.

R v Carberry [2023] ACTCA 32.

R v Crawford (No 1) [2020] ACTSC 245.

R v Crawford (No 3) [2017] ACTSC 99.

R v Forrest (No 2) [2017] ACTSC 83.

R v Gardner [2022] ACTSC 36.
R v George [2021] ACTSC 361.
R v Jovanovic [2014] ACTSC 157.
R v Kilic (2016) 259 CLR 256.
R v Lock [2016] ACTSC 319.
R v MAK (2006) 167 A Crim R 159.
R v Massey (No 3) [2021] ACTSC 156.
R v McCurley [2020] ACTSC 140.
R v Millwood [2012] NSWCCA 2.
R v Redmond (No 2) [2022] ACTSC 295.
R v Rosewarne [2021] ACTSC 217.
R v Torbert [2015] ACTSC 331.
R v Toumo'ua (2017) 12 ACTLR 103.
R v Tran [1999] NSWCCA 109.
R v Verdins (2007) 16 VR 269.
Sampson v De Haan [2016] ACTSC 327.
Smith v The Queen [2011] NSWCCA 163.
Taylor v The Queen [2014] ACTCA 9.
Veen v The Queen (No 2) (1988) 164 CLR 465.

Sentence

D Armstrong, for the prosecution.

S Lynch, for the offender.

B Hodges, *D Ritchie*, *M Abel* and *W Tompkins*, Elders.

Cur adv vult

24 October 2024

Taylor J.

Introduction

1 Martin Chatfield is a Gamilaroi and Barkendji man. In July 2023 he committed several offences and he is now to be sentenced for those offences after he participated in a sentencing list introduced in the ACT Supreme Court earlier this year. Supreme Court Practice Direction 1 of 2024 commenced on 15 February 2024 and outlined the procedure and the aims of the Pilot Circle Sentencing List (the Circle Sentencing List). This being the first sentencing outcome arising from the implementation of this list, I consider it appropriate to first record some observations and considerations that inform the process of circle sentencing.

2 It is a specialised sentencing list, established to provide to the extent possible, a culturally relevant and restorative sentencing process for Aboriginal and Torres Strait Islander offenders who have entered a plea of guilty to an eligible offence. The capacity of the Circle Sentencing List to achieve its objectives depends upon the critical participation of Elders and Respected Persons

(the Elders panel), who sit alongside the sentencing judge during a sentencing conversation, though do not sit in "judgment" of the offender. As distinct from the circle sentencing process in place in the ACT Magistrates Court since 2004, participation in the sentencing conversation in this Court does not see the Elders panel have any role in the determination of the sentence to be imposed. In this Court, that determination rests with the sentencing judge alone.

3 In *Law: The Way of the Ancestors* (2023), Professors Marcia Langton and Aaron Corn describe the *Possum and Wallaby Dreaming* mosaic in the Australian Parliament House forecourt. They note that the mosaic depicts the tracks of six wallabies and six possums as they approach the great fire at the centre of the mosaic design. Significantly, as the scholars explain, the animals walk slowly and peacefully, "on all fours in humility and respect for themselves, each other and the law". The intended message of the design, Langton and Corn observe at [88]-[89] is this:

> Respect for oneself and for others — indeed all things in creation — and humility before ancestors and their laws form the basic currency that has enabled Indigenous societies in Australia to develop and thrive across the continent. Given by the original ancestors and observed over countless generations by those who have gone before, these systems encourage people to maintain the social good and strive towards balance in all things. They instil people with good values and encourage beneficial behaviours.

4 I extract these observations to reinforce that which is well accepted, at least among First Nations peoples; systems of law enforcing rules by which we must live, are not new to us. There is a word for Law in numerous language groups. For many millennia our people have known systems of law, intended to ensure certainty, harmony, justice and peace. Notwithstanding what some might make of our consistent overrepresentation in what we now know as the criminal justice system, our culture has long embraced a system of law, the foundations of which include respect, responsibility and obligation. As Langton and Corn observe at [183]:

> The way of the ancestors is not just a body of rules or a digest of what is and what is not permitted. While those are necessary parts of any legal system, law is so much more. It is the great desire for harmony and balance, the proper comportment of a person in the world made by prolific ancestors long ago, the regard for all places and species as sacred, and the inner meanings of all known things. It is all this and much more.

5 We are not lawless peoples. As the Uluru Statement from the Heart eloquently declared we are not "innately criminal people". As Professor Megan Davis sets out in her essay, *Voice of Reason* (Megan Davis, "Voice of Reason: on Recognition and Renewal" [2023] (90) *Quarterly Essay* 1), the narrative behind that statement unequivocally recorded the survival of our shared stories, despite the rupture of our societies by colonisation and acknowledged that "all our stories start with our Law": at [31].

6 If the rule of law under which our society operates serves to enforce order in a civilised society and in doing so, afford protection to vulnerable citizens, the individual circumstances of those citizens must be understood. While the

colonial version of the rule of law in this country saw a racial administration of it, resulting in explicit and harsh exclusion of First Nations peoples of the kind explored by Dr Keally McBride in *Mr Mothercountry* (Keally McBride, *Mr Mothercountry: The Man Who Made the Rule of Law* (Oxford University Press, 2016)), a modern iteration of it should ensure equal justice. A sentencing process that seeks to understand the influence of the broad range of social issues experienced by First Nations peoples on the life of an individual First Nations offender, does not offend the statements in *Bugmy v The Queen* [2013] HCA 37; (2013) 249 CLR 571 (*Bugmy*) at [36] and [41] that affirmed the requirement for justice to be individualised. While the process has potential to enhance faith and trust in the modern criminal justice system's capacity to deal comprehensively with wrongdoing, it is the pursuit of individualised justice that fundamentally underpins this process.

7 The role of those who participate on the Elders panel as part of the sentencing conversation is reminiscent of our earliest systems of law and seeks to honour the long-standing position of eminence assigned to those people within our communities who possess wisdom and knowledge. It is the strength to be taken from that wisdom and knowledge that this process seeks to draw upon in an effort to genuinely deliver individualised justice to First Nations offenders.

8 The sentencing conversation provides the opportunity for the circumstances personal to an offender to be comprehensively explored and for the circumstances of their offending to be entirely uncovered. This necessarily includes recognition of the harm caused to a victim of offending conduct and a consideration of any statement that victim might contribute to the process.

9 The Elders panel lead the sentencing conversation drawing upon their cultural wisdom and authority, with the endorsement of Ngunnawal Traditional Owners. The sentencing conversation requires an offender to confront their criminal conduct and acknowledge the harm occasioned by their conduct to victims, to the community and to themselves. In addition, the sentencing conversation seeks to identify the strength inherent to cultural connection as well as the possibility of redemption through a commitment to rehabilitation and cultural wellbeing.

10 Through the sentencing conversation, First Nations offenders speak for themselves to First Nations knowledge holders. The offender is expected to directly engage with the Elders panel and the sentencing judge to answer for their conduct, to tell their personal story and to describe the challenges that are contributing to their engagement with the criminal justice system. In this way, an offender is held directly accountable for their conduct by the Elders panel without their legal representative acting as their mouthpiece. The Elders panel are exacting in their expectation that an offender will engage with the process enthusiastically and authentically. It is a process that can make for uncomfortable discussion and on occasion, promote powerful realisations.

11 As will become clear, like any sentencing exercise this process requires the sentencing judge to consider all the relevant factors and engage in a process of instinctive synthesis to determine the just and appropriate sentencing outcome.

This is not a process designed to provide a "soft" option for Aboriginal and Torres Strait Islander offenders. Indeed, in many instances the process I have described compels a level of engagement by offenders in brutally honest personal reflection, not replicated in typical sentencing proceedings.

12 This process should not be mistaken as an attempt to ensure more lenient sentencing outcomes for a particular cohort of offender. A reading of the Practice Direction reveals as much. Rather the process is an attempt to recognise the strength and power to be found for our people in cultural connection and accountability, respecting the objects and purposes of sentencing detailed in ss 6 and 7 of the *Crimes (Sentencing) Act 2005* (ACT) (the *Crimes (Sentencing) Act*).

13 This is the process in which the offender, Martin Chatfield, sought to engage. This is not a mandated sentencing option for all Aboriginal and Torres Strait Islander offenders. It is voluntary and ultimately demands that an offender engage in a sentencing process different to that typically required in sentencing proceedings. The nature of the process as I have described it, reflects much of the experience of Martin Chatfield when he appeared before the Elders panel and I in relation to several offences he committed in July 2023.

14 By way of clarification, in these remarks I have adopted the term "First Nations" when referring to Aboriginal and Torres Strait Islander peoples. In doing so, I acknowledge that the use of "First Nations" to refer to our people is not a term endorsed or embraced by all our people. I intend no disrespect or controversy by its use. The Elders panel were content with my use of the term in this way, in these remarks. I also wish to note that the handing down of the sentence was somewhat delayed in attempt to give effect to the desire of some of the members of the Elders panel to be present when Mr Chatfield was sentenced as an indication of their support for the process.

The offences

15 On 16 January 2024, the offender entered pleas of guilty in the ACT Magistrates Court to the following offences for which he will now be sentenced:

(a) **CC2023/6802**: intentionally inflict grievous bodily harm, contrary to s 19(1) of the *Crimes Act 1900* (ACT) (the *Crimes Act)* which carries a maximum penalty of imprisonment for 20 years.

(b) **CC2023/6803**: aggravated burglary, contrary to s 312 of the *Criminal Code 2002* (ACT) (the *Criminal Code*) which carries a maximum penalty of 2000 penalty units, imprisonment for 20 years or both.

(c) **CC2024/622**: assault occasioning actual bodily harm aggravated by family violence, contrary to s 24(1) of the *Crimes Act* which carries a maximum penalty of imprisonment for 7 years.

(d) **CC2023/7907**: dishonestly drive motor vehicle without consent, contrary to s 318(2) of the *Criminal Code* which carries a maximum penalty of 500 penalty units, imprisonment for 5 years or both.

(e) **CC2023/6804**: assault frontline community service provider, contrary to s 26A of the *Crimes Act* which carries a maximum penalty of imprisonment for 2 years.

(f) **CC2023/6805**: assault frontline community service provider, contrary to s 26A of the *Crimes Act* which carries a maximum penalty of imprisonment for 2 years.

(g) **CC2023/6806**: possess knife without reasonable excuse, contrary to s 382(1) of the *Crimes Act* which carries a maximum penalty of 10 penalty units, imprisonment for 6 months or both.

(h) **CC2023/6807**: possess licence issued to another, contrary to s 30(1)(a) of the *Road Transport (Driver Licensing) Act 1999* (ACT) which carries a maximum penalty of 20 penalty units.

The facts

Relationship between offender and Ms A

16 Ms A and the offender were in an "on again, off again" relationship for approximately 10 years. Ms A and the offender have one child together. The offender and Ms A have not been in a relationship for approximately two years.

17 The offender and Ms A are intimate partners as defined by s 10 of the *Family Violence Act 2016* (ACT) (the *Family Violence Act*).

Drive motor vehicle without consent (CC2023/7907)

18 On Sunday 2 July 2023, a red Nissan Patrol belonging to Ms [redacted] was parked at an address on Cooyong Street, City in the Australian Capital Territory (ACT). When Ms [redacted] woke up on Monday 3 July 2023, she noticed her vehicle was missing.

19 Closed Circuit Television (CCTV) footage showed that at about 10:52 pm on Sunday 2 July 2023, the offender, wearing a black head covering and dark clothing entered the carpark on a bicycle. A short time later, the vehicle exited the carpark.

Aggravated burglary (CC2023/6803), intentionally cause grievous bodily harm (CC2023/6802) and assault occasioning actual bodily harm (CC2024/622)

20 Between 26 June 2023 and 3 July 2023, the offender assisted Ms A to move into her new residence at [redacted] in the ACT.

21 Since the start of July 2023, the offender had been "creeping on" Ms A, and had asked her questions about where she had been and recorded at least two videos of her having conversations with her cousin from outside the residence.

22 During this time, Ms A was in contact with the offender via text messages and audio voice calls.

23 On Saturday 1 July 2023, Ms A asked the offender for $30 to buy cigarettes.

24 On Sunday 2 July 2023, Ms A and the offender had the following conversation via text message:

> The offender: Fuck off Gronk (12:22pm)

The offender: ask the lad you fucked in the bathroom at your cousins house I got you on camera dog

The offender: I was there at your house to

The offender: Your gonna get it

Ms A: Wow grow up.

The offender: I can show you ya little ice puff slut try play me at my game dog (2:45pm)

The offender: [Ms A] did you still need smokes I got thousands (11:32pm)

Ms A: Yes can I borrow some please

25 At about 1:11 am on Monday 3 July 2023, Ms A sent the following message to the offender.

Ms A: I'm going sleep it's all good thank you but

26 At about 1:31 am on Monday 3 July 2023, automatic numberplate recognition cameras located on Ginninderra Drive between Aikman Drive and Diddams Close in Belconnen, recorded the red Nissan Patrol travelling towards Charnwood, ACT.

27 A short time later, Ms A received the following text messages:

The offender: You ain't at your mum's.

The offender: I'm out the front.

28 Ms A and her friend, Mr B were sitting in the lounge room when they heard a tapping on the window. Ms A told Mr B to hide so he sat in the corner of the lounge room, near the front door and Ms A placed a blanket over him.

29 Ms A and Mr B heard a loud noise and the offender entered the premises. Ms A described the male as being tall, wearing a balaclava and multiple layers of dark clothing. Ms A recognised the male to be the offender by his eyes, the shape of his nose and his build.

30 The offender was holding a knife in each hand and had a third knife attached to his belt.

31 Ms A told the offender to get out of her house. Ms A got up off the lounge and the offender approached and flipped the lounge upside down.

32 Mr B felt the offender putting pressure on his hands and hitting him while he was under the blanket. He heard Ms A yelling and screaming on the other side of the room.

33 Mr B removed the blanket and saw the offender had three knives on his person. The offender began to swing the knives at Mr B. Mr B used his hands to defend himself.

34 At one point Mr B grabbed hold of one of the knives that the offender had in his hands. The offender ripped the knife from Mr B's grip causing injuries to Mr B's palm and fingers on his right hand. The injuries to Mr B's right hand included:

(a) transection of the right middle finger ulnar digital artery;

(b) transection of the right middle finger ulnar digital nerves;

(c) transection of the right middle finger radial digital nerve;

(d) transection of the right middle finger flexor digitatum profundus tendon; and

(e) transection of the right middle finger flexor tendon.

35 Mr B stated that the offender swung the knife wildly at him around 10 times. Mr B attempted to block these swings with his hands. Mr B's left wrist was struck during one of these swings which caused the complete laceration of the left thumb flexor pollicis longus tendon and a partial transection of the left extensor carpi ulnaris tendon. Mr B was able to put some distance between himself and the offender by moving behind the lounge. While on the other side of the lounge, the offender was swinging the knife back and forth in what Mr B believed was an intimidation technique.

36 While Ms A was standing in the dining room, the offender approached her, still holding the knife in his hand. He used his fist to punch Ms A across the face. This caused Ms A to experience swelling in her jaw area and a loose front tooth. Ms A was bleeding out of her mouth and nose.

37 The offender was inside the premises for approximately three minutes before he fled out of the same door he entered through.

38 Ms A ran to the front door and outside after the offender ran out of the laundry door. As Ms A approached the front fence, she observed an older red vehicle she thought was similar to a Land Cruiser depart the area.

39 After the offender left, Ms A called triple-zero and briefly spoke with the ACT Ambulance Service. Ms A then drove herself and Mr B to a friend's address in Scullin, ACT.

40 After the incident, Ms A received two further text messages from the offender:

> The offender: What know you want to lie than talk to police
> The offender: Told ya

41 Police attended the address at Charnwood, ACT however no one was located inside. Due to concerns for the occupants' safety and welfare, police made an emergency entry to the premises. Police observed an apparent shoe mark adjacent to the locking mechanism on the exterior of the timber door leading from the rear yard into the laundry. The timber frame of the door was detached from the door. Police observed a significant amount of what appeared to be blood on the floor and walls throughout the premises. The lounge was upturned in the lounge room and a vase was observed underneath blankets on the lounge.

42 Police attended an address in Scullin and spoke with Ms A and Mr B. Police observed Mr B to have a number of lacerations to his hands. An ambulance was requested to attend to assess Mr B's injuries.

43 Mr B attended the Canberra Hospital where he underwent emergency surgery.

44 Police spoke with Ms A who was visibly shaken up, crying and appeared to be in pain around her mouth and jaw. Ms A disclosed she was under the influence of an intoxicating substance. Ms A stated she was fearful of the offender; she thought the offender would have killed Mr B if he were in a relationship with her.

45 Ms A described the knife the offender was using as being a gutting knife with a dark coloured handle, the type typically used for fishing. When Ms A left the premises, she noticed a black sheath for a knife on the ground beneath the clothesline. Ms A had not seen that sheath before and it did not belong to her.

46 Mr B described the knife the offender used to injure him as being a flimsy fishing knife with a dark handle and straight blade. The other knife was a smaller combat style knife, which was similar to the one hanging from his waistband.

47 Ms A informed the police of the aforementioned circumstances however, she was not feeling well enough to participate in a formal statement.

48 Due to Ms A's intoxication and inability to consent to a forensic examination of her residence, police declared the address at Charnwood, ACT as a crime scene.

49 While police were speaking with Ms A, the offender sent her a location pin of [redacted] located at an address in Turner, ACT. The offender then sent her two videos that Ms A described as being videos the offender captured at her cousin's house two days prior, when the offender alleged she was engaging in sexual intercourse in the bathroom.

50 At about 8:20 am on Monday 3 July 2023, police obtained a search warrant for the address at Charnwood, ACT for the purpose of conducting an examination of the scene. Crime Scene Investigators collected numerous deoxyribonucleic acid (DNA) samples, fingerprints and shoe marks from the scene and seized the black sheath. The black sheath underwent examinations and a DNA swab was taken. A mixed DNA profile from a minimum of two individuals was obtained and the offender could not be excluded as a contributor.

51 At about 1:00 pm, police located the Nissan Patrol on the corner of [redacted] in Turner, ACT. CCTV footage from the area showed the vehicle was parked at that address at about 1:40 am on Monday 3 July 2023. A person wearing all black exited the vehicle and walked off.

52 The Nissan Patrol was uplifted to a secure AFP facility and a forensic examination was conducted. A mixed DNA profile from a minimum of two individuals was obtained from the steering wheel. The offender could not be excluded as a contributor.

53 Later that day, police located a red Jamis Durango bicycle at the same location the Nissan Patrol was stolen from. A forensic examination was conducted on that bicycle. A male DNA profile was obtained from the handlebar grips. The offender could not be excluded as the contributor.

54 At about 11:00 am on Tuesday 4 July 2023, police obtained a record of conversation with Mr B.

55 Mr B confirmed the aforementioned version of events.

56 Mr B was awaiting surgery at the time of the record of conversation however, he described his injuries in the following way:

(a) his right hand was the worst;

(b) his right ring finger was hanging on by a thread;

(c) his right middle finger was shredded;

(d) he had a hole puncture at the base of his left thumb;

(e) he had a chunk out of his left wrist;

(f) he had a small slice to his right cheek; and

(g) he had a small laceration to his right forearm.

57 Mr B said that he thought he was going to die, that he thought it did not matter who was in that house, the offender wanted them "gone". He described the offender as being "on a mission".

58 Mr B did not give the offender consent to assault him.

59 On Tuesday 4 July 2023, police obtained a record of conversation with Ms [redacted]. Ms [redacted] confirmed the aforementioned version of events regarding the red Nissan Patrol. Ms [redacted] did not give anyone permission to take her motor vehicle or drive it.

Assault frontline community service provider (CC2023/6804 and CC2023/6805), possess knife without reasonable excuse (CC2023/6806) and possess licence issued to another (CC2023/6807)

60 At about 2:30 am on Thursday 6 July 2023, police parked at a service station in Belconnen, ACT. At this time, police saw a male, now known to be the offender standing at the window to the service station while yelling at the attendant behind the counter.

61 Police suspected the male to be the offender, who was at the time wanted on an outstanding apprehension requiring his arrest.

62 At about 2:32 am, the offender entered the back seat of a parked taxi, and the taxi drove towards the entrance of the carpark of the service station. The taxi driver stopped the vehicle next to the police vehicle and asked police if they had change for a $100 note.

63 Police approached the taxi and asked the offender for his identification. The offender produced an ACT driver's licence held in the name [redacted], which contained a photo that did not match his physical appearance. The offender reiterated to police that he was the person named on the licence but had grown his hair longer since the photo was taken.

64 Police asked the offender to step out of the taxi. The offender exited the vehicle through the rear left door. Constable Scally grabbed the offender's left arm with both hands while asking the offender to put his hands behind his back. The offender immediately turned around and struck Constable Scally with his right hand using a closed fist. The offender's fist connected with the right temple area of Constable Scally's head and caused him to stumble backwards.

65 The offender ran from the side of the taxi, along Luxton Street towards a roundabout while Constable Tennent chased after him.

66 After about 10 seconds, the offender slowed and turned towards Constable Tennent, making direct eye contact with him. Constable Tennent saw the offender using his left hand to reach for an item at the belt line of his pants. Constable Tennent yelled "stop" before he caught up with the offender, grabbed his jacket with both hands and escorted him to the ground. During a brief

physical altercation, the offender thrust his left elbow backwards and connected with Constable Tennent's left eye. Constable Scally then approached and both officers were able to place the offender in handcuffs.

67 Police searched the offender while he was still on the ground and located a black handled "flick-knife" attached by the handle to the inside of the left side belt line area of his pants. The knife was located in the same area of the offender's clothing that he was seen reaching for during the foot pursuit.

68 During the above incident, both police officers were wearing full police uniform and accoutrements and were exercising their lawful duties. The entire incident was captured on body worn camera footage, including the assault on police and the offender reaching for his belt line during the foot chase.

69 The offender was placed in a caged vehicle and transported to the ACT Regional Watch House where he was lodged.

Sentencing considerations

Nature and circumstances of the offending

70 In considering the nature and circumstances of an offence the objective seriousness of the conduct establishing it must be assessed. The maximum penalty provides a "yardstick" against which to assess the objective seriousness of the offending: *Markarian v The Queen* [2005] HCA 25; (2005) 228 CLR 357 at [31]. It is important to consider where offending conduct sits on the spectrum of conduct establishing an offence: *R v Kilic* [2016] HCA 48; (2016) 259 CLR 256 at [19]. I will identify the features of the offending that bear upon the objective seriousness of the offence, though will not express a conclusion as to the seriousness of the offence by reference to low, mid or high range: *R v Toumo'ua* [2017] ACTCA 9; (2017) 12 ACTLR 103 at [24].

Aggravated burglary

71 I observe the following features of the aggravated burglary offence consistent with *R v Rosewarne* [2021] ACTSC 217 at [119].

72 The offending occurred at a residential premises when two occupants were present. One of the victims was known to the offender, being his ex-partner. The offender knew that she was present when he entered the premises. Both occupants were awake. The offence involved forced entry which resulted in the door of the premises being damaged. The extent of the disarray caused was not insignificant; furniture was upturned, and blood was left on the floor and walls throughout the premises. The offender intentionally engaged with both victims, directing gratuitous, deliberate violence toward them both. The offender has been charged separately for the violent conduct toward each victim and I bear in mind the need to avoid double punishment. The offender was in possession of three knives when he committed the offence and he used them to evoke fear in the victims.

73 The offence involved some degree of planning evidenced by the text exchange between the offender and Ms A in the immediate lead up to the offending and by the offender arriving in possession of the knives. That said, the offending was not carried out with any real degree of sophistication, the offender making an unsuccessful attempt to conceal his identity.

74 The offender sought to justify his actions by expressing a concern for the victim's safety after observing Mr B, whom he did not know, attempt to hide from him through the window. In light of the offender's accusations and paranoia surrounding the victim's alleged infidelity and his violent conduct once inside the premises, I do not accept that a concern for Ms A's safety motivated the offender to enter her home. The offender's purported "concern" for her makes no sense of the violence he then directed toward her. Rather, in my view the offender's conduct is properly viewed through the lens of family violence and I attribute his conduct as an attempt to control and punish Ms A for her perceived infidelity, and by extension Mr B for his perceived part.

75 The features of the offending reveal a serious example of an aggravated burglary.

Intentionally inflict grievous bodily harm

76 The maximum penalty for this offence demonstrates it to be undoubtedly objectively serious. In *R v Barron* [2020] ACTSC 281 at [28], Murrell CJ observed that "the objective seriousness of the offence is to be assessed by reference to the culpability of the offender and the degree of grievous bodily harm that was occasioned". Her Honour went on to identify the following features as influential:

(a) the motivation for the attack;
(b) the degree of premeditation;
(c) the victim's vulnerability and defencelessness;
(d) the type of weapon used;
(e) the nature of the attack; and
(f) whether the assault was committed in company.

77 The actions of the offender were retributive in nature, connected to Mr B's involvement in what the offender perceived to be Ms A's infidelity. There was a degree of premeditation in that the offender was suspicious of Ms A, was armed with three knives when he attended her home, observed the victim through the window before entering the premises and deliberately attacked him.

78 When initially struck by the offender, the victim was hiding under a blanket. As reflected in the injuries suffered, the victim attempted to defend himself against the sharp blade using his bare hands. While the altercation was brief, the offending was intense and vicious. Mr B later told police that he believed he was going to die.

79 A medical report and a bundle of photographs demonstrate the nature and extent of the injuries inflicted on the victim. The victim sustained over 13 injuries across his hands, forearms, face and right knee. The type of injury varied from stab wounds to redness. The victim required surgery to repair the skin, tendon, nerve and blood vessel injuries to his hands. He initially spent three days in hospital and required another three-day admission shortly thereafter. Dr Thomas confirmed that the victim would require another surgery in the coming months and expressed the view that several of the victim's

wounds would leave permanent scars. Further, Dr Thomas identified the possibility that the victim may experience permanent sensory loss in his right middle finger.

80 There is a wide scope of injuries that can be encompassed by the definition of grievous bodily harm. While this example of the offence saw the victim suffer serious injury including a degree of permanent disfigurement, as the prosecution accepted, the injuries ultimately fall toward the lower end of the spectrum of injury constituting grievous bodily harm.

Assault occasioning actual bodily harm

81 An assessment of this offence requires a consideration of the degree of violence used or the ferocity of the attack, and the consequent injury: see *R v Redmond (No 2)* [2022] ACTSC 295 at [7]. This is an aggravated version of the offence, it having occurred within the context of family violence. I bear that in mind when identifying the features of the conduct. As a result of the punch to the face, Ms A suffered swelling to the jaw area, a loose tooth and bleeding from the mouth and nose. In the aftermath of the incident, police observed Ms A to be "visibly shaken" and crying.

82 In this instance, the offending conduct exposed the offender's desire to exert control over Ms A. After Ms A informed him she was going to sleep, the offender attended her home without invitation, a place where she was entitled to feel safe. He observed her to be in the presence of another man and reacted with punishing, unpredictable violence. Shortly after the offending conduct, the offender sent the victim two intimate videos he had recorded of her which serves to confirm my view that the offender was driven by a desire to punish and control the victim, an all too familiar dynamic in family violence offending.

83 I record here for convenience that in determining the appropriate outcome, I must take into account the mandatory considerations in s 34B of the *Crimes (Sentencing) Act*. The preamble to the *Family Violence Act* captures the approach the community expects should be taken to family violence, including the need to condemn family violence, the need to promote offender accountability, and recognition of the exploitation of power imbalances that these offences can involve and that family violence is predominantly committed by men against women and children. There is strong utility in outcomes for offences committed in the context of family violence deterring similar conduct, protecting the victim and the community from similar conduct, and acknowledging the extent of the harm family violence visits upon families and communities.

Drive motor vehicle without consent

84 *R v Rosewarne* [2021] ACTSC 217 at [124], *R v Massey (No 3)* [2021] ACTSC 156 at [29], *Sampson v De Haan* [2016] ACTSC 327 at [40] and *R v Lock* [2016] ACTSC 319 at [15] identify factors relevant to an assessment of objective seriousness for this offence. Consistent with the observations recorded in those outcomes the following features are relevant:

(a) The offender drove the motor vehicle for a relatively short duration, being to and from Ms A's residence on 2 and 3 July 2023;

(b) The vehicle was recovered and there is no evidence it was damaged;
(c) There is no information before the Court regarding the nature of the driving during the period it was taken;
(d) The owner suffered the inconvenience of being without the vehicle for a period; and
(e) The vehicle was utilised in the commission of a number of offences, by virtue of the offender driving it to and from Ms A's house.

Assault frontline community service provider

85 The offender is charged with two counts of this offence. Section 26A of the *Crimes Act* came into effect on 10 June 2020 by virtue of the *Crimes (Protection of Police, Firefighters and Paramedics) Amendment Bill 2019* (ACT). The Explanatory Statement for that Bill details the increasing frequency and severity of assaults against emergency frontline workers and that the law must recognise their special occupational vulnerability as well as deter people from engaging in this type of violent conduct.

86 The circumstances and extent of the harm caused inform an assessment of the objective seriousness of the offence: see *R v George* [2021] ACTSC 361 at [67]. The first count involved a punch to the face of Constable Scally while the constable was attempting to arrest the offender. The second involved the offender throwing his left elbow backwards which connected with Constable Tennent's left eye region. The offender made contact with a vulnerable area of the bodies of both officers. The injuries resulting from both counts were minor. No doubt the offending caused pain to each victim and unnecessarily frustrated them in the execution of their duties.

Possess knife without reasonable excuse

87 In *Chatfield v Badman* [2015] ACTSC 209, Murrell CJ at [11] stated:

> When considering the objective seriousness of an offence of this type, it is necessary to consider both the nature of the particular prohibited weapon and the nature of the offender's conduct vis-à-vis that weapon.

88 The offender had in his possession a "flick-knife" during the commission of the assaults upon the two police officers. On the facts before me I am not satisfied beyond reasonable doubt that the offender evinced an intention to use the knife as he was being pursued by police.

Possess licence issued to another

89 This is a fine only offence with a maximum penalty of $3200 and is an unremarkable example of the offence.

Subjective circumstances

90 A pre-sentence report, as well as a report completed by psychologist Ms Vanessa Edwige, comprehensively recorded the background, history and personal circumstances of the offender. It can be observed from the outset that the offender has undoubtedly been shaped by exposure to profound grief and

loss from a very young age. This loss set the scene for an unsettled childhood marked by instability, abuse, neglect, exposure to violence, use of illicit substances and economic disadvantage.

91 The offender is 30 years old. The sentencing conversation with the Elders panel revealed the devastating effect upon the offender of the loss early on in his life of two significant female figures. His mother died when he was two years old and his grandmother became his primary carer. She died when he was four years old. He was then separated from his siblings and moved to Campbelltown, NSW to live with his maternal aunt and her family. The offender reported witnessing and being subjected to physical abuse from his aunt, uncle and cousins.

92 Ms Edwige cited the *Bugmy Bar Book*: "*Childhood Exposure to Domestic and Family Violence*" and observed that "there has been mounting empirical evidence of the effects of exposure to domestic and family violence on children's development, and a growing recognition of the ways these harms can manifest in intergenerational cycles of trauma, violence and disadvantage".

93 [Redacted]. He relocated to Canberra when he was 12 years of age to reside with his older brother. The offender was quickly exposed to illicit substance use, violence and other anti-social behaviour by his brother and his brother's associates. [Redacted].

94 [Redacted].

95 The offender did not meet his father until he was 17 years old and they do not share a close relationship. His older sister passed away when he was 23 years old and he continues to experience significant distress in relation to her death.

96 The offender and his ex-partner, Ms A, share a daughter. He advised that he has maintained contact with them both while in custody.

97 The offender advised he completed Year 6 before exiting the school system partway through Year 7. He advised that he had learning difficulties and learned to read and write [redacted]. He has never held employment in the community although intends on engaging in further education and starting his own landscaping business after completing residential rehabilitation. He has previously held employment positions while in custody but is not currently employed due to being engaged in a full-time treatment program.

98 The offender told the author of the pre-sentence report that most of his friends and associates have criminal records or are involved in criminal activity. He has contact with three family members who he considered to be living pro-social lives.

99 The offender reported that an older family member began forcing him to smoke cannabis when he was four years old. He began regularly consuming alcohol and using illicit substances from 12 years of age. He began consistently using crystal methamphetamine from 13 years of age, and heroin from 16 years of age. When last in the community, he reported his heroin use was almost daily. He was also using a substantial amount of methamphetamine, the result of which was long periods without sleep. The offender was able to identify that he uses illicit substances to mask his grief and cope with his childhood trauma. He is currently engaging in the Buvidal program and the Solaris Therapeutic

Communities program. He has applied to the Karralika residential rehabilitation program and is awaiting a response. He stated that he does not wish to be released from custody unless he is released to a residential rehabilitation program.

100 The offender has a diagnosis of schizophrenia for which he is currently prescribed antipsychotic medication. He has previously been admitted into the Adult Mental Health Unit after he reported increasing suicidal thoughts and psychotic symptoms. He also reported a diagnosis of bi-polar disorder.

Remorse and degree of responsibility for the offending

101 The offender presented with complex personal circumstances, that feature a history of childhood disadvantage, trauma, mental ill-health and entrenched addiction. They are relevant factors that influence an assessment of the offender's prospects for rehabilitation and the need to protect the community.

102 Remorse is relevant to an assessment of the offender's likelihood of re-offending and prospects of rehabilitation: *R v MAK* [2006] NSWCCA 381; (2006) 167 A Crim R 159 at [41]. While the pre-sentence report author noted that the offender agreed with the statement of facts, he also considered that the offender failed to show remorse for his offending and only accepted responsibility for his conduct to a limited extent. The offender attributed some blame to Ms A as at the time of his offending he believed they were still in a relationship and she was being unfaithful. He also told the pre-sentence report author that he only intended to punch Mr B however Mr B grabbed the knife and caused the injuries to his own hand. When challenged that his explanation did not correlate with the statement of facts, he conceded that he was under the influence of multiple illicit substances and was in active psychosis during the offences, therefore did not fully recollect his offending behaviour. Similarly, in relation to the 6 July offences he stated that he was in active psychosis and believed at the time that he was acting in self-defence. He reported that he was hearing voices at the time which convinced him that the police officers were intending to cause him harm.

103 In his interview with Ms Edwige, the offender demonstrated a higher degree of remorse and insight into his offending, stating:

> [I] feel sad, sorry and disgusted. Want to apologise to my ex-partner. I'm trying to better my life. I'm trying as hard as I can to better my life. I am eager to turn my life around.

104 The Elders panel were unequivocal in their condemnation of the offender's conduct, making clear to the offender that the use of violence against his partner and her friend was entirely unacceptable. Aunty Michele made a compelling observation in relation to the violence against Ms A, careful to acknowledge that the perpetration of violence against women is not part of our culture:

> I just wouldn't, in good conscience, be able to end our conversation without letting you know how sacred our women are and, as a woman and your aunty in the community, not biologically aunty … but you know what I mean, culturally, I can't not let you know how I'm — that it's not okay. And I get the sense that

> you have known it's not okay for a long time because you grew up seeing it but you're becoming a cycle of men doing it. But I also feel that you are aware enough to be able to make the change to not continue.

105 Accordingly, the offender was left in no doubt that neither Ms A nor Mr B bore any responsibility for his use of violence. The offender expressed to the Elders panel that he "feel[s] really bad" about his conduct. It was clear to the Elders panel that the offender is deeply ashamed and understood the gravity of the offences. The offender readily acknowledged that the victims "would have been petrified and scared" and that he put them through a "traumatic event". He demonstrated to the Elders panel a degree of insight into his offending, reflecting that he was going through a "bad" mental health period. He explained to the Elders panel that stealing a car gave him a sense of control in circumstances where he otherwise felt his mental health, drug use and personal relationships were beyond his control.

106 The offender entered pleas of guilty at an early opportunity, reflective of a willingness to accept responsibility for his conduct.

107 The material, along with the offender's reflections before the Elders panel, supports a finding that he has developed a genuine commitment to reform while he has been in custody. He has recently graduated from the Solaris Therapeutic Community program and expressed a strong desire to participate in a residential rehabilitation program upon release into the community. He has prepared a relapse prevention plan which demonstrated significant awareness of the risk factors he faces when he is in the community and strategies he can utilise to mitigate those risks. He also identified various programs and supports he intends to engage with as part of a cultural healing plan.

108 As will become clear, the offender's illicit substance addiction contributed to the commission of the offences before the Court. As submitted by the prosecution, this of itself does not mitigate the offending behaviour (*R v Crawford (No 3)* [2017] ACTSC 99 at [39]) however the circumstances underlying the addiction, in my view, do provide a basis for mitigation: *R v Forrest (No 2)* [2017] ACTSC 83 at [130]-[133]. What is made plain in the material before the Court is that the offender had very little control over the introduction of illicit substances to his life. From the age of four he was using cannabis. The level of instability in his caring and accommodation arrangements saw a ready transition to the use of methamphetamine and heroin by his early teens. The offender's older brother himself was in no position to be responsible for the day-to-day care and guidance of a vulnerable young boy and yet the care arrangement persisted, [redacted].

Bugmy considerations

109 It is beyond any doubt that the offender experienced a disadvantaged and traumatic childhood of the kind contemplated by the High Court in *Bugmy*. The offender's upbringing was significantly affected by alcohol and substance abuse, physical and emotional abuse, neglect, and social exclusion. He was [redacted]. Arising from all those factors it is unsurprising that the offender has had little by way of formal education and has no real history of meaningful employment.

110 As I have already identified, the offender first engaged in illicit substance use

at 4 years of age which escalated to consistent drug use from 12 years of age. In *Director of Public Prosecutions (ACT) v Djerke (No 2)* [2023] ACTSC 341 at [29], McCallum CJ observed that:

> It is well understood that drug addiction, particularly an addiction acquired at such a tender age, is a *medical* rather than a moral issue and one which requires considerable support from a range of disciplines in order to overcome.

(Emphasis in original.)

111 The offender reported being coerced into [redacted]. There is undoubtedly a strong link between the offender's childhood and his persistent engagement with the criminal justice system.

112 Ms Edwige considered that the offender's exposure to adverse experiences throughout his childhood and adolescence has resulted in "complex development trauma, post-traumatic stress disorder, and substance use disorder" which have all been untreated over the course of the offender's life. She further considered that the presence of these factors along with the offender's diagnosis of schizophrenia, significantly influenced the offender's capacity for emotional regulation, decision making and exercising sound judgement. Ms Edwige noted that the offender continues to relive his [redacted] through flashbacks and unwanted memories and "he cannot resume the normal course of his life, as the trauma repeatedly interrupts" which continues to cause him "considerable psychological harm". The offender "is a survivor of childhood neglect and physical and [redacted] and this has had a significant impact on his self-esteem and self-worth". Both Ms Edwige and the Elders panel observed that the offender did not have positive social or parental supports [redacted]. The absence of those supports, Ms Edwige considered, enhanced his feelings of isolation and disconnection which put him at greater risk of psychological harm.

113 The offender's disadvantaged childhood must be given full weight: *Bugmy* at [44]. By virtue of the childhood circumstances to which I have referred, the offender will necessarily "have fewer emotional resources to guide his (or her) behavioural decisions" than a person who had a "normal" or "advantaged" upbringing: *R v Millwood* [2012] NSWCCA 2 per Simpson J (with whom Bathurst CJ and Adamson J agreed at [69]). Accordingly, the offender's upbringing serves to reduce his moral culpability: *MT v The Queen* [2021] ACTCA 26; (2021) 17 ACTLR 22 at [62], citing *Bugmy* at [43]. This is not to say that the offender bears no moral responsibility for his offending conduct. Rather, it is to acknowledge the real influence of his profoundly deprived childhood such that he cannot be found to have the same degree of responsibility as an offender who did not experience a deprived childhood. This is what individualised justice demands.

Verdins considerations

114 The prosecution conceded that the collective impact of the offender's multiple diagnoses should reduce his moral culpability for the offending: see *R v Verdins* [2007] VSCA 102; (2007) 16 VR 269. Ms Edwige concluded that on 2, 3 and 6 July 2023, the offender had a mental health impairment that was clinically significant and arose from post-traumatic stress disorder, substance

abuse disorder and schizophrenia. She further concluded that the offender's behaviour was impacted by his history of complex developmental trauma.

115 A letter from Canberra Health Services dated 17 January 2023, confirmed the offender's diagnosis of paranoid schizophrenia. The offender reported first receiving this diagnosis when he was 16 years old. A Justice Health Services Mental Health Brief Assessment Report dated 21 January 2022, stated that the offender presented with "a complex mental health history characterized by mood disturbance, psychotic phenomena including delusional ideation, thought disorder, and hallucinations; polysubstance misuse and impulsive and erratic behaviour".

116 The offender stated that he was going through a particularly difficult time in relation to his mental health at the time of the offences. He reported hearing voices in the lead up to the commission of the 2 and 3 July offences, and that on 6 July 2023, those voices told him the police intended to cause him harm. Ms Edwige's report detailed that the offender presents with recurrent and intrusive memories of the traumas he experienced as a child and that he has a physical reaction to these distressing memories in the form of increased anxiety. The offender stated that at the time of the offences he was heavily drug affected. On 6 July 2023, he reported being under the influence of ice, Valium, marijuana and alcohol.

117 Ms Edwige concluded that the offender's mental health and substance use disorder at the time of the offences had a significant impact on his ability to make considered and appropriate choices and impaired his ability to make reasoned judgements, think clearly, regulate his behaviour and fully appreciate the wrongfulness of his conduct.

118 I am satisfied that the offender's schizophrenia contributed to his offending conduct. The presence of disordered thinking, erratic behaviour and impulsive decision making can be readily identified in the conduct the offender engaged in on each occasion. At the time of his offending, the offender had disengaged from treatment. Accordingly, the offender's moral culpability is reduced.

119 I am satisfied that giving "full weight" to the offender's deprived background as well as taking into account his diagnosis of schizophrenia, operates to moderate the weight to be afforded to general deterrence, denunciation and punishment.

120 At the same time, I acknowledge that those factors operate to emphasise the need to protect the community from the offender and deter him from this kind of conduct, which in light of the nature of the offences, is a compelling consideration. This is the tension the High Court identified in *Bugmy* at [44] and is what "makes the exercise of the discretion so difficult".

Rehabilitation

121 The picture of the offender's rehabilitative prospects is complex. Ms Edwige considered that the offender "presents with deficits in conceptual, social and practical skills that impact on his ability to function in his daily life". The author of the pre-sentence report justifiably expressed concern about the offender's capacity to comply with community-based orders given his inability in the past to engage satisfactorily. The author did note the progress the offender has made

while in custody including developing insight, actively pursuing treatment supports and remaining compliant with his prescribed medication regime.

122 Ms Edwige's report, while carefully documenting the many challenges for the offender arising from his childhood circumstances and his mental health conditions, identified the opportunity that proper treatment would offer to the offender and his prospects of rehabilitation. Ms Edwige recorded that the offender's "significant childhood trauma has never been addressed in a culturally safe trauma informed therapeutic environment. He has managed his trauma symptomatology through misusing substances to numb the pain".

123 Like the author of the pre-sentence report, Ms Edwige recorded her concern that the offender requires significant support to "address his substance use disorders and have opportunities to work therapeutically to enhance his social and emotional wellbeing in an environment that is culturally safe and conducive to therapeutic change". Ms Edwige underlined the capacity for repetitive evidence-based therapies to guide the offender's responses to future life experiences. Given the absence of any substantive treatment from the offender's life, Ms Edwige considered that with appropriate, targeted and long-term intervention, the offender has the ability to make positive change.

124 Ms Edwige confirmed that which the Elders panel reiterated, and that is the strength to be found in the offender's cultural identity and connectedness to culture, citing *Significance of Culture to Wellbeing, Healing and Rehabilitation* (Dr Paul Gray and Vanessa Edwige, June 2021) and observing:

> Aboriginal and Torres Strait Islander conceptualisations of wellbeing and healing are inextricably bound to cultural understandings of connectedness: our sense of self, identity and sense of belonging to family, community and Country. Engagement in and respect for these cultural frameworks and traditions promotes resilience and is critical to healing.

125 The capacity for the offender to draw on his cultural expression and to connect to culture in order to strengthen his rehabilitative efforts is constrained while he is incarcerated, a concern expressed by the Elders panel and by Ms Edwige. The offender has spent a significant portion of his life in a custodial environment, raising the prospect that he is at real risk of institutionalisation. Many of the behaviours cited by Ms Edwige as indicative of institutionalisation were observed in the offender and indeed were revealed in the difficulties the offender described experiencing with day to day living upon his release from prison prior to the offending conduct.

126 Ms Edwige summarised protective factors for the offender as follows:

(a) his love of culture and his people;

(b) his willingness and want to engage in cultural activities and programs that will enhance his social and emotional wellbeing;

(c) his strong motivation to address his substance misuse and access supports that will assist his recovery; and

(d) his strong support from his Aunty.

127 The sentencing conversation with the Elders panel highlighted the insight the offender has developed into the need for him to genuinely commit to

rehabilitation if he is to truly turn his life around. The offender was unequivocal that he should not be released from custody unless there is a position available for him in a residential drug rehabilitation facility. The Elders panel were impressed by the offender's commitment to that end and considered it demonstrated the offender's understanding of the overwhelmingly negative contribution the use of illicit substances has had to his capacity to live a fulfilling, crime-free life.

128 The Elders panel nonetheless made it clear to the offender that he must be held accountable for his conduct; a concept to which the offender was resigned. Uncle Benny described carefully to the offender that the need for punishment arising from wrongdoing is a concept well-known to our communities; it being a central feature of our cultural concepts of law, peace and justice long before the establishment of the system of criminal justice now in operation. Uncle Benny explained:

> I'll just go, and I shared this with us mob a few days ago, but I'll just go back, culturally, right? And you probably realise, you know, when someone done something serious wrong, seriously wrong, they'd come to this western court system. They'd be charged and they'd go in and do time. They didn't just do the time there because they were also aware that there was still a penalty that they had to pay when they come back out. They had to face the music with the mob and that meant, you know, some really harsh penalties that they had to face. The people, some of our mob, they were in there for a number of years, and they still come out and they still had to face the music with the old people.

129 What was also made clear to the offender by the Elders panel is the support that will always be available to him in our community; a community to which he belongs and to which he can return upon his release. The offender displayed real pride in his cultural identity, a matter reinforced by the confidence of the Elders panel in his potential to make a positive contribution in the future. The offender's observable shame in the face of the Elders panel's condemnation of his conduct was consistent with his acknowledgement that he needs to confront his addiction to illicit substances in order to properly address his mental health and his childhood trauma. The offender identified that his life, to date, has been absent a sense of peace, sharing with the Elders panel:

> I've spent probably close to half my life in prison now and it's not peaceful in there. Yes, I'm always — everyone's on edge, it's dangerous, it's scary and I just — I want to be at peace somewhere. I want to do the gardening every day and relax and don't have to look over my shoulder.

130 The Elders panel were united in communicating to the offender that he must take responsibility for his future if he is truly desirous of a life different to that which is reflected in his criminal history. In a powerful interaction, the offender was reminded by Aunty Michele of her engagement with him as a younger man and the hope she had then for his future. Aunty Michele reiterated to the offender that despite seeing him in this position, the Elders panel remained hopeful for his future, observing:

> One of the other things that is key to our role as Elders is that we give our mob hope. It's a partner with faith, hope that something could happen and faith that

> you will keep working towards that, even when times get hard, and here are the two things I heard you say which give me hope that after you have made — this is also a place, a circle where our mob get to make amends, where they do take the consequences of things they've done, but when that's done and said, you can, as you said, feel good about yourself, and you can, as you told us, be a role model.

131 The offender was open with the Elders panel about the struggle he experiences managing the stressors of everyday life when he is in the community. This led to a return to the discussion of the importance of connectivity with individuals and services in the community who are invested in the offender's success. The offender identified a long-term aspiration of getting himself into a position whereby he can help others in our community struggling with trauma and addiction. As is reflected in the quote extracted above, this aspiration was encouraged by the Elders panel who were enthusiastic about the offender seeing himself as a future role model. Uncle Benny telling the offender, "the word hope that practises with what you mentioned about faith. You know, we have hope and a sense of faith that there's a different man inside you that wants to come out".

132 While acknowledging the profoundly sad and disrupted childhood the offender experienced, the Elders panel each acknowledged the gravity of his conduct and reinforced the need for him to take personal accountability. The Elders panel drew on the resilience of our people to highlight the personal resilience and strength of the offender, having survived as he did a childhood and adolescence so lacking in care and guidance. It was for the offender, the Elders panel explained, to commit himself to substantive change if he wants to thrive and move beyond his negative childhood and adolescent experiences.

133 The sentencing conversation effectively demanded that the offender acknowledge those factors outside of his control and directly confront those factors within it, which are contributing to his offending conduct. The strength inherent in cultural connectivity was not only identified in the words of Ms Edwige's report; it was clearly embodied in the interaction between the offender and the Elders panel.

134 I am satisfied that rehabilitation, despite the offender's history and ongoing challenges, is not beyond him. Indeed, his commitment to residential drug rehabilitation together with his emerging insight into the other factors contributing to his offending conduct, provides a basis for cautious optimism. That said, it cannot be ignored that the offender will require significant support to cope with the demands of life upon his release. The parole authorities will be in a position to assess the offender's needs and craft conditions of his release to give effect to that requirement.

Criminal history

135 The offender has an extensive criminal history in the ACT and NSW. Notably, this includes 18 prior convictions for driving a motor vehicle without consent and 3 convictions for family violence offending against Ms A.

136 The offender's criminal history is not an aggravating feature. It limits the leniency that can be afforded to him. The pattern of conduct revealed in the

offender's criminal history demonstrates that this kind of offending is not uncharacteristic: *Veen v The Queen (No 2)* [1988] HCA 14; (1988) 164 CLR 465.

Time in custody

137 The offender has now spent 350 days in custody solely referable to these offences. I will take this into account in the sentences I impose which accordingly will be backdated to 10 November 2023.

Plea of guilty

138 The offender entered a plea of guilty to each offence on 16 January 2024 in the Magistrates Court. I am satisfied that the plea was entered at an early stage of the proceedings: see *Director of Public Prosecutions (ACT) v Joliffe-Cole* [2024] ACTSC 256. In recognition of the significant utilitarian value of the plea of guilty, a 25 per cent discount is appropriate.

Conditional liberty

139 The offender was granted bail in the Magistrates Court on 3 May 2023 for a separate series of offences. He was therefore on conditional liberty at the time he committed the offences currently before the Court. His most recent offending conduct represents a betrayal of the opportunity to remain in the community: *R v Tran* [1999] NSWCCA 109 at [15].

140 The fact that the offender committed these offences while on bail is an aggravating feature which must be considered in sentencing. This is relevant to the determination of the appropriate punishment for an offence and does not influence the objective seriousness of an offence: *Smith v The Queen* [2011] NSWCCA 163 at [26]. I bear in mind that I must approach this feature of the offending with care so as to avoid double punishment: *Kelly v Ashby* [2015] ACTSC 346; (2015) 73 MVR 360 at [61].

Current sentencing practise

141 Comparable cases do not operate to give effect to strict mathematical equivalence as between sentencing outcomes for the same offence. They assist to ensure consistency in the application of principles. I was taken to a number of outcomes in relation to the offence of causing grievous bodily harm in this jurisdiction including *R v Gardner* [2022] ACTSC 36, *R v Jovanovic* [2014] ACTSC 157, *R v Bourne* [2018] ACTSC 35 and *R v Torbert* [2015] ACTSC 331. In addition, I also had regard to *Director of Public Prosecutions (ACT) v Donohue (No 3)* [2024] ACTSC 272. Reflective of the wide spectrum of injury that can constitute grievous bodily harm, the circumstances within which it can be inflicted and the variation in subjective factors the outcomes vary considerably.

142 The outcomes in *R v McCurley* [2020] ACTSC 140 and *R v Crawford (No 1)* [2020] ACTSC 245 were drawn to my attention in relation to the offence of aggravated burglary and I have had regard to the outcomes and the principles applied therein.

Determination

143 In sentencing the offender, I must have regard to the purposes of sentencing

as set out in s 7 of the *Crimes (Sentencing) Act*. The reduction of the offender's moral culpability moderates the weight to be attached to punishment, denunciation and general deterrence. This must be balanced against the need to deter the offender and the need to protect the community. The sentence imposed in this instance must recognise the harm done to the victims by the offender's conduct. Additionally, there is a need to give effect to the offender's capacity for rehabilitation.

144 At a time when the offender was a boy in desperate need of care and support arising from the loss, abuse and neglect he had suffered, he was effectively left to be raised by another, albeit older, boy entirely ill equipped for that task. Sadly, the offender has realised a future that was severely limited by the deprivation that marked his childhood. These are not matters over which he had any control. He does have the capacity to take control of this next phase of his life and appears to have reached the point where he is desirous of change. If he can maintain that motivation for change and if appropriate supports can be made available to him, his interests can align with the community's interest in seeing him reform.

145 The offending conduct overall was serious and caused significant harm, in particular to Mr B and Ms A. There was sensibly no dispute that the s 10 (of the *Crimes (Sentencing) Act*) threshold was crossed in relation to the matters before the Court. In my view, given the objective seriousness of the offending, only a period of imprisonment is appropriate.

146 There was a submission advanced on behalf of the offender, perhaps tentatively, that consideration be given to providing further time for the offender to secure a place at residential rehabilitation which could facilitate the imposition of a suspended sentence or alternatively, an assessment for an Intensive Correction Order. In light of the seriousness of the offending and the offender's past history of poor compliance in the community, I do not consider either of these to be appropriate outcomes.

147 The reduction in the offender's moral culpability in light of his profound childhood disadvantage is properly reflected in the length of the overall sentence imposed and the length of the parole period. In my view, the offender can continue to work towards rehabilitation which will undoubtedly improve his prospects for release by the parole authorities. Release on parole will see the offender supported by a regime that will give effect to the need for the offender to have targeted support in the community including with respect to accommodation and life skills. This will necessarily require scrutiny and accountability.

148 Ideally, the offender's release would comprehensively incorporate his commitment to residential drug rehabilitation and the provision of additional support through the National Disability Insurance Scheme (NDIS), which I am convinced will significantly enhance his capacity to transition away from persistent engagement with the criminal justice system. Further, the offender's release would ideally give effect to the clear need identified in Ms Edwige's report for the supports provided to him to be culturally appropriate and relevant. It need hardly be said that the prospects of rehabilitation for First Nations

offenders, including this offender, are likely to be greatly enhanced by access to First Nations specific supports upon release, such as those currently available at Winnunga Nimmityjah Aboriginal Health and Community Services and Yeddung Mura.

149 The offender being sentenced for multiple offences, I acknowledge that there is no one correct approach to the structuring of multiple sentences. The principle of totality "can be implemented in a variety of acceptable ways": *R v Carberry* [2023] ACTCA 32 at [92]. The outcome must reflect the total criminality involved in the conduct and be "just and appropriate" in all the circumstances: *Mill v The Queen* [1988] HCA 70; (1988) 166 CLR 59 at 63. A balance must be struck between crushing any rehabilitative prospects of the offender and avoiding a perception that the commission of multiple offences will result in a discount.

150 Several of the offences are intertwined legally and factually, occurring either proximate to or simultaneously with each other. I must fix an appropriate sentence for each offence and then consider questions of accumulation or concurrence, applying the principle of totality: *Pearce v The Queen* [1998] HCA 57; (1998) 194 CLR 610 at [45]. Some cumulation will be required in recognition of the separate victims involved, though in each series the offending occurred in the context of a single episode of criminality: see *O'Brien v The Queen* [2015] ACTCA 47; (2015) 19 ACTLR 244. I also bear in mind that the offender has only recently completed a sentence of full-time imprisonment.

151 I must set a non-parole period. The relevant principles in relation to non-parole periods have been discussed in *Henry v The Queen* [2019] ACTCA 5; (2019) 276 A Crim R 519 at [33]-[37] and *Taylor v The Queen* [2014] ACTCA 9 at [19]. I have had regard to those principles. The setting of a non-parole period involves the exercise of a wide discretion. The non-parole period reflects the minimum term that justice demands the offender serve before he can be considered for release into the community. Rehabilitation is of course a factor, in particular, when assessing what is required in order to protect the community.

152 Consistent with his background, the offender has been incarcerated for varying periods [redacted]. The prosecution acknowledged that there is a risk of institutionalisation for a relatively young man. It was submitted that this risk can be addressed by a substantial parole period that will enable him to attend residential rehabilitation. In addition, a substantial period of parole would give effect to the need for the offender to be intensively supported in the way I have described, over a considerable period.

153 For the first series of offences:

(i) The starting point for the intentionally inflict grievous bodily harm offence (CC2023/6802) is 3 years and 6 months of imprisonment reduced to 2 years, 7 months and 14 days of imprisonment for the plea of guilty.

(ii) The starting point for the aggravated burglary offence (CC2023/6803) is 3 years of imprisonment reduced to 2 years and 3 months of imprisonment for the plea of guilty.

(iii) The starting point for the assault occasioning actual bodily harm offence (CC2024/622) is 2 years of imprisonment reduced to 1 year and 6 months of imprisonment for the plea of guilty.

(iv) The starting point for the dishonestly drive motor vehicle without consent offence (CC2023/7907) is 10 months of imprisonment reduced to 7 months and 15 days of imprisonment for the plea of guilty.

154 For the second series of offences:

(i) The starting point for the assault frontline community service provider offence (CC2023/6804) is 8 months of imprisonment reduced to 6 months of imprisonment for the plea of guilty.

(ii) The starting point for the assault frontline community service provider offence (CC2023/6805) is 8 months of imprisonment reduced to 6 months of imprisonment for the plea of guilty.

(iii) The starting point for the possess knife without reasonable excuse offence (CC2023/6806) is 2 months of imprisonment reduced to 1 month and 15 days of imprisonment for the plea of guilty.

Orders

155 For those reasons, I make the following orders:

(1) On the charge of intentionally inflicting grievous bodily harm (CC2023/6802), the offender is convicted and sentenced to 2 years, 7 months and 14 days of imprisonment commencing on 10 November 2023 and ending on 23 June 2026.

(2) On the charge of aggravated burglary (CC2023/6803), the offender is convicted and sentenced to 2 years and 3 months of imprisonment commencing on 23 March 2025 and ending on 22 June 2027.

(3) On the charge of assault occasioning actual bodily harm (CC2024/622), the offender is convicted and sentenced to 1 year and 6 months of imprisonment commencing on 22 October 2026 and ending on 21 April 2028.

(4) On the charge of driving a motor vehicle without consent (CC2023/7907), the offender is convicted and sentenced to 7 months and 15 days of imprisonment commencing on 6 September 2027 and ending on 20 April 2028.

(5) On the charge of assault frontline community service provider (CC2023/6804), the offender is convicted and sentenced to 6 months of imprisonment commencing on 20 January 2028 and ending on 19 July 2028.

(6) On the charge of assault frontline community service provider (CC2023/6805), the offender is convicted and sentenced to 6 months of imprisonment commencing on 20 April 2028 and ending on 19 October 2028.

(7) On the charge of possess knife without reasonable excuse (CC2023/6806), the offender is convicted and sentenced to 1 month and 15 days of imprisonment commencing on 5 September 2028 and ending on 19 October 2028.

(8) On the charge of possess licence issue to another (CC2023/6807), the offender is convicted and fined $200 and allowed no time to pay.

(9) The total period of imprisonment of 4 years, 11 months and 10 days will commence on 10 November 2023 and end on 19 October 2028.

(10) I impose a non-parole period to start on 10 November 2023 and end on 22 September 2026.

(11) Pursuant to s 67 of the *Crimes (Sentencing) Act* I make the following recommendations in relation to the conditions of parole:

(i) The offender attend or engage in drug rehabilitation services (including residential rehabilitation) specific to, or catering specifically for, the cultural needs of First Nations people; and

(ii) The offender be supported to engage with services designed for and operated by First Nations people to assist him upon his release with the management of his mental health (including his engagement with the NDIS), day to day living, cultural connectivity, employment readiness, housing and relationship management.

Sentences imposed

Solicitors for the prosecution: *ACT Director of Public Prosecutions*.

Solicitors for the offender: *Aboriginal Legal Service*.

RICHARD DAVIES

SUPREME COURT OF THE AUSTRALIAN CAPITAL TERRITORY
(FULL COURT)

Law Society (ACT) v Bangura

[2024] ACTSCFC 1

Mossop J, McWilliams J and Ainslie-Wallace AJ

23 August, 30 October 2024

Legal Practitioners — Misconduct and unfitness — Personal misconduct not in connection with legal practice — Fraudulent pursuit of damages and claimed inability to work following motor vehicle accident — False representations made to treating physicians and insurance assessors — Attempt to co-opt employer into corroborating false claims to insurer — Conviction and imprisonment by Local Court of New South Wales for attempting dishonestly to obtain financial advantage — Subsequent appeal to District Court and application for judicial review in Court of Appeal — Maintenance of innocence throughout — Claims that dishonesty stemmed from untreated mental health condition — Where dishonesty in pursuit of monetary gain prolonged and persistent — Where conduct outside legal practice indicator of unfitness to practise — Where evidence of candour and contrition limited and necessitated by circumstances — Where respondent's account of mental health treatment neither wholly accurate nor causally relevant to offending — Defect of character incompatible with membership of legal profession — Where no other order sufficient to fulfil protective role of the Supreme Court — Orders for striking off from Roll of Practitioners made.

The respondent, Mr Bangura, was admitted as a lawyer of the Supreme Court of the Australian Capital Territory on 14 December 2012. He practised as a solicitor for several years thereafter, but was not doing so at the time of these proceedings, although his name remained on the Roll of Practitioners.

In March 2015, Mr Bangura was involved in a minor motor vehicle accident, following which the other driver offered him $2,000 to cover the damage to his car. Subsequently, in May 2015, Mr Bangura submitted a $700,000 claim for damages for allegedly extensive personal injuries arising out of the accident. That claim was substantiated by false representations made to both physicians and insurance appraisers, including that he was unable to work despite having been employed by a firm of solicitors in New South Wales at the time. On being alerted

to his insurance company's investigation of his claim, Mr Bangura called the firm for which he worked and instructed the person who answered to be non-committal if anyone enquired about whether he was working there.

Following an investigation, Mr Bangura was arrested and charged in June 2017 with attempting dishonestly to obtain a financial advantage. He pleaded not guilty, and the matter was heard in the Local Court of New South Wales over 10 days, resulting in a conviction and sentence of two years' imprisonment with a non-parole period of nine months. Mr Bangura appealed both his conviction and sentence to the District Court of New South Wales, where he was resentenced to one year and nine months' imprisonment to be served by way of an intensive corrections order together with 240 hours' worth of community service. Both the Local and District Courts made findings of dishonesty in respect of Mr Bangura. Further proceedings brought by Mr Bangura in the Court of Appeal of the Supreme Court of New South Wales, seeking judicial review of the District Court's decision, were dismissed, and his practising certificate was subsequently cancelled by the Law Society of New South Wales in December 2020. Mr Bangura's submissions in the course of that process were that, although he was "dissatisfied" with the Court of Appeal's decision, he respected it, and remained a fit and proper person to hold a practising certificate despite his conviction.

Proceedings were brought by the applicant, the Law Society of the Australian Capital Territory, seeking orders that Mr Bangura's name be removed from the Roll of Practitioners on the basis of his not being a fit and proper person to be a legal practitioner of the Supreme Court. The facts of Mr Bangura's conduct were not contested at hearing. Mr Bangura's evidence was that, although he was not a fit and proper person at the time of his practising certificate being cancelled, he had changed in the intervening time and was fit and proper at the time of the proceedings. He also gave evidence that, at the time of his dishonest conduct and subsequently, his actions were attributable to serious and untreated mental health conditions. Counsel for Mr Bangura contended for suspension, rather than striking off, to allow Mr Bangura to fulsomely pursue medical treatment and rehabilitation.

Held, making the orders sought by the applicant:

(1) A practioner's personal conduct will be relevant to determining fitness to practise where it would reasonably be regarded as disgraceful and dishonourable by competent members of the profession in good standing. Given the importance of honesty and integrity to legal practice, and the centrality of dishonesty in his impugned conduct, it was appropriate to assess Mr Bangura's fitness and propriety by reference to that conduct despite it occurring outside the course of legal practice. [8]-[12]

Council of the Law Society (ACT) v Hoyle [2020] ACTSCFC 3; *New South Wales Bar Association v Cummins* [2001] NSWCA 284; (2001) 52 NSWLR 279; *Legal Practitioner v Council of the Law Society (ACT)* [2015] ACTCA 20, applied.

A Solicitor v Council of Law Society (NSW) [2004] HCA 1; (2004) 216 CLR 253; *Ziems v Prothonotary of the Supreme Court (NSW)* (1957) 97 CLR 279; *Prothonotary of the Supreme Court (NSW) v Thomson* [2018] NSWCA 230; *Legal Practitioners Complaints Committee v Palumbo* [2005] WASCA 129; *Prothonotary of the Supreme Court (NSW) v Kearns* [2011] NSWCA 394; *Attorney-General (Qld) v Legal Services Commissioner* [2018] QCA 66, referred to.

(2) In circumstances where the Law Society had established that Mr Bangura had manifested a serious character flaw warranting removal from the Roll of Practitioners, the evidential onus shifted to Mr Bangura to affirmatively satisfy the Court that that unfitness to practise was of limited duration. [15]

Council of the Law Society (NSW) v Zhukovska [2020] NSWCA 163; (2020) 102 NSWLR 655; *Council of the Law Society (ACT) v Bandarage* [2019] ACTSCFC 1, applied.

(3) Although the medical evidence provided by Mr Bangura established that he had lapsed in attending therapy and taking his medication at the time of the accident and the fraudulent conduct which followed it, it indicated that he had recommenced both forms of treatment from July 2017 to at least September 2020. It was therefore inaccurate to state that his mental health conditions were "untreated" throughout the litigation of his conviction. Furthermore, that evidence established no causal connection between Mr Bangura's conditions and his conduct such as that they would cause him to lie, resulting in little weight attending those conditions. [40]-[49]

(4) Mr Bangura's conduct, both in respect of his fraudulent pursuit of damages following the car accident, and in litigating the ensuing criminal conviction through to the Court of Appeal of the Supreme Court of New South Wales over several years, demonstrated that he had not reckoned with the nature and consequences of his actions. To the extent that Mr Bangura had demonstrated contrition in respect of that behaviour, it was only insofar as he had exhausted all avenues through which his fraudulent claims of innocence could be maintained. This lack of genuine remorse, set against Mr Bangura's extensive dishonesty, reflected an indefinite defect of character such that striking off was the only appropriate course in the exercise of the Court's role in supervising the legal profession, its obligations to protect the public, and the imperative of setting examples of deterrence to other practitioners. [3]-[5], [59]-[64]

Council of the Law Society (ACT) v Giles [2020] ACTSCFC 1; *Law Society (NSW) v Bannister* [1993] NSWCA 157; *Ziems v Prothonotary of the Supreme Court (NSW)* (1957) 97 CLR 279, applied.

Re Weare [1893] 2 QB 439; *New South Wales Bar Association v Cummins* [2001] NSWCA 284; (2001) 52 NSWLR 279, followed.

Cases Cited

Attorney-General (Qld) v Legal Services Commissioner [2018] QCA 66.

Bangura v Director of Public Prosecutions (NSW) [2020] NSWCA 138.

Childs v Walton [1990] NSWCA 41.

Law Society (ACT), Council of the v Bandarage [2019] ACTSCFC 1.

Law Society (ACT), Council of the v Giles [2020] ACTSCFC 1.

Law Society (ACT), Council of the v Hoyle [2020] ACTSCFC 3.

Law Society (NSW), Council of the v Zhukovska (2020) 102 NSWLR 655.

Law Society (NSW) v Bannister [1993] NSWCA 157.

Law Society (NSW) v Walsh [1997] NSWCA 185.

Legal Practitioner v Council of the Law Society (ACT) [2015] ACTCA 20.

Legal Practitioners Complaints Committee v Palumbo [2005] WASCA 129.

New South Wales Bar Association v Cummins (2001) 52 NSWLR 279.

Solicitor, A v Council of the Law Society (NSW) (2004) 216 CLR 253.
Supreme Court (NSW), Prothonotary of the v Da Rocha [2013] NSWCA 151.
Supreme Court (NSW), Prothonotary of the v Kearns [2011] NSWCA 394.
Supreme Court (NSW), Prothonotary of the v Thomson [2018] NSWCA 230.
Weare, Re [1893] 2 QB 439.
Ziems v Prothonotary of the Supreme Court (NSW) (1957) 97 CLR 279.

Application for removal of a practitioner from the Roll of Legal Practitioners

D Moujalli, for the applicant.

A Martin, for the respondent.

Cur adv vult

30 October 2024

The Court

The application

1 The Council of the Law Society of the ACT (the **applicant**) seeks an order that the name of Amadu Bangura (the **respondent**) be removed from the Roll of Legal Practitioners (the **Roll**) in the Australian Capital Territory on the basis that the respondent is not a fit and proper person to be a legal practitioner of the Supreme Court.

The Court's power

2 The proceeding invokes the Court's inherent and protective powers in relation to legal practitioners. A person may be admitted as a lawyer if the Supreme Court is satisfied that the person is "fit and proper" and on that satisfaction, the person becomes an officer of the Supreme Court (*Legal Profession Act 2006* (ACT) ss 26 and 27). Although there is no express statutory power to remove or suspend a practitioner, the power is preserved to the Supreme Court through its inherent jurisdiction "in relation to the control and discipline" of the legal profession. This includes the incidental power of suspension from practice or removal of a person's name from the Roll in a proper case: *Ziems v Prothonotary of the Supreme Court (NSW)* (1957) 97 CLR 279 (*Ziems*) at 290-291.

The issue for determination

3 The action of the applicant and the Court's role is protective of the public and of the reputation of the profession. It does so by the maintenance of its high standards and maintaining public confidence in the legal profession: *Council of the Law Society (ACT) v Giles* [2020] ACTSCFC 1 (*Giles*) at [115]. The protective role extends beyond ensuring that the public is protected from further defaults by the particular practitioner but acts as an example and deterrent to other practitioners against similar conduct: *Law Society (NSW) v Bannister* [1993] NSWCA 157 (*Bannister*) at 7-8. Personal misconduct, or conduct not in the course of practising the profession, may be sufficient to

warrant a finding that a person is not fit and proper: *Ziems* at 290; *A Solicitor v Council of the Law Society (NSW)* [2004] HCA 1; (2004) 216 CLR 253 (*A Solicitor*) at [20].

4 Thus, the principal question for this court is whether the respondent is presently a fit and proper person to be a lawyer of the Supreme Court upon whose roll the practitioner's name presently appears: *Ziems* at 298. In *Re Weare* [1893] 2 QB 439 at 448 Lopes LJ said of this task:

> To my mind the question which the Court in cases like this ought always to put to itself is this, is the Court, having regard to the circumstances brought before it, any longer justified in holding out the solicitor in question as a fit and proper person to be entrusted with the important duties and grave responsibilities which belong to a solicitor? That appears to me to be the question which the Court always has to answer when a matter of this kind comes before it.

5 For reasons that follow, we have determined that the respondent is not a fit and proper person and that his name should be removed from the Roll.

Applicable principles

6 The legal principles relevant to this matter were not in dispute and have been set out in this jurisdiction in cases such as *Giles* at [115]-[123] and *Council of the Law Society (ACT) v Bandarage* [2019] ACTSCFC 1 (*Bandarage*) at [142]-[149].

7 The question of fitness to practise is the same whether the Court is acting in its inherent jurisdiction, or following a recommendation made by the ACT Civil and Administrative Tribunal, pursuant to s 431 of the *Legal Profession Act 2006*: *Bandarage* at [16], citing *A Solicitor* at [15]. It is a question to be decided at the time of hearing, rather than when the misconduct was engaged in: *A Solicitor* at [21].

8 In making its assessment, the Court considers the whole circumstances. Not every finding of misconduct (personal or professional) justifies, or requires, a conclusion that removal from the Roll is the appropriate order: *A Solicitor* at [15]. Of significance to the present case, the mere fact of a criminal conviction is not necessarily an answer to the question of whether a person is fit and proper, but as was said in *Ziems* (at 288 per Fullagar J, 298 per Kitto J), the circumstances on which the conviction is based may reveal defects of character which are incompatible with membership of the legal profession.

9 Relevantly here, in relation to conduct occurring outside the practice of law, such conduct may indicate a present unfitness to practice where the practitioner's behaviour would reasonably be regarded as disgraceful and dishonourable by members of the profession of good repute and competency: *Council of the Law Society (ACT) v Hoyle* [2020] ACTSCFC 3 at [19], citing *Prothonotary of the Supreme Court (NSW) v Thomson* [2018] NSWCA 230 at [12]-[18].

10 In that regard, the present case is fundamentally concerned with the practitioner's honesty. The authorities make clear the importance of honesty and integrity to the practice of law. In *New South Wales Bar Association v Cummins* [2001] NSWCA 284; (2001) 52 NSWLR 279 (*Cummins*), the NSW Court of

Appeal explained the public interest in ensuring those who practise as lawyers are held to the highest standards of integrity; not only with their clients' confidences, and the reliance their professional colleagues place on their word, but because the judiciary must have confidence in those who appear before it. Spigelman CJ (with whom Mason P and Handley JA agreed) stated at [19]-[20]:

> 19. Honesty and integrity are important in many spheres of conduct. However, in some spheres significant public interests are involved in the conduct of particular persons and the state regulates and restricts those who are entitled to engage in those activities and acquire the privileges associated with a particular status. The legal profession has long required the highest standards of integrity.
>
> 20. There are four interrelated interests involved. **Clients must feel secure** in confiding their secrets and entrusting their most personal affairs to lawyers. **Fellow practitioners must be able to depend implicitly on the word and the behaviour of their colleagues. The judiciary must have confidence in those who appear before the courts. The public must have confidence in the legal profession** by reason of the central role the profession plays in the administration of justice. Many aspects of the administration of justice depend on the trust by the judiciary and/or the public in the performance of professional obligations by professional people.

(Emphasis added.)

11 The above extract was cited with approval in this jurisdiction in *Legal Practitioner v Council of the Law Society (ACT)* [2015] ACTCA 20 at [94].

12 Thus, a conviction for an offence involving dishonesty has been commonly found to render a practitioner unfit for the high degree of trust and confidence which the courts, members of the profession, clients and the public are entitled to place in a person endorsed by the court as a fit and proper person for admission to the profession: see for example, *Legal Practitioners Complaints Committee v Palumbo* [2005] WASCA 129 at [26]; *Prothonotary of the Supreme Court (NSW) v Kearns* [2011] NSWCA 394 at [20]; *Attorney-General (Qld) v Legal Services Commissioner* [2018] QCA 66 at [58]-[60].

13 Part of considering the whole circumstances also includes considering the subjective circumstances of the practitioner that may have operated on the conduct, and which may still be informative at the time the decision about fitness comes to be made. The caution to be applied is that while a practitioner's circumstances may be unfortunate and evoke sympathy, they should not detract from the core purpose of public protection: *Giles* at [116] and the authority there-cited.

14 An order for the involuntary removal of the name of a practitioner from the Roll is made only because the probability is that the solicitor is permanently unfit to practise, or at least unfit for a period of indefinite duration: *Bandarage* at [149]; *Council of the Law Society (NSW) v Zhukovska* [2020] NSWCA 163; (2020) 102 NSWLR 655 (*Zhukovska*) at [99].

15 The applicant bears the onus of establishing (in the sense of actual persuasion) that the solicitor is likely to be unfit to practise for the indefinite future: *Zhukovska* at [100], [115]. However, where the practitioner has

manifested a serious character flaw that would justify removal, it is for the practitioner to affirmatively satisfy the court that the unfitness was, or is, of limited duration: see *Bandarage* at [149] and the authorities there-cited. In that way, the evidential onus shifts.

16 Whether the practitioner has expressed true contrition may be a significant factor in determining the appropriate relief in the circumstances. The significance was described in *Prothonotary of the Supreme Court (NSW) v Da Rocha* [2013] NSWCA 151 (per Ward JA at [34], approving *Childs v Walton* [1990] NSWCA 41 per Samuels JA) as being that where the protection of the community is the paramount interest, any contrition that is accepted as honest may indicate that no occasion for protection exists. However, while a practitioner's expressed intention not to reoffend is relevant, it carries little weight unless accompanied by an understanding of the wrongfulness of the conduct which is the subject of concern: *Law Society (NSW) v Walsh* [1997] NSWCA 185 at 42.

17 Each case turns upon a close consideration of its own facts: *A Solicitor* at [37]. Where the application is made relying on the Court's inherent jurisdiction, the Court decides the facts for itself: *Bandarage* at [17].

Facts

18 The facts set out below were not contested and are the factual findings on which the Court proceeds to make its assessment.

19 The respondent was admitted as a lawyer on 14 December 2012. He remains on the Roll although is no longer practising. Following his admission, he worked in a solicitor's practice from 20 August 2014 until 10 March 2016. The respondent worked at various other firms before starting a practice on his own in 2018. He was also registered as a migration agent. That registration was cancelled on 18 September 2018 for a period of 5 years and has not since been renewed.

20 The conduct which led to this action was not done in the course of the respondent engaging in legal practice but, rather, arises from an event which occurred in his private life.

21 On 16 March 2015, the respondent was involved in what seemed to be a minor motor car accident. At the scene the driver of the other car involved gave the respondent $2,000 to cover the damage to his car.

22 On 5 May 2015, lawyers acting on the respondent's instructions lodged an insurance claim for damages for personal injuries to the respondent arising from the accident. The respondent claimed that he was suffering from pain in his right hip and back, severe headaches, shock, anxiety, depression, and fear and phobia about cars. He said he was self-employed but because of his injuries, was unable to return to work. He claimed he had pain as well as a restriction of movement in his right hip. He claimed $700,000 in damages.

23 Following the lodging of the claim, the respondent attended a number of doctors to assess his injuries and in those appointments, maintained his claim to injury and further claimed he could not sit for more than 20 minutes at a time due to the pain.

24 As it turns out, nothing could have been further from the truth.

25 On 27 June 2017, the respondent was arrested and charged with attempting dishonestly to obtain a financial advantage. He pleaded not guilty. The hearing took place in the NSW Local Court and occupied some 10 hearing days.

26 The respondent was convicted and sentenced to two years' imprisonment with a non-parole period of nine months.

27 The respondent appealed both conviction and sentence to the District Court of NSW, maintaining his innocence of the charge. The hearing took place over two days and on the third day Judge Payne dismissed the appeal and found the respondent guilty of the charge. Her Honour resentenced the respondent to one year and nine months imprisonment to be served as an intensive corrections order together with 240 hours of community service.

28 On 6 March 2020, the respondent commenced proceedings in the Court of Appeal of the Supreme Court of NSW seeking to have the sentence imposed by Judge Payne quashed. The summons was heard on 7 July 2020 and dismissed with costs: *Bangura v Director of Public Prosecutions (NSW)* [2020] NSWCA 138.

Criminality and duration of the conduct

29 The respondent's denial of his criminality resulted in the use of at least 14 days of court time. In the Local Court the presiding Magistrate said that his evidence was, at times, "just plain dishonest". She made findings that the respondent had made false representations to the doctors who examined him for the purposes of preparing reports and to assessors from the insurance company about his inability to work. In this regard, the presiding Magistrate said that the respondent's counsel challenged those doctors on the accuracy of their notes taken during the assessment, with the respondent claiming he had no recollection of what occurred. She expressed significant disquiet as to the basis on which the respondent instructed his counsel to make those challenges.

30 In the District Court of NSW, the respondent again maintained his innocence and denied any false statements or exaggeration of his condition. In the course of the judgment dismissing the respondent's appeal, Judge Payne set out the contents of a number of the respondent's telephone calls with his solicitor, which the police had intercepted and the contents of which had been played in the Local Court. When the respondent was told by his solicitor that the insurance company was assessing his claims that he could not work and that the records of the Law Society of New South Wales (**NSW Law Society**) showed him working at a particular firm, the respondent denied the fact. The respondent said to his solicitor:

> … the requirement is I still need to maintain my practising certificate. That is not to say I'm presently working with them. That's all.

31 Immediately after the conversation with his solicitor, the respondent called the firm by whom he was shown to be employed and said to the person who answered the phone there that if someone called wanting to know whether he worked there, they were to say, "I will have to get back to you on this one, I'm not sure".

32 Judge Payne said, referring to this conversation, that it illustrated that the respondent well knew that he was working and when he told doctors and other people that he was not, he was dishonest.

33 On 7 July 2020, following the dismissal of the respondent's summons seeking review by the NSW Court of Appeal, the respondent wrote to the NSW Law Society notifying it of the Supreme Court decision and saying that while he remained "dissatisfied" with the outcome, he respected the decision.

34 The respondent obtained legal representation to make submissions to the NSW Law Society that, notwithstanding the conviction, he remained a fit and proper person. In those submissions, it was said that while the respondent agreed he instructed a solicitor to make the claim of damages on his behalf, he merely signed the claim form. The submissions also raised separate unrelated criminal proceedings against the solicitor who made the claim on the respondent's behalf in what appears to be a clear attempt to distance the respondent from the making of the fraudulent claim. Other parts of the submission leave no doubt that at that point, the respondent was far from admitting to all of his criminality.

35 The respondent did not say in his evidence why on 7 July 2020 he respected the decision of the Supreme Court. In the circumstances of this case, it is a reasonable inference that it was because all of the avenues by which he could continue falsely to claim his innocence had been exhausted. The language of Shellar JA (Gleeson CJ and Handley JA agreeing) in *Bannister* at 12 is apt, in that the Court cannot be satisfied that the practitioner's "candour and contrition are any more than a virtue borne of present necessity and the inevitability of close scrutiny".

36 The comprehensive submissions for the applicant set out a litany of lies told by the respondent to various people and authorities in pursuit of this extensive dishonesty. What is recorded above is a summary.

The respondent's personal circumstances

37 The respondent was born in Sierra Leone in West Africa. In the course of defending his family home from rebels during the civil war, his father and two other relatives were murdered. The respondent fled to Australia via a refugee camp in Guinea before being brought to Australia on a Humanitarian Visa in 2004.

38 The respondent learned English and attended school, completing his Higher School Certificate in 2007. He attended university and received a Bachelor of Arts/Law in 2012. He completed a graduate diploma in late 2012. In 2014, he commenced a Master of Laws, which he completed in 2015.

39 He was admitted as a practitioner of the Supreme Court of the ACT in December 2012. In 2014, he was registered as a Migration Agent. In 2018, he commenced his own firm and practised in migration, criminal and family law.

40 In relation to his claim for damages and what followed, the respondent said (at [35] of his affidavit sworn on 27 May 2024 for the purpose of these proceedings):

> What followed on from here however, was a series of serious and disgraceful

> mistakes committed by myself in which I now say that the only explanation and motivation I had for engaging into such acts was as a result of my untreated serious mental health condition at the time.

41 The respondent said that he knew the accident caused minimal injuries to him and said that he made false claims of pain and other injuries.

42 Pausing here, the statement that the respondent's dishonesty resulted from an "untreated" mental health condition does not give an entirely accurate account. The report from Dr Ahmed, the respondent's treating psychologist, shows that she commenced treating him in February 2012 and had diagnosed the respondent with Post Traumatic Stress Disorder, anxiety and depression. He had been receiving treatment for those conditions from 2014, although she noted that between 16 March 2012 and 19 November 2014 and between 25 February 2015 and 11 July 2017 he was not attending for therapy or taking his medication.

43 However, relevantly to his dishonest conduct, he attended for treatment and resumed taking his medication from July 2017 until at least September 2020 (being the relevant period over which the charge was brought, heard, determined, appealed and ultimately dismissed).

44 Certainly then, at the time of the initial dishonest conduct, the respondent was not attending therapy nor was he taking his medication, but while the court cases were on foot, right up until their ultimate conclusion, he was having regular attendances on his therapist and taking his prescribed medication.

45 Dr Ahmed said:

> It is my opinion the Mr Bangura's was suffering from of Major Depressive Disorder, Generalised Anxiety Disorder and Post Traumatic Stress Disorder which was untreated at the time of his offending behaviour. Part of his psychological symptoms is sleep disturbances, interrupted sleep, problems with memory and concentration, spells of terror and panic, uncertainty low self esteem and helplessness which has a negative impact on affective decision making. I believe, the lapse in treatment, and Mr. Bangura not taking his medication, affected his behaviour at the time of the offending and made it difficult for him to assess the correct course of action in the situation he was in which contributed towards his offending behaviour.

46 She added that the respondent was aware that a future lapse in treatment can result in negative consequences, and he will attend regular medical and psychological sessions.

47 We do not doubt Dr Ahmed's clinical assessment, nor her opinion as to how the respondent's mental health symptoms might affect him. However, even accepting that it might have had an impact on his initial decision to make a dishonest claim, it does not explain away, in the face of regular therapy and medication, the respondent's continued dishonesty throughout that time. In short, Dr Ahmed's report does not establish a causal connection between the respondent's mental health issues and his criminal conduct, or to put the matter bluntly, that his mental health conditions would cause him to lie.

48 In his evidence to the Court, the respondent said that he has continued to receive treatment for his mental health condition in Sierra Leone where he is

presently living. He said he is seeing his family doctor and a nurse practitioner once per month for cognitive behaviour therapy and medication. Dr Jabba, the respondent's treating doctor, noted that he has seen some "remarkable improvement" in the respondent's reported symptoms and he has reduced the dosage of his medications. Ms Koroma, the nurse practitioner, said that the respondent is engaged in their Intensive Outpatient Anxiety and Stress Management Program which requires attendance three days each week for one hour. She noted there had been great progress in the respondent's condition.

49 While it is obviously in the respondent's interests to continue to receive treatment for his mental health conditions, given that we have found a lack of causal connection between his conditions and his criminal offending, it is difficult to give this matter significant weight.

50 The respondent says that while living in Sierra Leone he is living in his family compound and his accommodation and other needs are met. He said that he assists the community, working at a homeless shelter and teaching English to children. He helps elderly people with their shopping.

51 In the respondent's affidavit he refers to his work at university and later in supporting and assisting his colleagues and citizens of West Africa for which some of his referees praise him.

52 A number of character references were before the Court and we accept that they demonstrate that he is valued and held in high regard by the community. A number of them commented that his offending appears to be out of character. We accept the submission of counsel for the applicant that, at least in relation to the references from lawyers, it is not altogether clear that the respondent told them not only that he was charged with attempt to obtain a financial advantage by deception, but that his conduct also involved repeatedly lying to courts over a period of five years, an obviously important point. Nonetheless, his professional colleagues speak well of the respondent.

53 The respondent agrees that at the time his practising certificate was cancelled in NSW in December 2020, he was not a fit and proper person but argued that, in the time since then, he has changed and is presently fit and proper.

54 Counsel for the respondent, Mr Martin, in his helpful, perceptive and balanced submissions, accepted the extent and gravity of the respondent's conduct and accepted that the respondent's conduct was deplorable.

55 Mr Martin submitted that the respondent's conduct in not seeking a renewal of his practising certificate in NSW shows an acceptance of his conduct.

56 Mr Martin's submissions focussed on the future, and he observed that the respondent was still young, 37 years old, and that in the time that has passed since his dishonest conduct, his character has reformed to the extent that, with professional supervision, he could practise in a limited fashion. It was submitted that the respondent has developed insight into his conduct, although he conceded that it only developed or commenced to develop in 2020.

57 Mr Martin submitted that there is still work to be done by the respondent in terms of his mental health before he could resume the practice of law, and it was submitted that he needs a couple of years of therapy to assist him fully with his rehabilitation. He submitted that if he was suspended from practice for

two years it would foster that process. In that time, it was said, the respondent would return to live in Australia where his ex-wife and children are living and engage in a rigorous treatment regime such as was suggested by Dr Ahmed.

Discussion

58 The sanction under consideration in this case is the most serious protective order this Court may make. Unless the Court is satisfied that the reason for unfitness is permanent, or at least of indefinite duration, other protective orders will usually be appropriate. A practising certificate might be capable of being suspended or conditioned; the exclusion from admission to the legal profession itself is absolute.

59 The respondent's conduct here was neither isolated, nor of short duration. It went on for years. The offence itself was one of dishonesty and, combined with what followed, may be likened to an attempt to pervert the course of justice. It demonstrates a defect in character incompatible with membership of the legal profession, for the reasons expressed in *Cummins* (see above at [10]).

60 Those who do not conduct themselves according to these high standards must expect severe sanctions. However, the Court is not punishing the practitioner for the conduct comprised in the offence itself, or its aftermath. We have already said that the concern of such a proceeding is to protect the public and the maintenance of the highest standards of the legal profession.

61 Here, the respondent coupled personal dishonesty in the offence itself with a course of conduct that displayed further dishonesty in the course of the appeal and the further application seeking review which he pursued. In that respect, he has shown scant regard for the system of justice, of which he was a part, which relies in great measure on being able to trust the word of lawyers who appear within it.

62 We accept that the respondent has expressed contrition and remorse, but, as his counsel said, it only came about belatedly in 2020. We also accept that in the time since 2020, he has been working within his community and assisting those who need help.

63 However, the dishonesty with the compounding lies to professionals and to the court, which commenced in pursuit of monetary gain, was prolonged and persistent. Even at a time when his sentence had been reduced to a sentence that was to be served other than by fulltime custody, the respondent continued to assert his innocence and sought the conviction be quashed in the Court of Appeal. His attempt to suborn the person at the solicitor's office where he worked to lie on his behalf only makes his conduct all the more egregious.

64 We are of the view that the defect in character is of a kind that brings the respondent within the realm of indefinite unfitness, such that nothing short of removing his name from the Roll of Legal Practitioners in the ACT is sufficient to fulfill the protective role of the Court. Although we accept the respondent's submission that it is open to the Court to suspend the practitioner from practice, it is worthy to note the comments of Dixon CJ in *Ziems* at 286 (with similar comments made by McTiernan J at 287), to the effect that even in cases where

that course was available, it is probably better in most cases to allow the practitioner to re-apply at a subsequent time and offer positive evidence of the grounds upon which he then claims to be re-admitted.

Conclusion

65 We will order the respondent's name be removed from the Roll. Mindful of his relative youth and relative inexperience as a lawyer, it is important to record that this outcome does not prevent the respondent from seeking employment as a non-lawyer under the supervision of a solicitor (subject to any relevant statutory approvals) to better place him to re-apply to be admitted to the legal profession, sometime in the future.

66 The applicant sought the costs of the application. It need hardly be said that orders for costs are discretionary and the purpose of such an order is compensatory. In this case, there is no reason to depart from the ordinary consequence that costs follow the event.

Orders

67 For the above reasons, the Court makes the following orders:

(1) Amadu Bangura is struck off the Roll of Legal Practitioners in the Australian Capital Territory.

(2) The respondent is to pay the applicant's costs of the application.

Orders to strike the respondent off the roll of practitioners

Solicitors for the applicant: *Thomson Geer*.

Solicitors for the respondent: *Martin Lawyers*.

JB WOODYATT

SUPREME COURT OF THE AUSTRALIAN CAPITAL TERRITORY
(COURT OF APPEAL)

McIver v Australian Capital Territory

[2024] ACTCA 36

Mossop, Loukas-Karlsson and Rangiah JJ

12 November, 17 December 2024

Statutes — Interpretation — Proper construction of s 18(7) of Human Rights Act 2004 (ACT) — Right to compensation for unlawful arrest or detention — Where appellants variously remanded in custody or serving sentences of imprisonment — Where multitude of breaches of human rights during appellants' detention alleged on part of respondent — Where respondent alleged unlawfully not to have segregated prisoners on remand from convicted prisoners — Where respondent further alleged unlawfully to have denied certain prisoners adequate access to open air and opportunities for exercise — Where appellants instituted separate proceedings seeking declaratory relief and compensation pursuant to s 18(7) of Human Rights Act — Where appellants framed claims for compensation as arising directly under s 18(7) of Human Rights Act as statutory cause of action — Where primary judge rejected existence of such statutory cause of action — Whether s 18(7) of Human Rights Act provides independent statutory cause of action for compensation — Whether primary judge's construction erroneous — Relevant grounds of appeal dismissed — No independent statutory cause of action created by section either as enacted or amended — International Covenant on Civil and Political Rights, Art 2, cl 3; Art 9, cl 6 — New Zealand Bill of Rights Act 1990 (NZ), s 3 — Legislation Act 2001 (ACT), ss 126, 132, 139, 141, 142 — Human Rights Bill 2003 (ACT), Pt 3 — Human Rights Act 2004 (ACT), ss 5, 7, 10, 18, 19, 23, 28, 30, 32, 37, 38, 40, 40A, 40B, 40C, 40D — Charter of Human Rights and Responsibilities Act 2006 (Vic), s 39 — Corrections Management Act 2007 (ACT), ss 12, 44, 45 — Human Rights Amendment Act 2008 (ACT).

Appeal — Applications for leave to appeal — Leave to appeal against orders dismissing applications for extensions of time in which to institute proceedings pursuant to s 40C(2)(a) of Human Rights Act 2004 (ACT) — Where each proceeding instituted outside of time prescribed by s 40C(3)

of Human Rights Act — Where legal substratum of appellants' statutory claims for compensation correctly rejected by primary judge — Where certain explanations as to delay in instituting proceedings inadequate — Whether primary judge erred in refusing to grant extensions of time to institute proceedings — Whether relief sought by appellants remained futile — Relevant grounds of appeal dismissed — Primary judge correctly refused extensions of time — Human Rights Act 2004 (ACT), ss 18, 19, 28, 40C — Corrections Management Act 2007 (ACT), ss 44, 45 — Corrections Management (Separate Confinement) Operating Procedure 2019 (ACT), cl 4.3 — Justice and Community Safety Legislation Amendment Act 2024 (ACT), s 11.

Appeal — Nature of appellate review — Standard of appellate review — Standard of review applicable to decisions not to grant extensions of time pursuant to s 40C(3) of Human Rights Act 2004 (ACT) — Whether such decisions reviewable on correctness standard or on grounds enumerated in House v The King (1936) 55 CLR 499 — Correctness standard inapplicable — Decisions involve exercise of discretion — Human Rights Act 2004 (ACT), s 40C(3).

Words and Phrases — "Unlawfully ... detained" — Human Rights Act 2004 (ACT), s 18(7).

Section 18(7) of the *Human Rights Act 2004* (ACT) (the HR Act) provided that a person who had been "unlawfully arrested or detained" had the "right to compensation for the arrest or detention". That right to compensation was both flanked by rights associated with liberty and security of person recognised across the subsections of s 18, and followed by a number of other human rights regarding humane treatment when deprived of liberty in s 19 of the HR Act. Where a "public authority" within the compass of s 40(1) of the HR Act was alleged to have breached the statutory prohibition in s 40B(1)(a) thereof, by acting in a way "incompatible with a human right", s 40C(2)(a) of the HR Act entitled the victim of that alleged breach to institute proceedings in the Supreme Court. By force of s 40C(3) of the HR Act, however, any proceedings instituted pursuant to s 40C(2)(a) thereof were to be commenced within a year of the commission of the act(s) complained of, in the absence of leave to proceed out of time. On the victim's success in any such proceedings, s 40C(5) of the HR Act empowered the Supreme Court to "grant the relief it considers appropriate except damages". That statutory constriction on awardable relief did not, by reason of s 40C(6)(b) of the HR Act, affect the victim's right, if any, to damages.

In July and November 2022 respectively, each of the appellants instituted separate proceedings against the respondent for a multitude of alleged breaches of the HR Act and the *Corrections Management Act 2007* (ACT) (the CM Act), committed during each of their periods of detention at the Alexander Maconochie Centre (the AMC). With respect to Mr McIver, those breaches, which spanned September 2020 to January 2021, were said to arise from: the respondent's failure to provide him with his own accommodation, contrary to s 19(1) of the HR Act; the respondent's failure to segregate him, as a prisoner on remand, from convicted prisoners, contrary to s 19(2) of the HR Act and s 44(2) of the CM Act; and the resultant deprivation of his liberty otherwise than "on the grounds and

in accordance with the procedures established by law", contrary to s 18(2) of the HR Act. With respect to Mr Williams, those breaches, which ended in January 2021, were said to arise from the respondent's failure to provide him, as a prisoner within the AMC's Management Unit, with adequate daily access to open air and exercise — itself constituting cruel, inhuman, or degrading treatment — contrary to ss 10(1)(b), 18(1) to (2) and 19(1) of the HR Act and s 45(1) of the CM Act. It was not in dispute either at trial or on appeal that each appellant required leave under s 40C(3) of the HR Act to pursue his claim outside of the time period specified therein.

At first instance, it was contended that the multitude of breaches of the HR Act and CM Act alleged on the part of the respondent rendered each appellant's detention relevantly "unlawful", thereby enlivening the right to compensation contained in s 18(7) of the HR Act. On each appellant's pleadings, the right to compensation conferred by s 18(7) of the HR Act was advanced as an independent statutory cause of action, and pursued alongside certain declaratory relief pertaining generally to the lawfulness of each appellant's detention. Those contentions, and that construction of s 18(7) of the HR Act, were rejected by the primary judge. In declining to grant in toto leave to Mr McIver to proceed out of time, and in declining to grant in part leave to Mr Williams to proceed with his claim under s 18(7) of the HR Act, the primary judge held that: properly construed, s 18(7) of the HR Act did not create an independent statutory cause of action, enforceable in its own right, but rather recognised that unlawful detention might sound in damages at common law; in any event, neither appellant had been "unlawfully … detained" for the purposes of s 18(7) of the HR Act, as the lawfulness of any such detention falls to be determined by the lawfulness of the deprivation of the prisoner's liberty, rather than the lawfulness of the conditions of the prisoner's detention; and, accordingly, leave ought to be refused, in circumstances where the legal substratum of each appellant's claim had not been made out. At the hearing of their applications for leave to appeal, and their appeals, each of the appellants challenged each of those conclusions. The appellants further contended that, should the challenges to the primary judge's construction of s 18(7) of the HR Act be upheld, the standard of appellate review applicable to a decision to make an order under s 40C(3) thereof was the correctness standard, rather the standard articulated in *House v The King* (1936) 55 CLR 499 (*House v The King*).

Held, granting each appellant leave to appeal, but dismissing each appeal:

(1) Interpreting s 18(7) of the HR Act by reference to its text, context, structure, and relevant extrinsic materials, that subsection did not create an independent statutory cause of action, enforceable in its own right. Examining the provisions of s 18 as a whole, as enacted and as amended, and in the context of Pts 3, 4, 5, and 6 of the HR Act, there was no indication that the right conferred by subs (7) should be independently actionable when the rights flanking it were not. Moreover, and consistently with the relevant extrinsic materials pertaining to the HR Act as enacted and as amended, the statutory exclusion in subs (5) of s 40C of the HR Act of a right to damages in proceedings instituted pursuant to s 40C(2)(a) thereof did not have the effect of impliedly creating a right to damages where one did not otherwise exist. [55], [58], [68], [76]-[78], [87], [96]-[97], [99]

Federal Commissioner of Taxation v Consolidated Media Holdings Ltd [2012] HCA 55; (2012) 250 CLR 503, applied.

Hakimi v Legal Aid Commission (ACT) [2009] ACTSC 48; (2009) 3 ACTLR

127; *Lewis v Australian Capital Territory* [2018] ACTSC 19; (2018) 329 FLR 267, approved.

Strano v Australian Capital Territory [2016] ACTSC 4; (2016) 11 ACTLR 134; *Monaghan v Australian Capital Territory (No 2)* [2016] ACTSC 352; (2016) 315 FLR 305; *Eastman v Australian Capital Territory* [2019] ACTSC 280; (2019) 14 ACTLR 195; *Brown v Australian Capital Territory* [2020] ACTSC 70; (2020) 350 FLR 417; *Deng v Australian Capital Territory (No 3)* [2022] ACTSC 262; (2022) 372 FLR 227, discussed.

Morro v Australian Capital Territory [2009] ACTSC 118; (2009) 4 ACTLR 78, disapproved.

(2) Understood in the context of the HR Act as a whole, the reference to "unlawfully … detained" in s 18(7) thereof relates to the legal justification for the deprivation of liberty, and does not extend to any breaches of the law relating to the conditions of the detention in question. Such an interpretation accorded with the immediate statutory context of s 18(7) within s 18, which contains a series of different rights related to the liberty and security of a person and does not address conditions of detention as opposed to the fact of detention, and with the broader context of other rights in Pts 3 and 5A of the HR Act. [110]-[113], [123]

Behrooz v Secretary, Department of Immigration and Multicultural and Indigenous Affairs [2004] HCA 36; (2004) 219 CLR 486; *Monaghan v Australian Capital Territory (No 2)* [2016] ACTSC 352; (2016) 315 FLR 305; *Davidson v Director-General, Justice and Community Safety Directorate* [2022] ACTSC 83; (2022) 18 ACTLR 1; *R v McIver* [2022] ACTSC 206; *McIver v The King* [2023] ACTCA 48; (2023) 20 ACTLR 303, discussed.

Consideration of the principles governing the interpretation of beneficial or remedial legislative provisions. [121]-[122]

Carr v Western Australia [2007] HCA 47; (2007) 232 CLR 138; *Islam v Director-General, Justice and Community Safety Directorate* [2021] ACTSC 33, considered.

(3) The legal substratum of Mr McIver's claim for compensation having correctly been rejected, the primary judge did not err in concluding that an order permitting the proceedings to be brought, notwithstanding the expiry of the limitation period, was not appropriate. In light of, inter alia, the inadequacy of Mr McIver's pleadings and the absence of a cogent explanation as to why an extension was necessary, no error was disclosed in the exercise of the primary judge's discretion not to grant an extension of time. [144]-[145]

R v McIver [2022] ACTSC 206; *McIver v The King* [2023] ACTCA 48; (2023) 20 ACTLR 303; *Director of Public Prosecutions (ACT) v Alexander (a pseudonym)* [2024] ACTSC 161, discussed.

(4) The legal substratum of Mr Williams' claim for compensation having correctly been rejected, the primary judge did not err in concluding that an order permitting those aspects of the claim seeking certain declaratory relief to be brought, notwithstanding the expiry of the limitation period, was not appropriate. In light of the futility of the declaration that Mr Williams' detention had relevantly been unlawful, and amendments to the relevant confinement policies at the AMC, no error was disclosed in the exercise of the primary judge's discretion not to grant an extension of time. [157]-[160]

(5) For the purposes of s 40C(3) of the HR Act, the standard of appellate review applicable to a decision to make an order extending time within which

proceedings pursuant to s 40C(2)(a) of the HR Act might be instituted is that articulated in *House v The King*. [162]

GLJ v Trustees of the Roman Catholic Church for the Diocese of Lismore [2023] HCA 32; (2023) 97 ALJR 857; *Star Aged Living Ltd v Lee* [2024] QCA 1; *Connelly v Transport Accident Commission* [2024] VSCA 20; (2024) 73 VR 257; *Trustees of the Christian Brothers v DZY (a pseudonym)* [2024] VSCA 73; *Waldron v O'Callaghan* [2024] VSCA 196; (2024) 75 VR 138, explained.

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Behrooz v Secretary, Department of Immigration and Multicultural and Indigenous Affairs (2004) 219 CLR 486.

Brown v Australian Capital Territory (2020) 350 FLR 417.

Carr v Western Australia (2007) 232 CLR 138.

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Connelly v Transport Accident Commission (2024) 73 VR 257.

Davidson v Director-General, Justice and Community Safety Directorate (2021) 18 ACTLR 1.

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Harrison v Melhem (2008) 72 NSWLR 380.

House v The King (1936) 55 CLR 499.

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Public Prosecutions (ACT), Director of v Alexander (a pseudonym) [2024] ACTSC 161.

R v A2 (2019) 269 CLR 507.

R v Deputy Governor of Parkhurst Prison; Ex parte Hague [1992] 1 AC 58.

R v McIver [2022] ACTSC 206.

R v McIver [2021] ACTSC 227.

R v Williams [2017] ACTSC 298.

Sleiman v Commissioner of Corrective Services [2009] NSWSC 304.

Star Aged Living Ltd v Lee [2024] QCA 1.

Strano v Australian Capital Territory (2016) 11 ACTLR 134.

SU v Commonwealth (2016) 307 FLR 357.

Taxation, Federal Commissioner of v Consolidated Media Holdings Ltd (2012) 250 CLR 503.

Waldron v O'Callaghan (2024) 75 VR 138.

Williams v Australian Capital Territory (2023) 375 FLR 20.

Williams v The Queen (2018) 83 MVR 505.

Applications for leave to appeal, and appeals

The appellants sought leave to appeal, and appealed, against orders of the Supreme Court, dismissing their applications for extensions of time within which to institute proceedings pursuant to s 40C(2)(a) of the *Human Rights Act 2004* (ACT).

K Foley SC and *J McComish*, for the appellants.

H Younan SC and *P Bindon*, for the respondent.

Cur adv vult

17 December 2024

The Court

Introduction

1 These applications for leave to appeal are brought by two prisoners at the Alexander Maconochie Centre (AMC). They seek leave to challenge the decision of a judge of the court (the primary judge) made in relation to applications for an extension of time in which to bring proceedings under the *Human Rights Act 2004* (ACT) (HR Act): *McIver v Australian Capital Territory* [2024] ACTSC 112.

2 Section 40C(2) of the HR Act provides that a person may start proceedings in the Supreme Court against a public authority which is alleged to have acted in a way that is incompatible with a human right. Section 40C(3) provides that such a proceeding "must be started not later than 1 year after the day (or last day) the act complained of happens, unless the court orders otherwise". In each of the two cases, the applicants sought an extension of time under s 40C(3). In the case of Mr McIver, an extension of time was refused. In the case of Mr Williams, an extension of time was granted in relation to only some of the relief sought.

3 The principal issues before the primary judge related to the interpretation of s 18(7) of the HR Act. That subsection provides:

> (7) Anyone who has been unlawfully arrested or detained has the right to compensation for the arrest or detention.

4 The argument before the primary judge raised two issues in relation to s 18(7):

(a) whether it gave rise to a freestanding cause of action for compensation or damages, notwithstanding the lack of power to award damages under s 40C of the HR Act; and

(b) whether the reference to "unlawfully … detained" covered circumstances in which the detention of the prisoner was lawfully justified by the sentence of imprisonment but there was a breach of the law in relation to the conditions of detention.

5 The primary judge determined both of these issues adversely to the applicants. The applicants now seek to challenge those findings and also the primary judge's exercise of discretion in relation to whether or not to grant an extension of time in which to commence proceedings. There are a number of other cases pending in the court that would be affected by the determination of the legal issues arising upon these applications.

6 For the reasons that follow, the primary judge's determination of the two issues relating to s 18(7) was correct and there was no error in the exercise of the discretion as to whether to make an order extending time. In the circumstances, leave to appeal should be granted to each of the applicants, but their appeals should be dismissed.

Background to Mr McIver's claim

7 Mr McIver commenced proceedings against the Australian Capital Territory on 30 November 2022. He was, at that time (and still is), a convicted prisoner. However, between 11 September 2020 and 28 January 2021, he was an accused person detained on remand. On 9 September 2021, he was found not guilty of the two offences with which he had been charged: *R v McIver* [2021] ACTSC 227.

8 However, in the period prior to the acquittal, from 11 September 2020 until 28 January 2021, he was detained in a way that meant that he was not segregated from convicted prisoners. On 28 January 2021, a convicted prisoner entered his cell and assaulted him. He subsequently assaulted that other detainee: *R v McIver* [2022] ACTSC 206.

9 His pleading alleged that the Territory caused him to be detained in breach of his human rights and in breach of the *Corrections Management Act 2007* (ACT) (CM Act). He alleged that the Territory had not treated him with humanity and respect for the inherent dignity of the human person as required by s 19(1) of the HR Act by placing him in cell sleeping accommodation which he did not occupy by himself. He claimed that the Territory had breached its obligations in s 19(2) of the HR Act and s 44(2) of the CM Act by not segregating him from convicted prisoners. He alleged that the Territory had failed to treat him in a way that was appropriate for a person who had not been convicted, as required by s 19(3) of the HR Act. Those contraventions of the HR Act and the CM Act were alleged to amount to a breach of s 18(2) of the HR Act, which required that deprivation of liberty be "in accordance with the procedures established by law", and, hence, were unlawful within the terms of s 40B of the HR Act. It was then alleged that s 18(7) of the HR Act made the Territory liable to pay

compensation in relation to that unlawful detention but that the Territory had not done so. Two declarations were sought, as well as compensation under s 18(7) of the HR Act.

10 By application in proceeding dated 6 April 2023, Mr McIver sought an order *nunc pro tunc* permitting him to commence the proceedings after the expiry of the one-year limitation period set by s 40C(3) of the HR Act. That application was heard, along with a similar application by Mr Williams, on 17 July 2023. On 17 April 2024, the primary judge dismissed that application, effectively ending the proceedings.

Background to Mr Williams' claim

11 Mr Williams commenced proceedings on 15 July 2022. He was and is a convicted prisoner: *R v Williams* [2017] ACTSC 298; *Williams v The Queen* [2018] ACTCA 4; (2018) 83 MVR 505. At various times between 2019 and 2021, Mr Williams was placed in the Management Unit of the AMC, as distinct from one of the other accommodation areas of the prison. The last date on which he was so detained was 15 January 2021. He alleged that the structure of his cell within the Management Unit was such that he did not have access to at least one hour a day of the "open air" and was not adequate for at least one hour a day of exercise. He alleged that this involved a breach of s 45 of the CM Act and involved breaches of s 19(1), 18(1) to (2), and 10(1)(b) of the HR Act. He also alleged that the detention of him in this part of the AMC constituted the tort of false imprisonment. He contended that he was entitled to compensation pursuant to s 18(7) of the HR Act, as well as damages for false imprisonment at common law.

12 Those aspects of his claim which raised breaches of the HR Act were stayed on 13 February 2023 by McWilliam AsJ (as her Honour then was), until an order was made under s 40C(3) permitting them to proceed, notwithstanding the expiry of the one-year limitation period set out in that section: *Williams v Australian Capital Territory* [2023] ACTSC 18; (2023) 375 FLR 20.

13 By application in proceeding dated 6 April 2023, Mr Williams sought an order permitting the stayed parts of his case to proceed notwithstanding the expiry of the limitation period. That application was heard by the primary judge on 17 July 2023, along with that of Mr McIver, and determined on 17 April 2024. The stay was lifted so as to permit Mr Williams to seek a declaration that the Territory had, by detaining him in breach of s 45(1) of the CM Act, breached his human rights, and a declaration that the Territory had, as a result of the breach of s 45, breached his human rights under s 19(1). However, an extension was not granted for a declaration that the breach of s 45(1) was "unlawful" or a declaration relating to a provision of a now repealed operating procedure for the AMC that related to time in the open air and exercise.

Relevant statutory provisions

14 The HR Act was enacted in 2004. It was subject to significant amendments in 2008 as a result of the *Human Rights Amendment Act 2008* (ACT) (2008 Amendment). It was the 2008 Amendment that inserted Pt 5A of the

HR Act, which allowed for orders to be made by the Supreme Court against public authorities, where the authority had acted in a way that was incompatible with human rights or failed to give proper consideration to a relevant human right when making a decision.

15 The statutory provisions relevant to the issues before the court are contained within the HR Act and the CM Act. The most relevant provisions of the HR Act are set out below. Since the decision of the primary judge, there have been amendments to and renumbering of s 40C of the HR Act. Most significantly, what were previously ss 40C(4) and (5) have now become ss 40C(6) and (7). The version of the provisions which is set out below is the version that was in force at the time that the primary judge made his decision. Although the amendments and renumbering are not of any substantive significance for the outcome of the appeal, it is easier to understand what occurred below and in previous cases if the references in these reasons are uniformly to the terms of the HR Act as it was at the time that the primary judge gave his decision, namely, 17 April 2024, unless otherwise indicated.

16 The most relevant provisions of the HR Act are as follows.

10 Protection from torture and cruel, inhuman or degrading treatment etc

(1) No-one may be —

(a) tortured; or

(b) treated or punished in a cruel, inhuman or degrading way.

(2) No-one may be subjected to medical or scientific experimentation or treatment without their free consent.

…

18 Right to liberty and security of person

(1) Everyone has the right to liberty and security of person. In particular, no-one may be arbitrarily arrested or detained.

(2) No-one may be deprived of liberty, except on the grounds and in accordance with the procedures established by law.

(3) Anyone who is arrested must be told, at the time of arrest, of the reasons for the arrest and must be promptly told about any charges against them.

(4) Anyone who is arrested or detained on a criminal charge —

(a) must be promptly brought before a judge or magistrate; and

(b) has the right to be tried within a reasonable time or released.

(5) Anyone who is awaiting trial must not be detained in custody as a general rule, but their release may be subject to guarantees to appear for trial, at any other stage of the judicial proceeding, and, if appropriate, for execution of judgment.

(6) Anyone who is deprived of liberty by arrest or detention is entitled to apply to a court so that the court can decide, without delay, the lawfulness of the detention and order the person's release if the detention is not lawful.

(7) Anyone who has been unlawfully arrested or detained has the right to compensation for the arrest or detention.

(8) No-one may be imprisoned only because of the inability to carry out a contractual obligation.

19 Humane treatment when deprived of liberty

(1) Anyone deprived of liberty must be treated with humanity and with respect for the inherent dignity of the human person.

(2) An accused person must be segregated from convicted people, except in exceptional circumstances.

Note An accused child must also be segregated from accused adults (see s 20 (1))

(3) An accused person must be treated in a way that is appropriate for a person who has not been convicted.

…

23 Compensation for wrongful conviction

(1) This section applies if —

(a) anyone is convicted by a final decision of a criminal offence; and

(b) the person suffers punishment because of the conviction; and

(c) the conviction is reversed, or they are pardoned, on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice.

(2) If this section applies, the person has the right to be compensated according to law.

(3) However, subsection (2) does not apply if it is proved that the nondisclosure of the unknown fact in time is completely or partly the person's own doing.

…

Part 5A Obligations of public authorities

40 Meaning of *public authority*

(1) Each of the following is a ***public authority***:

(a) an administrative unit;

(b) a territory authority;

(c) a territory instrumentality;

(d) a Minister;

(e) a police officer, when exercising a function under a Territory law;

(f) a public employee;

(g) an entity whose functions are or include functions of a public nature, when it is exercising those functions for the Territory or a public authority (whether under contract or otherwise).

Note A reference to an entity includes a reference to a person exercising a function of the entity, whether under a delegation, subdelegation or otherwise (see Legislation Act, s 184A (1)).

(2) However, ***public authority*** does not include —

(a) the Legislative Assembly, except when acting in an administrative capacity; or

(b) a court, except when acting in an administrative capacity.

40A Meaning of *function of a public nature*

(1) In deciding whether a function of an entity is a ***function of a public nature***, the following matters may be considered:

(a) whether the function is conferred on the entity under a territory law;

(b) whether the function is connected to or generally identified with functions of government;

(c) whether the function is of a regulatory nature;

(d) whether the entity is publicly funded to perform the function;

(e) whether the entity performing the function is a company (within the meaning of the Corporations Act) the majority of the shares in which are held by or for the Territory.

(2) Subsection (1) does not limit the matters that may be considered in deciding whether a function is of a public nature.

(3) Without limiting subsection (1) or (2), the following functions are taken to be of a public nature:

(a) the operation of detention places and correctional centres;

(b) the provision of any of the following services:

(i) gas, electricity and water supply;

(ii) emergency services;

(iii) public health services;

(iv) public education;

(v) public transport;

(vi) public housing.

40B Public authorities must act consistently with human rights

(1) It is unlawful for a public authority —

(a) to act in a way that is incompatible with a human right; or

(b) in making a decision, to fail to give proper consideration to a relevant human right.

(2) Subsection (1) does not apply if the act is done or decision made under a law in force in the Territory and —

(a) the law expressly requires the act to be done or decision made in a particular way and that way is inconsistent with a human right; or

(b) the law cannot be interpreted in a way that is consistent with a human right.

Note A law in force in the Territory includes a Territory law and a Commonwealth law.

(3) In this section:

public authority includes an entity for whom a declaration is in force under section 40D.

40C Legal proceedings in relation to public authority actions

(1) This section applies if a person —

(a) claims that a public authority has acted in contravention of section 40B; and

(b) alleges that the person is or would be a victim of the contravention.

(2) The person may —

(a) start a proceeding in the Supreme Court against the public authority; or

(b) rely on the person's rights under this Act in other legal proceedings.

(3) A proceeding under subsection (2) (a) must be started not later than 1 year after the day (or last day) the act complained of happens, unless the court orders otherwise.

(4) The respondent to a proceeding started under subsection (2) (a) is —

(a) if the public authority is a public authority mentioned in section 40 (1) (a) to (e) or (g) — the public authority; or

(b) if the public authority is a public employee who is a statutory office-holder — the statutory office-holder; or

(c) if the public authority is any other public employee — the Territory; or

(d) if the public authority is an entity for whom a declaration is in force under section 40D — the entity.

(5) The Supreme Court may, in a proceeding under subsection (2), grant the relief it considers appropriate except damages.

(6) This section does not affect —

(a) a right a person has (otherwise than because of this Act) to seek relief in relation to an act or decision of a public authority; or

(b) a right a person has to damages (apart from this section).

Note See also s 18 (7) and s 23.

(7) In this section:

public authority includes an entity for whom a declaration is in force under section 40D.

40D Other entities may choose to be subject to obligations of public authorities

(1) An entity that is not a public authority under section 40 may ask the Minister, in writing, to declare that the entity is subject to the obligations of a public authority under this part.

(2) On request under subsection (1), the Minister must make the declaration.

(3) The Minister may revoke the declaration only if the entity asks the Minister, in writing, to revoke it.

(4) A declaration under this section is a notifiable instrument.

Note A notifiable instrument must be notified under the Legislation Act.

17 The most relevant provisions of the CM Act are ss 12(1)(e), 44 and 45:

12 Correctional centres — minimum living conditions

(1) To protect the human rights of detainees at correctional centres, the director-general must ensure, as far as practicable, that conditions at correctional centres meet at least the following minimum standards:

…

(e) detainees must have reasonable access to the open air and exercise;

…

44 Treatment of convicted and non-convicted detainees

(1) Without limiting section 14 (Corrections policies and operating procedures), the director-general must make a corrections policy or operating procedure providing for different treatment of convicted detainees and non-convicted detainees.

Example

a corrections policy or operating procedure, in accordance with the following rules of the *United Nations Standard Minimum Rules for the Treatment of Prisoners*, for non-convicted detainees to be able to —

- procure food at own expense (r 87)
- be offered work but not be obliged to work (r 89)
- procure reading and writing material at own expense (r 90)
- visit and be treated by own doctor at own expense (r 91)

(2) The director-general must also ensure that convicted detainees are accommodated separately from non-convicted detainees.

(3) For chapter 10 (Discipline) —

(a) a detainee's entitlement in relation to treatment in detention includes anything expressed to be an entitlement in a corrections policy or operating procedure made for subsection (1); and

(b) subsection (2) is taken to provide an entitlement for each detainee in relation to accommodation.

(4) However, the director-general may give directions for different accommodation of a non-convicted detainee if the director-general suspects, on reasonable grounds, that is necessary to ensure the safety of the detainee or anyone else.

Example

Remandee J has served various sentences for violence offences, has an aggressive personality and enjoys bullying other people. The director-general suspects that other remandees detained with J are highly vulnerable in comparison with J. The director-general decides that J should be accommodated with convicted offenders.

(5) In this section:

convicted detainee means a detainee whose detention is because of the detainee's conviction of an offence.

45 Access to open air and exercise

(1) The director-general must ensure, as far as practicable, that detainees —

(a) have access to the open air for at least 1 hour each day; and

(b) can exercise for at least 1 hour each day.

(2) The standards under subsection (1) may both be satisfied during the same hour on any day.

(3) For chapter 10 (Discipline), this section is taken to provide an entitlement for each detainee in relation to access to the open air and exercise.

Is there a separately enforceable right?

What was proposed?

18 Central to the contentions of the applicants were the two issues outlined at [4] above. Having conducted a review of the previous cases, the primary judge found, contrary to the submissions of the applicants, that s 18(7) did not provide a freestanding entitlement to compensation or damages which avoided the limitation in s 40C(5). He also found that the reference to "unlawfully … detained" in s 18(7) did not apply in circumstances where a sentenced prisoner was detained in conditions which breached an applicable legal requirement regulating those conditions.

19 The applicants contend that both of these conclusions were wrong. In order to assess these submissions, it is necessary first to review previous authorities relevant to the interpretation of s 18(7).

Previous cases

20 The arguments in relation to whether or not s 18(7) provides a legally enforceable right to compensation are relatively well trodden ground, both in relation to the HR Act as initially enacted, as well as after the 2008 Amendment.

21 In *Morro v Australian Capital Territory* [2009] ACTSC 118; (2009) 4 ACTLR 78, Gray J had to consider the position prior to the 2008 Amendment. The case involved admitted false imprisonment but a claim for compensation under s 18(7) was added. Gray J ultimately decided that s 18(7) provided an enforceable right to compensation. In reaching that conclusion, he made the following points:

(a) The HR Act did not contain any equivalent to Art 2, cl 3 of the *International Covenant on Civil and Political Rights* (ICCPR), which provided that any person whose rights or freedoms were violated shall have an "effective remedy": *Morro* at [18]-[19].

(b) The HR Act did not contain any provision equivalent to s 3 of the *New Zealand Bill of Rights Act 1990* (NZ), which provided that the *Bill of Rights Act* "applies" to acts done by the legislative, executive or judicial branches of the government of New Zealand: *Morro* at [20].

(c) He referred (at [21]-[22]) to clear statements to the Legislative Assembly to the effect that no new remedy or cause of action was created in relation to the rights set out in Pt 3 of the *Human Rights Bill 2003* (ACT):

(i) The Explanatory Statement to the Bill provided:

> The Bill does not incorporate Article 2 of the Covenant because the bill is not intended to create a new right to a new remedy for an alleged violation of a Part 3 right.

(ii) The Chief Minister, in his presentation speech, said (see Australian Capital Territory Legislative Assembly, *Parliamentary Debates* (Hansard), 18 November 2003 at 4248-4249):

> And I reiterate, lest there is any confusion on the point, the bill does not invalidate other territory law, nor does it create a new cause of action.
>
> …
>
> The bill I introduced today does not create a new right of action against a public authority … My government considers that at this time creating a new right of action would not be appropriate.

(d) He said that the words of ss 18(7) and 23(2) "are apt to declare a remedy by way of compensation in the circumstance predicated in those subsections": *Morro* at [28], [32].

(e) He rejected a submission that the structure of the HR Act denied a substantive application to s 18(7). It was submitted that the substantive effect of the Act was that Pts 4 and 5 apply those rights outlined in Pt 3 to Territory laws and provide for parliamentary scrutiny of future laws. His Honour said "That would give a forced and unnatural operation to a very specific provision that provides for compensation where a right has been infringed": *Morro* at [33].

(f) Notwithstanding the absence of the word "enforceable", which appears in Art 9, cl 6 of the ICCPR, his Honour thought that the effect was consistent with s 18(7) providing such an enforceable right and, hence, making the word unnecessary: *Morro* at [34].

(g) He referred to a statement concerning the limits upon the use to be made of parliamentary statements as to the operation of legislation: *Minister for Immigration and Ethnic Affairs v Tang Jia Xin* (1994) 69 ALJR 8 at 11; *Harrison v Melhem* [2008] NSWCA 67; (2008) 72 NSWLR 380 at [12]-[16], [168], which emphasised that the obligation upon courts is to determine what is meant by the words that Parliament actually used. He found that the statements of the Chief Minister were "not consistent with at least the apparent meaning of s 18(7) of the [HR Act] which on its face gives a statutory right to compensation": *Morro* at [38].

(h) He found (at [39]) that it was not necessary to decide whether a more general remedy could be implied in relation to the rights in the HR Act, saying:

> It is enough that amongst the general purposes of the [HR Act] reflected in the long title is the protection of human rights. A specific provision in the [HR Act] which gives effect to the protection of a particular right by providing for compensation in the event of it being breached gives effect to that expressed purpose, in my view, should be interpreted accordingly.

22 However, in light of the fact that damages were recoverable at common law for false imprisonment, Gray J found that those damages gave full effect to the statutory right to compensation: *Morro* at [139], and, hence, no additional damages or compensation were required.

23 *Strano v Australian Capital Territory* [2016] ACTSC 4; (2016) 11 ACTLR 134 was an application for summary judgment. The plaintiff claimed that he had a right to compensation under s 18(7) and that his entitlement to compensation only accrued when he became aware, as a result of judicial determination, that his imprisonment had been unlawful. The conduct alleged to have given rise to the right to compensation under s 18(7) occurred prior to the 2008 Amendment. The plaintiff relied upon the earlier decision in *Morro*.

24 Because of the reliance upon *Morro*, Penfold J considered the decision in some detail. Penfold J said that the statements in *Morro* as to the operation of s 18(7) were obiter dicta. Her Honour said that Gray J made no finding that the statutory cause of action had been made out and found that any entitlement under s 18(7) could be remedied by recourse to an action in tort for wrongful imprisonment. She said that Gray J did not reach any explicit conclusion about

the relationship between damages for false imprisonment and compensation under s 18(7). Her Honour found that "[t]he only conclusion that was a necessary step in his reasoning was that any remedy given by s 18(7) could be provided by the existing action in tort": *Strano* at [30].

25 However, more fundamentally, her Honour indicated that she was not convinced that s 18(7) created a separate statutory cause of action: *Strano* at [31]. That was for five reasons.

26 First, no additional remedy was necessary to be implied where the general law already provided such a remedy.

27 Second, the assumption that ss 18(7) and 23 operate in the same way because they both provide a right to compensation did not have "any substantial basis", having regard to their different language and that they approached their topics in different ways.

28 Third, the proposition that the two provisions "appear on their faces to provide for remedies" was no more convincing than the alternative proposition that they "appear on their faces" to require that ACT law provides for compensation for breach of the specified rights: *Strano* at [34].

29 Fourth, that reading s 18(7) so that it did not create a statutory right to compensation would fail to give effect to the tenor of Art 9, cl 6 was not of "any particular significance". There was "no reason why ACT legislation should be assumed to give full effect to any particular international instrument, especially one to which the ACT is not a party": *Strano* at [35].

30 Fifth, Gray J had not given any reasons for the proposition (at [35] in *Morro*) that when the Territory, which was not a State Party to the ICCPR, legislated to give effect to that provision, it was not merely declaratory but intended to give effect to a substantive remedy.

31 Her Honour also pointed out that the approach that Gray J took to the use of extrinsic materials assumed that they were inconsistent with the text of the legislation, a view which, her Honour said, "[she did] not find convincing": *Strano* at [42].

32 Her Honour summarised her position in quite forthright terms (at [45]):

> 45. In summary, the difficulty that I have with Gray J's reasoning is that his Honour, without any proper consideration of the text of s 18(7) or the legislative context of that provision, without any consideration of the extrinsic materials that are under the *Legislation Act* available for interpretation purposes, and without offering any explanation of his conclusion by reference to the text of s 18(7), adopted a particular interpretation of that provision and then relied on that unexplained interpretation to reject the extrinsic material as inconsistent with the text as he had already interpreted it.

33 Her Honour then pointed out (at [47]-[48]) that s 18(7) sat within a section that conferred a variety of rights that gave substance to the right to liberty and security of person set out in s 18(1). All of those rights were, to a greater or lesser degree, protected by laws of the ACT. There was scope for interpreting those laws to enhance the protection they provided to achieve greater consistency or compatibility with s 18 or, as a last resort, declaring that law to

be incompatible with the HR Act. "To that extent, s 18(7) appears to have no different significance from that of any of the other provisions of s 18": *Strano* at [48].

34 Her Honour said that the approach of the plaintiff in the case before her depended upon the proposition that a provision mentioning compensation had a different status and operation from provisions mentioning other matters. Her Honour said that she had heard no explanation as to why that would be correct. The mere reference to "compensation", in her Honour's view, "establishes nothing": *Strano* at [49].

35 Finally, her Honour said that the specification of what can be done with the rights set out in the HR Act, and the absence of recognition that those rights create new rights of action, had to be taken into account in interpreting the various provisions of the HR Act that set out particular rights. The statements made in the extrinsic material disregarded by Gray J "may become relevant, in that they are in fact consistent with the overall structure and content of the *Human Rights Act*": *Strano* at [50].

36 Her Honour made it clear that she did not adopt Gray J's conclusion or reasoning but recognised that she did not need to make any finding about whether the s 18(7) cause of action existed in order to determine the case before her. She could determine the case before her by making the assumption that it did. For that reason, her Honour's comments on the point are clearly obiter dicta. Her Honour ultimately concluded that, whatever the nature of the plaintiff's claim, it was filed after the expiry of the applicable limitation period and could not be maintained.

37 *Monaghan v Australian Capital Territory (No 2)* [2016] ACTSC 352; (2016) 315 FLR 305 was heard before, but decided after, *Strano*. The plaintiff had been arrested and imprisoned as a result of the negligence of employees of the Territory working within the court system who had failed to accurately communicate to the Australian Federal Police the bail conditions applicable to the plaintiff. In addition to making a claim in negligence, the plaintiff also sought to claim compensation pursuant to s 18(7) of the HR Act.

38 Mossop AsJ (as his Honour then was) found (at [213]) that the claim in negligence was made out and awarded damages. For reasons which are not necessary to describe in detail, even if s 18(7) gave rise to a freestanding entitlement to compensation, his Honour found (at [227]-[234]) that the claim could not succeed. However, Mossop AsJ considered (at [235]-[257]) whether or not, following the 2008 Amendment, there was a freestanding entitlement to compensation that was distinct from any entitlement at common law. The points made in *Monaghan* were:

(a) Both *Morro* and *Strano* related to the form of the HR Act prior to the 2008 Amendment: *Monaghan* at [236].

(b) Following the 2008 Amendment, the nature of the remedy that could be granted was both defined and limited by s 40C(4), which provided that the Supreme Court could "grant the relief it considers appropriate except damages".

(c) However, s 40C(5)(b) provided that the section did not affect "a right a person has to damages (apart from this section)" and the note under that subsection provided "*Note* See also s 18 (7) and s 23."

(d) That note could be taken into account as extrinsic material: *Monaghan* at [237].

(e) The note and the terms of the Explanatory Statement for the 2008 Amendment (Explanatory Statement, *Human Rights Amendment Bill 2007* (ACT)) were consistent with the legislature having amended the HR Act on the assumption that s 18(7) provided a separate enforceable right to damages, even though *Morro* was only decided subsequently: *Monaghan* at [237], [243].

(f) The indication in the note and Explanatory Statement was inconsistent with the extrinsic material at the time of the enactment of the HR Act, in particular, the Explanatory Statement and the presentation speech of the Chief Minister: *Monaghan* at [238]-[240].

(g) The review of the HR Act in June 2006 had recommended including a direct duty on public authorities to comply with human rights but a bar on any new rights to compensation arising from breach, following the model recently adopted in Victoria which was in s 39 of the *Charter of Human Rights and Responsibilities Act 2006* (Vic): *Monaghan* at [241]-[242].

(h) The legislative history of the Bill that led to the 2008 Amendment did not indicate there was any recognition of, or support for, any implication of a freestanding right that might be drawn from the inclusion of the note or the Explanatory Statement: *Monaghan* at [244]-[254].

(i) If the only provision was s 40C(4), then the natural interpretation of the Act would have been that any remedy for breach of the rights in the Act would have been one which did not involve the award of damages. However, the existence of s 40C(5)(b) makes the more natural reading of the Act one which permits the rights stated in ss 18(7) and 23 to be directly enforced. That was because of the reference in s 40C(5) to "apart from this section" as opposed to "apart from this Act" and the terms of the note after para (b). It was really the latter that gave force to the contention that ss 18(7) and 23 provided freestanding rights: *Monaghan* at [255]-[256].

(j) Because of the limited argument made by the parties in that case, the conclusion reached earlier in the decision at [234] that s 18(7) would not have provided a remedy in the circumstances of the case, and because of the conclusion reached that any compensation would not extend beyond those available at common law, it was not essential to reach a conclusion as to whether or not s 40C permitted recovery of compensation under s 18(7) and his Honour did not do so: *Monaghan* at [257].

39 *Lewis v Australian Capital Territory* [2018] ACTSC 19; (2018) 329 FLR 267 involved a claim by a plaintiff who had earlier succeeded in obtaining a

declaration that a decision to place him in full-time custody was invalid. In addition to a common law claim for false imprisonment, he made a claim based on s 18(7). As his imprisonment occurred in January 2009, the post-2008 Amendment HR Act applied.

40 Refshauge J commenced his consideration of s 18(7) by pointing out (at [434]-[438]) that the HR Act followed the report of a consultative committee which proposed a "dialogue model". That involved the process by which the courts made a declaration of incompatibility. That was incorporated into the HR Act. Refshauge J pointed out (at [443]) that in debate on both the original Bill and the Bill for the 2008 Amendment, there were many references to the absence of any right to damages. He characterised the HR Act (at [449]) as recognising rights, rather than creating them, and that many of the rights in the HR Act are already recognised in the Territory (at [453]-[454]). He interpreted the provisions of Pt 3 of the HR Act as not "intended to amend or change the law" but rather to "state, or … to declare, the rights which are to be respected, protected and promoted in the Territory": *Lewis* at [458].

41 Having regard to the existence of the remedy of the tort of false imprisonment, his Honour concluded that s 18(7) had not, in the circumstances of the case, been breached. That was because, by reason of the common law, the plaintiff had an entitlement to compensation as required by s 18(7): *Lewis* at [467]-[468].

42 The fact that the HR Act involved "setting standards by which legislation is to be judged and construed and Executive action is to be reviewed" meant that the rights were not subject to legislative undermining by implied repeal by inconsistent legislation: *Lewis* at [469]-[472].

43 Refshauge J did not consider that the terms of s 40C(5) and the terms of the note were sufficient to outweigh the approach that he had adopted or the inconsistent extrinsic material: *Lewis* at [473].

44 In relation to the 2008 Amendment, his Honour thought that the introduction of s 40C, which provided for victims of breaches of rights set out in the HR Act to have a remedy but not damages, was consistent with the absence of such remedies in the unamended HR Act: *Lewis* at [516]. He reiterated that the extrinsic materials were, with one exception, all pointing directly away from there being a freestanding public law remedy for breaches of the rights in Pt 3 of the HR Act. As to the note to s 40C(5), he said (at [519]): "This seems to me to be too weak a reed to weave into a remedy as contended for by [counsel for the plaintiff]".

45 Finally, his Honour referred (at [520]) to the maxim *ubi jus ibi remedium*, "where there is a right, there is a remedy". He considered that the maxim could be applied except where, on consideration of the whole of the HR Act, it appeared that no such right was intended to be given. He considered that when the HR Act as a whole and the permissible extrinsic material were analysed, the HR Act could not be construed as providing the public law remedy suggested: *Lewis* at [526]-[528]. Alternatively, he articulated the narrower conclusion that the maxim was not applicable because, in the circumstances of this case, there was a remedy available, namely the tort of false imprisonment.

46 Elkaim J gave some brief consideration to the operation of s 18(7) in the course of his reasons in *Eastman v Australian Capital Territory* [2019] ACTSC 280; (2019) 14 ACTLR 195, a decision in which his Honour found that an enforceable right to compensation was to be derived from s 23 of the HR Act. So far as s 23 was concerned, his Honour accepted that it created a freestanding cause of action, reasoning from the immediate text of the subsection in a way that was consistent with Gray J in *Morro*. He said (at [56]-[57]):

> 56. Thus the defendant submitted that if s 23(2) created a new statutory cause of action it had to say a lot more than it did, it had to create a framework stipulating, for example, whose benefit the action is for, the type of damages that can be recovered and the means of enforcement.
>
> 57. The difficulty with the submission is to understand what else besides creating a cause of action the words "the person has the right to be compensated" could mean. The right is given and must be capable of being enforced. Unlike the United Kingdom no section in ACT legislation imposes an obligation on a statutory body to pay compensation.

47 It was pursuant to s 23 that the plaintiff ultimately recovered in excess of $7 million.

48 In relation to s 18(7), Elkaim J referred to the decisions in *Morro* and *Strano*, but did not need to resolve the difference between these decisions because he did not think the threshold for the possible application of s 18(7) had been met in the circumstances of the case before him.

49 In *Brown v Australian Capital Territory* [2020] ACTSC 70; (2020) 350 FLR 417 at [102]-[109], Murrell CJ was addressing a claim of unlawful detention and referred to the decisions in *Morro*, *Strano*, *Monaghan* and *Eastman*, but had found that the plaintiff's arrest and detention was not unlawful, so it was unnecessary to determine whether s 18(7) created a freestanding cause of action.

50 Similarly, in *Deng v Australian Capital Territory (No 3)* [2022] ACTSC 262; (2022) 372 FLR 227 at [219]-[254], Loukas-Karlsson J addressed a claim of unlawful detention and the question whether s 18(7) of the HR Act gave rise to a freestanding cause of action for compensation. Her Honour reviewed the decisions in *Morro*, *Strano*, *Monaghan*, *Eastman*, *Lewis* and *Brown*, as well as commentary on Art 9 of the ICCPR, and concluded, like Murrell CJ in *Brown*, that it was unnecessary to determine the issue because the detention in question was not unlawful.

The primary judge's reasons

51 Given the nature of the interpretive exercise and the summary of the reasoning in the earlier authorities just undertaken, it is not necessary to set out the reasoning of the primary judge in any detail. His Honour considered that the approach articulated in *Lewis* was correct and provided additional reasons, beyond those provided by Refshauge J for reaching the same result.

Decision

52 His Honour was correct in concluding that s 18(7) of the HR Act does not create a freestanding right to compensation. That conclusion can be reached as a relatively straightforward exercise in statutory interpretation undertaken in a

manner consistent with the statements of the High Court in *Federal Commissioner of Taxation v Consolidated Media Holdings Ltd* [2012] HCA 55; (2012) 250 CLR 503 at [39] and *R v A2* [2019] HCA 35; (2019) 269 CLR 507 at [58]. It can be reached by sequentially considering the following matters:

(a) the text of s 18(7);
(b) the immediate context of s 18(7);
(c) the structure of the original HR Act as a whole;
(d) the extrinsic materials relevant to the original HR Act;
(e) a conclusion as to the original HR Act;
(f) the text of Pt 5A;
(g) the extrinsic materials relating to Pt 5A; and
(h) a conclusion as to the amended HR Act.

53 Proceeding in these stages allows the text of the subsection to be considered in its total context and an interpretation given to the language used that best achieves the purpose of the Act as required by s 139 of the *Legislation Act 2001* (ACT).

The text of s 18(7)

54 Section 18(7) provides:

> (7) Anyone who has been unlawfully arrested or detained has the right to compensation for the arrest or detention.

55 Plainly, the section articulates a "right". It makes no reference to a remedy. It refers to "compensation", rather than damages. It does not include the word "enforceable" as exists in Art 9, cl 6 of the ICCPR, from which it is derived.

The immediate context of s 18(7)

56 Section 140 of the *Legislation Act* requires that, when working out the meaning of s 18(7), that provision must be read in the context of the Act as a whole. That context includes both the immediate context provided by the other parts of s 18 (which is addressed under this heading) as well as the other provisions of the Act and the structure of the Act as a whole (addressed under the next heading).

57 The immediate context of the subsection is the series of rights in the other paragraphs of s 18. As with their antecedents in the ICCPR, these are carefully formulated, each addressing a discrete right. The subject matters of the paragraphs make it clear that they address matters which are otherwise dealt with by Territory law, including the common law, Territory statutes, and Commonwealth Acts applying in the Territory. Whilst the rights set out extend beyond the criminal process, they address the circumstances in which a person may be deprived of liberty: s 18(2), rights of persons who are arrested to be told why they have been arrested: s 18(3), and to be promptly brought before a judge or magistrate: s 18(4), a general right to bail: s 18(5), and a right to apply to a court to decide the lawfulness of detention and an entitlement to release if the detention is not lawful: s 18(6). Finally, there is also the right not to be imprisoned only because of an inability to carry out a contractual obligation: s 18(8).

58 When the provisions of the section as a whole are examined in the context of Territory law as it existed at the time of its enactment, it is clearly unlikely that these provisions were intended to be directly actionable. That is because the subject matters were already dealt with by existing statutory provisions applying in the Territory or by common law doctrines. Further, there is nothing in the terms of s 18 which would indicate that s 18(7), of all of the various paragraphs of the section, should be an independently actionable right when the rights in the other paragraphs were not.

The structure of the original HR Act as a whole

59 Section 5 of the HR Act defined human rights as meaning "the civil and political rights in part 3". Section 7 described that "This Act is not exhaustive of the rights an individual may have under domestic or international law." Examples (which have effect according to ss 126 and 132 of the *Legislation Act*) of other rights following s 7 refer to "rights under the *Discrimination Act 1991* or another Territory law", "rights under the ICCPR not listed in this Act", and "rights under other international conventions". Importantly, the examples make it clear that the concept of "rights", when used in the HR Act, extend beyond rights which were directly enforceable under Territory law because they are stated in the example to include rights under the ICCPR not listed in the HR Act and rights under other international conventions. The fact that the HR Act identified "rights" in a manner that did not address or require their enforceability would tend against an interpretation reliant upon the maxim "where there is a right, there is a remedy". Because the HR Act recognises as "rights" both those which are enforceable and those which are plainly not, the maxim cannot be safely assumed to apply.

60 Following the definition of human rights in Pt 2 of the HR Act, Pt 3 sets out the various civil and political rights. The nature of the rights described in Pt 3 are such that it is not possible to reasonably argue that they are all directly enforceable because they are specified in statute and identified as rights. In no previous proceeding has that been contended to be the case and this would be directly contrary to the "dialogue model" adopted in the HR Act. Like the rights in the various paragraphs of s 18, it is clear that some of the rights set out in Pt 3 are given effect by existing statutes applying in the Territory or common law doctrines, either in whole or in part.

61 There is nothing in the provisions of Pt 3 of the HR Act which would indicate that, of all of the various rights in that Part, ss 18(7) or 23 have a special status that would differentiate them from the other rights. The fact that they deal with the topic of "compensation" is not given, by the terms of the HR Act, any special status that would indicate that those rights, as distinct from all others, are directly enforceable. Nor is there any reason, external to the HR Act, that would indicate that the subject matter of "compensation" is uniquely adapted to enforceability that could justify such a conclusion. The mere fact that courts, in other contexts, routinely make awards of damages and, hence, are familiar with damages as a remedy, is insufficient to indicate that

statutory statements of rights relating to compensation, as distinct from those which refer to any other subject matter, should be treated as enforceable in the courts.

62 The existence of s 28 within Pt 3, which provided: "Human rights may be subject only to reasonable limits set by Territory laws that can be demonstrably justified in a free and democratic society", does not enhance the case for direct enforceability. Rather, the statement in s 28 (which appears at the end of a long list of rights) that they may be limited by Territory laws is the only provision in Pt 3 which addresses any aspect of their application in the real world. The only limited manner in which its application is addressed is to indicate that the rights stated may be qualified by certain Territory laws. Section 28 is notable because of the fact that it does not address any aspect of the implementation of the rights in Pt 3 other than stating the abstract proposition that those rights are subject to limitation by Territory laws.

63 It is Pts 4, 5 and 6 that provide the means by which the human rights identified in Pt 3 are given effect. The HR Act would have been easier to understand if it had simply said explicitly that the rights in Pt 3 are to be given effect pursuant to Pts 4, 5 and 6 of the HR Act. However, even though the HR Act does not say that explicitly, when regard is had to the nature of the rights created, the terms of those rights, the structure of the HR Act, and the subject matter of the various parts of the HR Act, it is clear that this is how the HR Act was intended to work.

64 Part 4 provided the interpretation provision in s 30 and the potential to make a declaration of incompatibility in s 32. Both of those are means by which the rights in Pt 3 may be given effect. The process involved in a declaration of incompatibility (ss 32 to 34) clearly reflects the dialogue model that was intended to be implemented by the HR Act. However, it is significant that a declaration of incompatibility is expressly stated to "not affect … the rights or obligations of anyone": s 32(3)(b). In other words, one of the express mechanisms for implementation of the rights set out in the HR Act specifically excludes any effect on the rights or obligations of anyone. In that context, it is difficult to see how it would be possible to imply a cause of action directly arising from the rights in Pt 3 that *did* affect rights by creating an obligation to pay damages.

65 Part 5 related to scrutiny of new laws of the Legislative Assembly. It required a compatibility statement to be prepared: s 37, and required consideration of human rights issues by the relevant standing committee of the Legislative Assembly: s 38.

66 Part 6 established the position of Human Rights Commissioner. The functions of that Commissioner are identified as:

(a) to review the effect of Territory laws, including the common law, on human rights and report to the Attorney-General;

(b) to provide education about human rights and the HR Act;

(c) to advise the Attorney-General on anything relevant to the operation of the HR Act.

67 When Pts 4, 5 and 6 of the HR Act are considered, it is apparent that the

HR Act was intended to provide incremental, institutional means by which it was hoped that Territory laws would, over time, come to reflect the rights articulated in the HR Act. To the extent that they did not, the processes under the HR Act would expose that issue and allow a democratically accountable decision to be made by the Legislative Assembly. The institutional requirements of those parts of the HR Act relating to the conduct of the Attorney-General, the Legislative Assembly and the Human Rights Commissioner would necessarily have the effect of increasing awareness and consideration of the human rights set out in the HR Act.

68 It is very clear, when the structure of the HR Act as a whole is examined, that the human rights set out in Pt 3 were intended to be standards against which statutes and the common law are to be assessed and interpreted in the ways set out in the HR Act, rather than directly enforceable rights.

The extrinsic materials relevant to the original HR Act

69 It is uncontroversial that, of the variety of statutory regimes relating to human rights that might have been adopted, the HR Act involves what is referred to as the "dialogue model". As pointed out in *Hakimi v Legal Aid Commission (ACT)* [2009] ACTSC 48; (2009) 3 ACTLR 127 at [73] and *Lewis* at [434], the report of the ACT Bill of Rights Consultative Committee, *Towards an ACT Human Rights Act*, (May 2003), falls within the scope of extrinsic material to which regard may be had in interpreting the HR Act. That report explains the dialogue model as follows (at 61):

> To create a dialogue, the judiciary should not be able to invalidate legislation but rather be able to give its opinion that a law is incompatible with the *Human Rights Act*. It should then be a matter for the legislature to determine whether or not to amend the legislation so that it conforms to the *Human Rights Act*.

70 The extrinsic materials proximate to the original enactment of the HR Act put it beyond doubt that the purpose of the HR Act did not extend to creating directly actionable rights which would give rise to a cause of action that did not exist prior to its enactment. That is demonstrated by the terms of the Explanatory Statement for the *Human Rights Bill* and the presentation speech of the Chief Minister.

71 The Explanatory Statement included the following:

> **Overview of Bill**
>
> The main purpose of this Bill is to recognise fundamental civil and political rights in Territory law. **In particular, the Bill ensures that, to the maximum extent possible, all Territory statutes and statutory instruments are interpreted in a way that respects and protects the human rights set out in Part 3 of the Bill**.
>
> The Bill also promotes respect for and protection of human rights **in the development of new law and increases transparency about the consideration of human rights in parliamentary procedures**.

(Emphasis added.)

72 In describing the rights in Pt 3, the Explanatory Statement provided:

> The Bill does not incorporate Article 2 of the Covenant because the Bill is not intended to create a new right to a new remedy for an alleged violation of a Part 3 right.

73 There was nothing in the Explanatory Statement that suggested that the rights in Pt 3 of the HR Act were intended to be directly actionable. In those circumstances, it necessarily follows that there was nothing in the Explanatory Statement that suggested that, of all the rights specified in Pt 3 of the HR Act, only ss 18(7) and 23 were intended to be directly actionable.

74 The presentation speech given by the Chief Minister was extensive. A significant portion of it is set out below with emphasis added because it makes very clear that the Minister intended that the Bill did not establish any new cause of action but, instead, pursued the goal of advancing human rights in a number of other ways. Those ways reflected a careful compromise between competing interests and approaches to the protection of human rights. The Chief Minister said (Hansard at 4246-4250):

> The object of this bill is to **give recognition in legislation** to basic rights and freedoms. It is a clear and unequivocal commitment by this government and by this community about those values that bind us together as a democratic, multicultural and rights-respecting people. By passing this bill **we commit ourselves to minimum standards in our law making. It is a bottom line, a floor below which we should not fall**.
>
> Some are nervous about the impact of this law. Let me say this: rights exist in a social context that is well recognised in international human rights law, but it is too frequently lost in debate which exaggerates the scope and impact of rights. Some human rights are absolute. The right not to be tortured is one such right. I am sure no-one in this Assembly would disagree with that proposition. But the covenant does not permit the use of human rights as a pretext to violate the rights of others. We have taken care to reflect this principle in our bill and to ensure that restrictions on rights do not go further than is necessary.
>
> I am aware that some will say that this bill does not go far enough. There are many who want to see economic, social and cultural rights enshrined in law, but I have to say to you, "Let us at least begin." Let us begin with what is well accepted in the rest of the common law world. The world has moved on from the Magna Carta. Let us begin by incorporating the work done 60 years ago at the formation of the United Nations. This bill may not be exhaustive of all rights, but it is a beginning. I have already announced that economic, social and cultural rights will form part of the social plan. This issue can be looked at as part of a review of the Human Rights Act in the future.
>
> Mr Speaker, I now turn to some of the major features of the bill. The first is individual civil and political rights. **First, this bill will recognise in legislation fundamental rights and freedoms drawn from the International Covenant on Civil and Political Rights**. Consequently, rights such as equality before the law, the protection of family life and children, personal freedoms such as freedom of religion, thought conscience and expression, the right not to be arbitrarily detained, the right to a fair trial and so forth, will be interpreted and applied in the ACT context.
>
> **To achieve that goal the bill requires that all ACT statutes and statutory instruments must be interpreted and applied so far as possible in a way that**

is consistent with the human rights protected in the act. Unless the law is intended to operate in a way that is inconsistent with the right in question, the interpretation that is most consistent with human rights must prevail. **Decision makers in all government areas will have to incorporate consideration of human rights into their decision-making process, and a statutory discretion must be exercised consistently with human rights unless legislation clearly authorises an administrative action regardless of the human right**.

As I have already said, some rights, such as the right not to be tortured, are absolute. Other rights must be balanced against the rights of others. Limitations on a fundamental right must be read as narrowly as possible. By drawing on the International Covenant on Civil and Political Rights, we are able to ensure that the principles in the bill are interpreted in a way that is coherent with established human rights law.

In practice, decision makers and others authorised to act by a territory statue [sic] in the courts and tribunals must take account of human rights when interpreting the law. If an issue concerning the interpretation of human rights arises, that issue can be raised in the context of criminal or civil proceedings. **In practice, the opportunity to raise the issue will only arise where there is already provision for a proceedings in a court or tribunal**.

The covenant and related instruments, case law and materials which form part of the jurisprudence of civil and political rights, would inform the interpretation of the rights protected by the bill. **And I reiterate, lest there is any confusion on the point, the bill does not invalidate other territory law, nor does it create a new cause of action**.

If, in the ordinary course of litigation, the question is raised in the Supreme Court about whether a territory law is consistent with human rights and the Supreme Court is unable to conclude that the law is consistent, the court will have the power to issue a declaration of incompatibility. The bill is abundantly clear that a declaration does not invalidate either primary or subordinate legislation. Nor would it make the operation or enforcement of the law invalid or in any way affect the rights or obligations of anyone.

The purpose of the declaration is to alert the government and the Assembly and indeed the community to an issue of incompatibility. It is appropriate that this power be vested only in the higher court which has a supervisory function over lower courts and tribunals, although all courts and tribunals are engaged in the process of interpretation of our laws.

If the government is not a party to the proceedings, the court must notify me, as Attorney-General, if it is considering making a declaration. This is to guarantee that the government has the opportunity to put argument if the attorney considered it necessary to do so in the same way that currently exists when constitutional law questions are raised. If a declaration is issued it will be presented to the Assembly, and within six months the attorney will provide a written response also for presentation to the Assembly. **A declaration does not bind the government or the Assembly to change primary or subordinate legislation**. Nor would we expect that a declaration would be issued except in relatively rare cases.

The facility for a declaration of incompatibility is a vital component of the dialogue model this bill seeks to establish. While preserving parliamentary sovereignty, the declaration will function as a signal to the government and

the Assembly. It will make an important contribution to rational and coherent debate about human rights issues.

As Attorney-General, I will also have the discretion to intervene in any proceedings before any ACT court and certain ACT tribunals where a question concerning the application of the Human Rights Act arises. In practice, the discretion to intervene will only be exercised where there is a public interest in doing so.

The bill does not take away the power of the Assembly to pass laws that are inconsistent with human rights as set out in the Human Rights Act. However, as Attorney-General, I would be required to scrutinise all government bills to ensure they are consistent with fundamental human rights. **A statement of compatibility for publication in the Assembly will be issued. If it is necessary to limit or depart from human rights standards we will explain why it is necessary to do so**.

The scrutiny of bills committee or another committee nominated by the Speaker is obliged to report to the Assembly about human rights issues raised by bills presented to the Assembly. This will apply to both government and non-government bills. To ensure the business of the Assembly is not disrupted or subjected to unnecessary delays if for practical reasons either the government or the scrutiny of bills committee fails to report before legislation is considered, this will not effect the validity of laws passed by the Assembly. I want to assure you that this is not a backdoor way out of our obligations. I have no doubt that, if such a situation did arise, members would make their feelings known about it.

The bill also establishes the office of Human Rights Commissioner. By making the Discrimination Commissioner the Human Rights Commissioner, we avoid an unnecessary proliferation of institutions. The Human Rights Commissioner will have several functions, namely, to review territory law, conduct education programs and report to the Attorney-General on any matter relating to the Human Rights Act.

The commissioner will also have a right of intervention in proceedings that concern the interpretation and application of the act. However, this right may only be exercised with the leave of the court or tribunal. Again it is expected the commissioner's intervention powers will be exercised sparingly and only in cases where there is a significant public interest at stake.

There will be a consequential amendment to the Annual Reports (Government Agencies) Act 1995 requiring government departments and authorities to include a statement describing measures taken to respect, protect and promote human rights. **This will promote a more conscious consideration of human rights issues by territory authorities**.

I have outlined the key components of this bill. **It is also incumbent on me to clarify what this bill will not do so as to avoid any confusion in the media, among members of this chamber or in the wider community**.

The bill I introduced today does not create a new right of action against a public authority on the ground that conduct is inconsistent with human rights as recommended by the consultative committee. My government considers that at this time creating a new right of action would not be appropriate. However, an action that is allegedly based on an incorrect interpretation of the law will be open to judicial review and administrative law remedies. These remedies are already available.

> Nor will the Human Rights Act allow complaints to the Human Rights Commissioner. The government agrees with the consultative committee that involving the Human Rights Commissioner in complaints handling would conflict with the primary responsibility of the courts and tribunals to interpret ACT law.
>
> **As part of our ongoing commitment to exploring how human rights protection can be strengthened, we have included an obligation to review and report to the Assembly within five years of the commencement of the bill**. This doesn't preclude us from looking at matters early in the life of the act and, as a statute of the parliament, if it is necessary to make amendments we have the ability to do so, subject of course to the agreement of the Assembly.
>
> The bill that I present today is the very first human rights legislation in this jurisdiction or anywhere in Australia. We have had the benefit of being able to draw on the experience of comparable jurisdictions such as New Zealand, the UK and Canada to create a model that is uniquely our own, one that is appropriately adapted to the special circumstances of the ACT but which is consistent with fundamental human rights principles.
>
> **The government's model will not encourage unnecessary litigation, but it will ensure that human rights are taken into account when developing and interpreting all ACT laws. It will promote a dialogue about human rights within the parliament, between the parliament and the judiciary, and, most importantly, within the Canberra community**. It will also serve to educate us and foster respect for the rights of others and greater understanding of our responsibilities towards each other. By enshrining the values of inclusiveness and decency in our law, we are laying a solid foundation for human rights protection in the ACT — at home, at work, at school and in our neighbourhoods.
>
> This is a carefully crafted bill that has been the subject of extensive consultation in the community and within government. I commend this bill to the Assembly, and I look forward to a fruitful debate in the Assembly during the first session of 2004.

(Emphasis added.)

75 The terms of this speech may be taken into account as extrinsic materials informing the legislative purpose of the enacted provisions: *Legislation Act*, ss 141, 142, Table 142 item 5. The speech is significant because it strongly reinforces the interpretation of the HR Act that is apparent from its text and structure as outlined earlier in these reasons. The emphasised portions of the speech make the following points clear:

(a) the measures in the HR Act were targeted at interpretation of the law, setting standards by which new laws could be judged, and processes relating to the enactment of new laws which would encourage the assessment of those laws by reference to human rights standards;

(b) the enactment of the rights was not intended to establish any new cause of action, even though the rights could be relied upon in otherwise available judicial review proceedings; and

(c) the HR Act was not expected to result in an increase in litigation and the rights established would only be raised in litigation that was otherwise on foot.

76 Nothing in the presentation speech provides any support for the proposition that the rights or any breach of them would give rise to a new cause of action.

The whole direction of the presentation speech reflects the incremental institutionalisation of human rights standards by which new laws may be judged and existing laws may be interpreted.

77 The applicants did not point to any other extrinsic materials which were said to support the contention that the HR Act as originally enacted was intended to create rights directly enforceable by action or, in relation to s 18(7) (or s 23), an enforceable action for compensation or damages.

Conclusion as to the original HR Act

78 Having regard to the terms of s 18(7) when read in the context of the other provisions of the HR Act, and having regard to the stated purpose of the legislation articulated in the most immediately significant extrinsic materials, there can be no doubt that the purpose of the legislation was not to make the rights in Pt 3 of the HR Act independently enforceable. Nor was it a purpose of the HR Act to create the rights stated in ss 18(7) and 23 as independently enforceable rights. There is no basis upon which those two rights could legitimately be selected from amongst the pool of rights in Pt 3 and given a differential operation by making them independently enforceable. The fact that those two rights, of all the rights in Pt 3, make reference to compensation as part of their subject matter does not provide a basis for rendering them independently enforceable when compared with other rights which do not make a reference to compensation. Having regard to the structure of the HR Act as a whole and, in particular, the defined and limited ways in which the rights stated in Pt 3 are to be given effect, there is no room for the operation of the maxim "where there is a right, there is a remedy".

79 This conclusion is obviously to the contrary of that reached by Gray J in *Morro*. To the extent that the decision held that s 18(7) gave rise to a right enforceable by action, that decision was wrong.

The text of Part 5A

80 When it was inserted by the 2008 Amendment, Pt 5A provided, for the first time, a means by which the rights set out in Pt 3 could be directly enforced against public authorities.

81 Section 40B, for the first time, made it unlawful for a public authority to act in a way that was incompatible with a human right or, in making a decision, fail to give proper consideration to a relevant human right.

82 Section 40C defined the ways in which a person who claimed that a public authority had acted unlawfully could deploy the human rights in Pt 3. At the time that s 40C was inserted into the HR Act, it provided that the person could start a proceeding against the public authority or rely on the person's rights in other legal proceedings: s 40C(2). Where new proceedings were to be started, a limitation period was provided in s 40C(3). Section 40C(4) (equivalent to s 40C(5) as set out at [16] above) related to proceedings under subs (2) and permitted the grant of relief that the Supreme Court considered appropriate "except damages". Section 40C(5) (equivalent to s 40C(6) set out at [16] above) provided that s 40C did not affect either:

(a) a right a person has (otherwise than because of this Act) to seek relief in relation to an act or decision of a public authority; or

(b) a right a person has to damages (apart from this section).

83 There was then the note ("*Note* See also s 18 (7) and s 23") which falls into the category of extrinsic material and will be addressed below.

84 Section 40C(5)(a) preserved rights outside the HR Act to seek relief against a public authority. It extended to relief of any kind in relation to an act or decision of that authority. It thereby protected entitlements to relief of any sort based on any cause of action. It made it clear that the right to obtain relief under subs (4) was in addition to, and did not derogate from, other rights which the law provided.

85 Section 40C(5)(b) specifically preserved a right that a person had to damages outside s 40C. It avoided any implication arising from either the existence of the entitlement to bring proceedings under subs (2), or the exclusion of damages from the relief that may be granted in subs (4) that an entitlement to damages arising either elsewhere in the HR Act or outside the HR Act was qualified by s 40C. It is notable that para (b) (in contrast to para (a)) referred to rights apart from the *section* rather than apart from the HR Act, hence capturing within its scope rights that arose under the HR Act as well as rights outside the HR Act. Given that ss 18(7) and 23 both articulate rights to "compensation", which could be seen as the equivalent of damages, the terms of para (b) leave open the argument that the drafter was intending to protect a freestanding right that existed under those provisions.

86 That is a possible implication to be drawn from the terms of the paragraph. It depends upon deriving significance from the contrast between the carveouts in para (a) ("otherwise than because of *this Act*") and in para (b) ("apart from *this section*"). However, given that the language of para (b) mirrors the language that existed in the Victorian *Charter of Human Rights and Responsibilities* (s 39(4)), it may be that the distinction between the drafting of paras (a) and (b) is more attributable to its drafting history than to a deliberate decision to vary the scope of the respective carveouts.

87 Even if it is accepted that the rights in ss 18(7) and 23 are to be treated as the equivalent to a right to damages, the protection of those rights by para (b) does not carry with it a *necessary* implication that those rights are freestanding. It is equally consistent with a desire to ensure that the absence of damages as a remedy available under s 40C does not, by implication, qualify the terms of those rights in Pt 3 or affect the other ways in which those rights may be given effect without an award of damages. So far as rights to damages within the HR Act are concerned, those rights remain, even though the remedy of damages is not available under the HR Act. Insofar as the rights to damages exist outside the HR Act, they are unaffected by s 40C.

The extrinsic materials relating to Part 5A

88 The relevant extrinsic materials are the note following s 40C(5)(b), the terms

of the Explanatory Memorandum that accompanied the Bill for the 2008 Amendment, and the statements made by the Minister at the time of the presentation of that Bill.

89 The note has been set out earlier. Consistently with the terms of s 40C(5)(b), the note referred to provisions within the HR Act as distinct from those outside the HR Act. If the note is referring to those provisions because they are preserved by the operation of s 40C(5)(b), then they would be consistent either with the rights being freestanding rights or not. That is because, as explained in relation to the legislative provision, that provision can be interpreted as designed to avoid any impact upon rights specified in the HR Act, whether or not they are directly enforceable.

90 The alternative interpretation of the note which is available places emphasis on the word "also", which is a use of language consistent with referring to those sections not because they are directly preserved by s 40C(5)(b) but because they deal with the related concept of a right to compensation, and, hence, are usefully signposted in the context of s 40C(5)(b).

91 The Explanatory Statement provided, in relation to what became ss 40C(4) and (5):

> Sub-section 40C(4) provides that the Court may grant such relief it considers appropriate in relation to the unlawful act, except for damages. However, sub-section 40C(5) makes clear that if the same conduct is independently unlawful and compensable, this section does not take away that right to damages.
>
> Paragraph 40C(5)(a) makes clear that nothing in this section restricts any existing rights that a person might have to seek a remedy in respect of an act or decision of a public authority.
>
> Paragraph 40C(5)(b) confirms that nothing in this section affects any right a person may have to damages apart from the operation of this section. The note explains that nothing in this section restricts the right to compensation that arises under section 18(7) and section 23 of the *Human Rights Act 2004*.

92 The only elaboration upon the text of the statute that arises from this statement is to tie the terms of the note which refer to ss 18(7) and 23 to the protection of rights to damages in para (b). It remains consistent with treating the paragraph and its note as protecting rights to damages that are enforceable only in the limited way provided by the HR Act, although it would also be consistent with those rights being independently enforceable.

93 Nothing else in the Explanatory Memorandum is consistent with an understanding that the existing HR Act contained within it freestanding enforceable rights or that the 2008 Amendment was intended to create such rights.

94 When considering the significance of the note and the Explanatory Statement as extrinsic material, it is worth noting that the decision in *Morro* was only made *after* the 2008 Amendment, even though it related to the earlier form of the HR Act. Because *Morro* was only decided later, it cannot be contended that the drafters of the 2008 Amendment or the Explanatory Statement were intending to recognise and give effect to that decision. That makes it easier to reach the conclusion that para (b) and its note were, to the extent that they

operated upon rights to "compensation", simply intended to preserve the rights in ss 18(7) and 23 to the extent to which they were implemented by the other provisions of the HR Act, rather than as freestanding rights.

95 The legislative history of the Bill which became the 2008 Amendment, including the debates in the Legislative Assembly, make it manifestly clear that the purpose of the 2008 Amendment was not to recognise or establish rights to damages arising under the HR Act. The relevant passages were set out in *Monaghan* (at [245]-[253]) but bear repeating.

> 245. The bill was referred to the Standing Committee on Legal Affairs (performing the duties of a Scrutiny of Bills and Subordinate Legislation Committee). Report 50 of the Committee (4 February 2008) referred to the proposed s 40C(4), which provided that the Supreme Court may grant the relief it considers appropriate except damages. The Committee recorded:
>
> > The Committee draws attention to these provisions and notes that there are quite divergent views on the issue of whether the Supreme Court should or should not be permitted to award damages simply on the basis that there has been a contravention of a human right (as stated in the Act) in the performance of some action by a public authority.
>
> 246. The government's response to this is recorded in the Committee's Report 51 (3 March 2008) in which the then Attorney-General stated:
>
> > I note the committee's comment that there are quite divergent views on the issue of whether the Supreme Court should or should not be permitted to award damages for a breach of [the] duty to comply with human rights. I believe that it is not appropriate, given this [divergence] of views, for the Court to be permitted to award damages for a breach of the duty to comply with human rights. The amendments do not, however, affect any existing right to damages.
>
> 247. During the course of the Legislative Assembly debates upon the bill which became the 2008 Amending Act there was no reference to the possible operation of ss 18(7) and 23 in the context of proposed s 40C(5)(b). In his presentation speech the Attorney-General said (Hansard, 6 December 2007, page 4030):
>
> > I turn to the issue of remedies. In line with the recommendation of the 12-month review and the Victorian [c]harter, damages will not be available for a breach of the Human Rights Act. Rather, a finding of a breach could, for example, be a basis for setting aside an administrative decision or for a declaration that the public authority's actions breached were not in compliance with human rights. [sic]
>
> 248. The Leader of the Opposition (Mr Seselja), who opposed that part of the bill which introduced Part 5A, said during the debate in principle that individuals could start proceedings in the Supreme Court against a public authority and continued (Hansard [4] March 2008 page 381):
>
> > In such cases, the Supreme Court will grant relief but not damages.
> >
> > The provision does not prevent individuals from pursuing other legal avenues should they wish to seek damages.

249. Later in his speech he referred to the report of the Standing Committee on Legal Affairs and the response by the Attorney-General set out above.

250. Mr Mulcahy, by then an independent member of the Assembly, said (Hansard 4 March [2008] page [389]):

> I had some lengthy discussion with my advisers in relation to the matter of remedies. I have been persuaded to the view that damages are not appropriate. I would contend that it is more appropriate, for example, that a breach of the act could lead to the setting aside of the administrative decision or a public notification of a breach. We must be very cautious about turning the ACT into a choice venue for litigation. I believe that not making the remedy of damages available for this sort of breach [avoids] this issue.

251. Later in his speech he said "I do not believe that damages are appropriate."

252. In his speech in reply in the Attorney-General said (Hansard 4 March 2008 page 393):

> As members have pointed out, the legislation does not create any new remedies. It does not give the Supreme Court powers it does not already have. The court can only grant a remedy which is already within its power. For example, it may quash an unlawful decision or order a public authority to take or not to take proposed action. It cannot, however, awards [sic] damages for a breach of human rights. The government does agree with the committee's comments on this point. There is a lack of consensus on whether damages should be awarded for a breach of human rights. The government believes it would not be appropriate, however, given this [divergence] of views, for the court to be permitted to award damages for a breach of duty to comply with human rights.

253. The debate in detail did not contain any remarks relevant to the present issue.

96 It is clear that so far as the debates in the Legislative Assembly inform an assessment of the legislative purpose, they do not provide any support for the proposition that the Assembly intended to introduce, expressly or by implication, an enforceable cause of action for damages.

97 When the extrinsic materials relevant to the 2008 Amendment are considered as a whole, it is clear that Refshauge J was correct in *Lewis* when he said (at [519]) that the terms of the note to s 40C(5)(b) were "too weak a reed to weave into a remedy as contended for".

Conclusion as to the amended HR Act

98 Prior to the 2008 Amendment, the HR Act did not provide a freestanding right to compensation under ss 18(7) and 23. The terms of Pt 5A and, in particular, s 40C inserted by the 2008 Amendment are quite clear insofar as they preclude a grant of damages as relief under s 40C. It is also clear from s 40C(5) that any right to damages outside of s 40C is preserved. That means that the terms of ss 18(7) and 23 are not impliedly qualified by the exclusion of an

entitlement to damages in s 40C. Those provisions remain unqualified and may be given effect in the specific ways contemplated by Pts 4, 5, and 6 of the HR Act, as well as the other provisions of Pt 5A.

99 But that does not have the effect of impliedly creating a right to damages as a result of the terms of ss 18(7) or 23, where one did not previously exist. That conclusion is consistent with the very clear statements in the extrinsic materials just referred to. There is no proper basis, consistent with the command in s 139 of the *Legislation Act*, for interpreting the HR Act following the 2008 Amendment as establishing, pursuant to s 18(7), a directly enforceable entitlement to damages or compensation. In its amended form, the HR Act remains inconsistent with the conclusion reached in *Morro*.

The meaning of "unlawfully detained"

100 The issue is whether the expression "unlawfully … detained" in s 18(7) covers only circumstances where the detention itself is not authorised by law or whether it extends to circumstances in which the conditions of the detention involve some unlawfulness. Two types of unlawfulness were in issue in the present cases: a failure to segregate remandees from convicted prisoners, contrary to s 19(2) of the HR Act, and a failure to comply with the statutory obligation in s 45 of the CM Act to "ensure, as far as practicable" that a detainee has access to one hour of open air and exercise each day.

101 The submissions of the applicants emphasised that they were not contending simply that the harshness of the conditions rendered the detention unlawful but, instead, were contending that the contravention of legal constraints upon the detention of the applicants arising under the provisions of the HR Act and the CM Act was where the unlawfulness arose sufficient to allow it to be said that the applicants were "unlawfully … detained".

Previous consideration

102 This is an issue which has only had limited consideration in the context of s 18(7).

103 In *Monaghan*, the plaintiff sought to argue that an arrest which was "arbitrary" under s 18(1) or not "in accordance with the procedures established by law" under s 18(2) was thereby unlawful under s 40B and, therefore, the arrest and detention were unlawful for the purposes of s 18(7). Mossop AsJ rejected that argument, referring to the different concepts described in each of ss 18(1) ("arbitrarily"), (2) ("in accordance with the procedures established by law") and (7) ("unlawfully"). His Honour held: "Because of the different language used in the subsections of s 18, it would be inconsistent with the text and structure of s 18 to permit the reference in s 40B to convert the rights in s 18(7) from that which is stated in the subsection to something else."

104 *Davidson v Director-General, Justice and Community Safety Directorate* [2022] ACTSC 83; (2022) 18 ACTLR 1 was a case in which the issue of the entitlement to open air and exercise of a detainee in the Management Unit of the AMC was determined. This is the same issue now raised in Mr Williams' claim. Loukas-Karlsson J made declarations that the provision of open space did not comply with s 45 of the CM Act, that the operating procedure then in place was

invalid, that the plaintiff's human rights under s 19(1) of the HR Act had been breached, and that the invalid operating procedure was incompatible with the plaintiff's rights under s 19(1). The case did not, however, address any claim for damages alleged to have arisen under s 18(7) because no such claim was made.

105 In sentencing proceedings involving Mr McIver (*R v McIver* [2022] ACTSC 206), he argued that there had been a breach of s 19(2) because he had been detained with convicted prisoners, and, in fact, assaulted by one before he committed the offences for which he was charged. The breach of s 19(2), he argued, meant that he was not detained in "lawful custody" for the purposes of s 64(2)(e) of the *Crimes (Sentencing) Act 2005* (ACT). That section had the effect that non-parole periods could not be set for a sentence of imprisonment for an offence "committed while in lawful custody". Mossop J rejected that argument, saying (at [54]):

> A person may be in "lawful custody" even if there is a breach of the law relating to the conditions of their detention: *R v Deputy Governor of Parkhurst Prison; Ex parte Hague* [1992] 1 AC 58; *Re an application for bail by Chris* [*Merritt*] [2009] ACTSC 56 at [42]; *Monaghan v Australian Capital Territory (No 2)* [2016] ACTSC 352; 315 FLR 305 at [232].

106 The Court of Appeal confirmed this interpretation, saying that the words "lawful custody" in ss 64 and 72 of the *Crimes (Sentencing) Act* meant detention that was authorised by law: *McIver v The King* [2023] ACTCA 48; (2023) 20 ACTLR 303 at [61], [64]-[65].

Text

107 Section 18(2) does not refer to the legally required conditions of detention. Having said that, the expression "unlawfully … detained" in the phrase "unlawfully arrested or detained" in s 18(7) could relate simply to the lawfulness of the deprivation of liberty or could extend to the conditions of that detention. The potential for the word "unlawful" to have different meanings was usefully explained by Gleeson CJ in *Behrooz v Secretary, Department of Immigration and Multicultural and Indigenous Affairs* [2004] HCA 36; (2004) 219 CLR 486 at [10]:

> There is a possible ambiguity in the expression "unlawful detention". It may refer to a case where one person has no right to detain another; the person detained has a right to be free. It could also be used to refer to a case in which the detention is authorised by law, but the conditions under which the detention is taking place are in some respects contrary to law. In the second case, the detainee may be entitled to complain, and may have legal remedies, but it does not follow that he or she is entitled to an order of release from custody, much less that he or she is entitled, in an exercise of self-help, to escape.

The statutory context

108 In determining which meaning of the expression "unlawfully … detained" is the correct one, it is necessary to have regard to:

(a) the immediate statutory context of s 18(7) within s 18; and

(b) the broader context of the other rights in Pts 3 and 5A of the HR Act.

109 When s 18 is examined, it can be seen that there are a series of different

rights related to the liberty and security of a person. There is no hierarchy identified as between those rights. Each one is separate. They relate to:

(1) arbitrary arrest or detention;
(2) deprivation of liberty only on grounds and in accordance with procedures established by law;
(3) being told at the time of the arrest the reasons for the arrest and being promptly told about the charges against the person;
(4) the right of arrested persons to be promptly brought before a judge or magistrate and to be tried within a reasonable time, or released;
(5) a general entitlement to be released pending trial;
(6) a right to have a court decide about the lawfulness of detention without delay;
(7) the right to compensation for unlawful arrest or detention;
(8) the right not to be imprisoned only because of an inability to carry out a contractual obligation.

110 There is nothing in s 18 which governs the conditions of detention. That is found elsewhere in the HR Act, most obviously s 19 but extending beyond that. The fact that the other provisions of s 18 do not address conditions of detention as opposed to the fact of detention suggests that s 18 is focused upon the legal justification for the arrest or detention as distinct from anything else.

111 Subsection (6), which immediately precedes s 18(7), provides:

> (6) Anyone who is deprived of liberty by arrest or detention is entitled to apply to a court so that the court can decide, without delay, the **lawfulness of the detention** and **order the person's release if the detention is not lawful**.

(Emphasis added.)

112 As the words of this provision make clear, it is focused upon the deprivation of liberty by arrest or detention. It talks about a determination by a court of the lawfulness of the detention. If the detention is not lawful, then the right is to release. That there is the contradistinction between lawful detention and a right to release in s 18(6) is significant for the interpretation of s 18(7). Given that s 18(6) provides the immediate context for the subsequent right to compensation in s 18(7), it is a very strong indicator that s 18(7) is focused upon the deprivation of liberty by arrest or detention rather than unlawfulness that occurs in the context of a detention that is otherwise justified by law.

113 When one goes beyond s 18 and has regard to the rights in Pt 3 more generally, it can be seen that there are a large number of rights which may be affected during the course of a person's lawful detention. Some of those commonly referred to in the context of imprisonment are the right not to be treated in a cruel, inhuman or degrading way: s 10(1), freedom to demonstrate religion in worship, observance, practice and teaching: s 14(1)(b), treatment of persons deprived of liberty with humanity and respect for the inherent dignity of the human person: s 19(1), segregation of accused persons from convicted people other than in exceptional circumstances: s 19(2), and segregation of children from adults: s 20(1).

114 Conduct on the part of prison authorities which is incompatible with these rights or, indeed, any other right in Pt 3 is declared by s 40B to be "unlawful". If "unlawful" conduct on the part of prison authorities amounts to a person being "unlawfully … detained", then s 18(7) has an extremely wide scope. All breaches of the rights in Pt 3 would then feed into s 18(7) so as to give a right to compensation. Similarly, any breaches of the various rights relating to the conditions of detention articulated in the CM Act (in particular, all those set out in Ch 6 "Living conditions at correctional centres"), including s 45, which is relied upon in the present case, would also result in a person being "unlawfully … detained" and feed into the s 18(7) right to compensation. So far as persons in detention are concerned, s 18(7) would absorb any other breaches of the law and convert those breaches into an unlawful detention giving rise to an entitlement to compensation. It would be a very broad right to monetary compensation going far beyond the common law right to damages for false imprisonment.

Decision

115 The written submissions made on behalf of the applicants were careful not to assert that the factual circumstances of harsh conditions in detention would render the detention unlawful for the purposes of s 18(7). Rather, those submissions asserted that there would be an "unlawful detention" if the legal constraints governing the detention were infringed. That was consistent with the manner in which the case was argued before the primary judge. The primary judge (at [103]) summarised the submissions as follows:

> 103. The plaintiffs' central submission essentially was that any breach of any statutory or other obligation by the Territory relating to the conditions of detention rendered the detention "unlawful" for the purposes of s 18(7): see T 22.15-19.

116 This interpretation of s 18(7) would give it an extremely broad operation. By combining a breach of a Pt 3 human right with the requirement in s 18(2) that deprivation of liberty be "in accordance with the procedures established by law" and/or with s 40B(1), which makes it unlawful for a public authority to act in a way incompatible with a human right, s 18 would provide a very wide-ranging entitlement to monetary compensation. Further, any contravention of a detainee's statutory entitlements in the CM Act would also give rise to an entitlement to monetary compensation. Such an entitlement would involve a very significant expansion of the entitlements of detained persons beyond those which existed prior to the enactment of the HR Act in 2004. There is nothing in the text of the HR Act or in the extrinsic materials that indicate that this was part of the legislative purpose of the HR Act. The alternative interpretation, that the concept of being "unlawfully … detained" was to be generally coincident with those circumstances which would give rise to a common law entitlement to compensation for false imprisonment, would not involve a dramatic expansion of the entitlements of detainees and corresponding burden upon those responsible for their detention.

117 During the course of oral argument, recognising the potential for the

applicants' formulation of the scope of s 18(7) to be extremely broad, counsel for the applicants provided alternative formulations. Senior counsel sought to draw a distinction between the conditions of the detention and the "legal character of the detention". This contemplated some dividing line which would characterise certain conditions of detention as giving rise to unlawful detention but others as not. Although some reference was made to habeas corpus and false imprisonment cases, such as *Sleiman v Commissioner of Corrective Services* [2009] NSWSC 304 (detention in segregation); *New South Wales v TD* [2013] NSWCA 32; (2013) 83 NSWLR 566 (detention in a prison rather than a hospital) and *SU v Commonwealth* [2016] NSWSC 8; (2016) 307 FLR 357 (unlawful arrest and custody when liable to be held in immigration detention), as being circumstances which would fall on the unlawful detention side of the line, how that line might be determined was not made clear. Next, junior counsel suggested, by reference to those same cases, that the line could be drawn by reference to the way the tort of false imprisonment would determine unlawful detention. Finally, in oral submissions in reply, senior counsel for the applicants proposed, as an "organising principle that … the court may well find useful", that there would be unlawful detention if a condition was infringed that "goes to the character of the deprivation of liberty" or where "the way that their liberty interests [have] been affected, is fundamentally altered". Having regard to the formulation of this "organising principle", it is not clear where it would draw the line between legally required conditions of detention which did not affect its lawfulness and those legally required conditions of detention which, if not complied with, would give rise to unlawful detention for the purposes of s 18(7).

118 For the purposes of this case, it is not necessary to determine the boundaries of a claim for false imprisonment at common law in order to use that to derive a generally applicable formulation of the meaning of the composite expression "unlawfully … detained" when enacted in 2004. What was significant for the present case was the manner in which the applicants' claim had been put. The basis upon which their claim was put was that if conditions of detention involved a breach of one or other of the human rights outlined in Pt 3 of the HR Act, then that was "unlawful" by reason of s 40B (or possibly even without s 40B) and thereby rendered the applicants "unlawfully … detained". Similarly, the contraventions of ss 44 and 45 of the CM Act, being breaches of statutory obligations on the part of the relevant director-general, would also render the applicants "unlawfully … detained".

119 The statutory context provided by the other subsections in s 18, and the broader statutory context of the provisions of Pt 3 and other statutory provisions applicable in the Territory regulating the conditions of detention of detainees, all point very strongly against the interpretation contended for by the applicants. Allowing s 18(7) to extend beyond the lawful justification for the detention itself would give it an operation inconsistent with the position of s 18(7) in the HR Act as a whole. As pointed out earlier, there is nothing in the extrinsic materials which would indicate that s 18(7) was intended to operate as such a broad right going far beyond the lawfulness of the detention itself.

120 Further, insofar as counsel for the applicants suggested an organising principle which might allow classification of some human rights or other legally required conditions of detention as not rendering detention unlawful whereas others would render it unlawful, there is nothing in the HR Act that would permit such a distinction. It is not essential for the purposes of these reasons to express an opinion upon whether or how s 18(7) would apply in circumstances equivalent to those described in the three cases referred to earlier. It is sufficient to say that the conditions of detention relied upon in each of the present cases did not mean that the relevant applicant was "unlawfully … detained" for the purposes of s 18(7).

121 Related to this point, the applicants criticised the primary judge for failing to give some effect to the proposition that the legislation was beneficial and remedial legislation when deciding between competing interpretations of the expression "unlawfully … detained". It was contended that, given the choice between a narrower interpretation of the meaning of unlawful detention and a broader interpretation of the meaning of unlawful detention, the fact that the legislation was of a beneficial character designed to protect persons who, by reason of their detention, were vulnerable, was a reason to adopt the broader interpretation. That is a submission which cannot be accepted. That submission falls into the error of assuming that the legislature intended to pursue a generally conceptualised beneficial goal at the expense of all other considerations: *Carr v Western Australia* [2007] HCA 47; (2007) 232 CLR 138 at [5]-[6]. The HR Act is a good example of an Act which has an undoubted beneficial character but where the legislature has implemented its beneficial goals with significant nuance, having regard to the variety of interests and considerations involved in the process of giving effect to human rights. Favouring a beneficial interpretation is an interpretive principle which has very little work to do in circumstances where the text and structure of the Act and the extrinsic materials are far better guides to the legislative purpose and the manner and method by which that purpose was pursued, and, hence, to the judicial implementation of the legislative command in s 139 of the *Legislation Act*. The same point can be made in relation to statements that rights in Pt 3 must be interpreted in "the broadest possible way": see for example *Islam v Director-General, Justice and Community Safety Directorate* [2021] ACTSC 33 at [79]. The uncritical application of any such principal is inconsistent with the statutory requirement of s 139 of the *Legislation Act*.

122 In the present case, no extrinsic material was pointed to by the applicants as indicating that the legislative purpose was one which was consistent with the interpretation for which they contended.

123 When s 18(7) is understood in the context of the act as a whole, there is no doubt that the reference to "unlawfully … detained" relates to the legal justification for the deprivation of liberty and does not extend to any breaches of the law relating to the conditions of the detention, as has been alleged in this case.

The exercise of discretion

The approach of the primary judge

124 His Honour considered that the applicants' claims under the HR Act for damages were futile because the HR Act does not provide a remedy in damages and there was no merit in the pleaded claims that the applicants were unlawfully detained within the meaning of s 18(7): primary judgment at [440]. He then had to consider whether to grant an extension of time in relation to those parts of the applicants' claims under the HR Act that did not seek damages and were not based upon allegations of unlawful detention: primary judgment at [442].

Mr McIver

125 The relief initially claimed by Mr McIver was only compensation pursuant to s 18(7). On 29 June 2023, shortly before the hearing of his application for an extension of time, he amended his originating application so as to add claims for declarations:

(a) that he had been unlawfully detained in a non-segregated section of the AMC, in breach of s 44(2) of the CM Act and s 19(2) of the HR Act; and

(b) that his detention in that non-segregated area constituted a breach of his human rights under s 18(2) and 19(2) of the HR Act.

126 Consistent with his earlier findings, the primary judge found that the claim for the first of these declarations could not proceed because it was based upon an allegation that he was unlawfully detained and the interpretation of s 18(7) required to support that claim had been rejected.

127 So far as the second declaration was concerned, his Honour found that there was no pleading of any breach of s 18(2) ("No one may be deprived of liberty, except on grounds in accordance with the procedures established by law") nor any clear pleading of the material facts said to establish the elements of any breach of this human right. This was a reference to the fact that the only pleading of a breach of s 18(2) was as a "further particular". In relation to s 19(2), his Honour said that it only appears as a particular rather than as a pleading.

128 His Honour gave three reasons why he would not grant leave to Mr McIver to pursue the second declaration.

129 First, there was no proper pleading (as distinct from particulars) of the breaches of ss 18(2) and 19(2).

130 Second, Mossop J had already found in *R v McIver* that Mr McIver's human rights had been breached by reason of the fact that he had been detained in a non-segregated section of the AMC, so another declaration to that effect would seem to be of no utility.

131 Third, there was no explanation as to why Mr McIver did not commence proceedings between the date of the last act complained of on 28 January 2021 and when he first instructed his present solicitors 18 months later. His Honour accepted that the time after he instructed his present solicitors was explained but said that no persuasive explanation was offered for the period of about six months which preceded that date and post-dated the expiry of the one-year

limitation period. Further, there was no evidence led from Mr McIver's previous solicitors about any advice, or lack thereof, in relation to a claim under the HR Act. He referred to Mr McIver's evidence that he "didn't know anything about human rights" until he retained his present solicitors and, after speaking to them, he "liked the idea that [he] could get some compensation".

132 His Honour dismissed Mr McIver's application for an extension of time.

Submissions — McIver

133 Mr McIver sought to challenge the decision in relation to both declarations.

134 So far as the first declaration was concerned, his challenge was dependent upon a breach of s 19(2) of the HR Act being capable of rendering his detention "unlawful detention".

135 So far as the second claim for declaratory relief was concerned:

(a) Mr McIver criticised his Honour's reliance upon the inadequacy of the pleading, saying that this was not a fundamental objection to the claim proceeding at all;

(b) Mr McIver said that the primary judge erred in relying upon the earlier finding of a "prima facie breach" of his right under s 19(2), in circumstances where no declaratory relief was sought or granted in those proceedings; and

(c) Mr McIver contended that there was a factual error in the finding that there was "no explanation provided by Mr McIver" to explain the 18-month period between the act last complained of and his instructing lawyers to institute the proceedings. He pointed out that his evidence was not the subject of objection or cross-examination. In particular, the submissions relied upon Mr McIver's evidence that he "didn't know anything about human rights".

Decision — McIver

136 The primary judge dealt with the first declaration on the basis that it was targeted at the allegation that he was "unlawfully … detained" by reason of a breach of s 44(2) of the CM Act and s 19(2) of the HR Act. That was clearly the case being propounded by Mr McIver in paragraphs 34-38 of his Amended Statement of Claim, as the declaration sought was a step along the way to a claim for compensation under s 18(7).

137 The submissions now made, which, in light of the rejection of the availability of compensation under s 18(7), seek to untether the declaration that he was "unlawfully … detained" from a claim under s 18(7), cannot be accepted. Read fairly and as a matter of substance in light of the pleaded claim, the point of this declaration was the establishment of unlawful detention for the purposes of the s 18(7) claim and, given the unavailability of that claim, the primary judge was clearly correct to refuse leave to pursue it.

138 So far as the second declaration is concerned, each of the matters relied upon can be addressed separately.

139 The primary judge was correct to criticise the adequacy of the pleadings. The only reference to s 18(2) in the pleadings is a single reference in the "Further Particulars" to paragraph 35, which appears intended only to pick up, as

"procedures established by law", those breaches pleaded in paragraph 34, namely, ss 19(1), (2), and (3) of the HR Act and s 44(2) of the CM Act. All the relevant content of those breaches are contained in particulars, rather than being tied back to earlier pleaded material facts. Having said that, the obscurity and unnecessary complexity of Mr McIver's pleading was something which might have been remedied.

140 In relation to the earlier decision in *R v McIver*, Mr McIver is correct to point out that no declaration was made in that case and the finding was only of a "prima facie breach". That is because, for the purposes of sentencing, the relevant director-general had not been given the opportunity to make submissions as to whether or not the provisions of the CM Act amounted to a limitation on the right under s 19(2) consistent with s 28 of the HR Act. Notwithstanding the preliminary nature of the conclusion, the reasons in *R v McIver* make it clear that the prima facie breach was taken into account in favour of Mr McIver when determining the appropriate sentence for the assault that he committed on the other prisoner: *R v McIver* at [51]-[54]. The Court of Appeal recognised that the apparent breach of Mr McIver's human rights had been taken into account "in determining the weight to be given to general deterrence": *McIver v The King* at [38]. It is true to say that there had not been a declaration of right that took into account the possibility that a limitation upon Mr McIver's s 19(2) right might have existed within the CM Act. However, having regard to the treatment of the issue in *R v McIver* and the fact that Mr McIver received some benefit of the conclusion reached as to the existence of a prima facie breach of his right in the sentencing decision, his Honour did not err in concluding that "another declaration to that effect would seem to be of no utility". No practical utility or additional vindication of the rights of Mr McIver by a further declaration was demonstrated.

141 Insofar as Mr McIver sought to distinguish between the finding of a prima facie breach in *R v McIver* and a formal declaration of a contravention of that provision which may be of significance for the dialogue model established by the HR Act, it should be noted that, subsequent to the primary judge's decision, Mossop J found in May 2024, in the case of another prisoner, that a failure to segregate accused persons from convicted prisoners constituted a breach of s 19(2) and that the right in s 19(2) was not limited by the terms of s 44(2) of the CM Act: *Director of Public Prosecutions (ACT) v Alexander (a pseudonym)* [2024] ACTSC 161. Like *R v McIver*, that case did not involve any formal declaration but did involve a finding that the applicant in that case was detained in circumstances that involved a breach of s 19(2). Consistent with the dialogue model, the Legislative Assembly then, in September 2024, amended s 44 so as to make it easier for the mixing of accused and segregated prisoners, thereby seeking to limit the s 19(2) right as contemplated by s 28: *Justice and Community Safety Legislation Amendment Act 2024* (ACT), s 11. Although both of these matters occurred after the primary judge's decision, they illustrate that if the decision that his Honour made had to be reconsidered, the case for an extension of time would have been weakened even further because the issue in relation to which a declaration had been sought had been addressed

in another case and the legislation subsequently changed from the form applicable at the time in relation to which Mr McIver sought a declaration.

142 So far as the third matter relied upon by the primary judge, his Honour was correct to say that there was no explanation as to why Mr McIver did not commence proceedings between January 2021 and when he first instructed his present solicitors 18 months later. His Honour questioned the lack of evidence as to what advice Mr McIver had received from the solicitors representing him in the sentencing proceedings prior to his current solicitors visiting him in jail after he was sentenced and procuring instructions to investigate a claim for compensation. Although the evidence of Mr McIver that before he met with his current solicitors he did not know anything about human rights was not challenged, there was simply no evidence as to what advice had been given to Mr McIver by his earlier solicitors, notwithstanding that the human rights issue was clearly raised in the sentencing proceedings. There is always a forensic choice made in determining what evidence is put before the court on an extension of time application, with both minimalist and maximalist approaches to the explanation for the failure to commence proceedings, each carrying with them risks. The minimalist approach, as adopted in this case, carried with it the risk that the judge would not be given an adequate impression of the merits of the claim for an extension of time. That risk manifested itself. The absence of evidence about Mr McIver's dealings with his earlier solicitors left it open to the primary judge to conclude that there was "no persuasive explanation … for the period of about six months which preceded" the date when he instructed his current solicitors.

143 The position of Mc McIver before the primary judge was, therefore:

(a) He required a discretionary extension of time in order for his claim to proceed.

(b) It was apparent from the manner in which Mr McIver's claim was pleaded that the principal relief sought was compensation pursuant to s 18(7).

(c) It was also apparent from the evidence that the motivation of Mr McIver in bringing further proceedings beyond the sentencing proceedings in which his non-segregation from convicted prisoners had already been addressed, was because "I liked the idea that I could get some compensation."

(d) The primary judge found, correctly, that s 18(7) did not provide Mr McIver with a cause of action and, hence, that he could not recover compensation.

(e) His Honour had correctly identified that one of the declarations sought was dependent upon an interpretation of s 18(7) which he had rejected.

(f) There was, therefore, the possibility that the proceedings might continue in order to seek a bare declaration on a matter that had already been the subject of findings in the sentencing proceedings.

144 Having regard to the fact that most of the claim had fallen away by reason of the primary judge's findings on questions of law, the case for an extension of time was a slender one and, hence, it would not have taken much for the

primary judge to reach the conclusion that he did. In those circumstances, it was clearly open to the primary judge to reach the conclusion that an order permitting the proceedings to be brought, notwithstanding the expiry of the limitation period, was not appropriate. Each of the factors referred to — the inadequacy of the pleadings, the earlier decision in *R v McIver*, and the absence of a cogent explanation as to what had occurred since the cause of action accrued — were all relevant considerations in determining whether or not to make an order permitting the proceedings to continue.

145 No error is disclosed in the discretionary decision of the primary judge relating to Mr McIver.

Mr Williams

146 In relation to Mr Williams, the primary judge noted that his tortious claim for false imprisonment had not been stayed by McWilliam AsJ in *Williams v Australian Capital Territory* [2023] ACTSC 18; (2023) 375 FLR 20 and was unaffected by the primary judge's judgment.

147 Mr Williams sought three declarations:

(a) that detaining Mr Williams in breach of s 45(1) of the CM Act had breached his human rights;

(b) that detaining Mr Williams in breach of s 45(1) of the CM Act was unlawful; and

(c) that, pursuant to s 40C of the HR Act, the Territory had breached Mr Williams' human rights under s 19(1) of the HR Act.

148 Section 45(1) of the CM Act is the provision that requires the relevant director-general to "ensure, as far as practicable, that detainees … have access to the open air for at least 1 hour each day; and … can exercise for at least 1 hour each day". Section 19(1) of the HR Act is the right to be treated with humanity and respect for the inherent dignity of the human person when deprived of liberty.

149 His Honour identified that the last day on which an act complained of occurred was 15 January 2021 and that Mr Williams first conferred with his present solicitors on 10 November 2021 (ie within the limitation period). Mr Williams said that he was not advised of any potential claim under the HR Act at any time before the expiration of the limitation period. That was because his solicitors had the erroneous view that the Territory was not a "public authority" for the purposes of s 40C of the HR Act and, hence, the 12-month limitation period had no application: see primary judgment at [141]. His Honour considered that this was "a sufficient explanation" in relation to the first declaration and, therefore, that claim should be allowed to proceed.

150 He said that the second declaration was futile for the reasons he had given earlier and should not be allowed to proceed.

151 So far as the third declaration which was sought, his Honour said that this related to two pleadings. The first (at paragraph 22B of the Further Amended Statement of Claim) was that cl 4.3 of the *Corrections Management (Separate Confinement) Operating Procedure 2019* (ACT) was incompatible with the plaintiff's human rights under s 19(1) of the HR Act. His Honour pointed out

that this clause ceased to have effect on 20 May 2022, when the *Corrections Management (Separate Confinement) Operating Procedure 2022* (ACT) came into force. His Honour said, "It seems to me that there is no utility in having litigation about a policy that is no longer in force when the only relief sought is a declaration": primary judgment at [463].

152 The second pleading (at paragraph 29 of the Further Amended Statement of Claim) pleaded that there was a breach of s 45(1) and that that breach operated as a breach of, or was incompatible with, s 19(1) of the HR Act. Because s 45(1) remained in operation, his Honour saw some utility in allowing that claim to proceed. His Honour was of the view that the HR Act was about standard-setting and "when the Territory is alleged to have breached those standards in relation to members of a generally powerless class of citizens, then those citizens should have the opportunity to ventilate their claim in court": primary judgment at [466].

153 He therefore granted Mr Williams leave to proceed with his claims, limited to declaratory relief in accordance with the findings and holdings in his judgment.

Submissions — Williams

154 Mr Williams' submissions contested the primary judge's approach to the second declaration, saying that if the reason that it was rejected was because it related to infringement of s 18(7), that was incorrect because it concerned only a breach of s 45(1) of the CM Act. He then contended that seeking a declaration that a breach of the law was unlawful had utility and was the purpose of the dialogue model underlying the HR Act.

155 In relation to the third declaration, so far as the repealed separate confinement policy was concerned, he submitted that this was closely related to the breach of s 45 and that the fact that the statutory instrument may have been repealed was "irrelevant to the merit of the plaintiff's claim". It was said that a declaration has utility as a means of vindicating the claimant's rights when relief such as mandamus or injunctive relief are unavailable.

Decision — Williams

156 Mr Williams had (and has) a common law claim for false imprisonment, which had not been stayed. That meant that whatever decision his Honour made, proceedings would remain on foot. His Honour granted leave to proceed with Mr Williams' human rights claim insofar as it related to the first declaration sought, because his lawyers had taken what his Honour found was a "not unreasonable (but ultimately incorrect)" view of the state of the law.

157 The point of the second declaration was not clear. It also related to s 45. Whilst the first declaration would identify that by breaching s 45(1) there was a breach of Mr Williams' human rights, the second declaration then sought to identify that detaining Mr Williams in breach of s 45(1) was "unlawful". Insofar as a declaration of unlawfulness was being sought, this was a step along the way to obtaining compensation pursuant to s 18(7) and was, as the primary judge found, futile because s 18(7) did not provide a cause of action. Insofar as it said, in different words, that which was in substance addressed by the first declaration, it lacked utility. Mr Williams did not explain any practical

utility of the second declaration over and above any utility of the first declaration in circumstances where s 18(7) did not provide a cause of action. Clearly enough, for the purposes of Mr Williams' cause of action, the consistency of his treatment with s 45(2) of the CM Act needed to be determined. His position would not be improved by seeking multiple declarations addressing that issue.

158 So far as the third declaration is concerned, it was open to the primary judge to conclude that it was not appropriate to grant an order permitting an extension of time in relation to a policy which was no longer in effect but allowing a claim for a declaration relating to the operation of s 45(1) which remained in effect. The decision in relation to the repealed separate confinement policy occurred in the context of the earlier decision in *Davidson* which had considered the operation of that policy.

159 The conclusions reached by the primary judge in relation to the second and third declarations were even more clearly open to him because the earlier decision in *Davidson* (at [439]):

(a) had already made a declaration that the rear courtyard of the Management Unit at the AMC did not comply with s 45 of the CM Act; and

(b) had declared the subsequently repealed separate confinement policy to be invalid because of its inconsistency with s 45.

160 No error is disclosed in the discretionary decision of the primary judge relating to Mr Williams.

Alternative contention as to the correctness of the decisions

161 The applicants contended that a decision to make an order under s 40C(3) was subject to review on the correctness standard rather than by reference to *House v The King* (1936) 55 CLR 499. This was said to arise from the decision of the High Court in *GLJ v Trustees of the Roman Catholic Church for the Diocese of Lismore* [2023] HCA 32; (2023) 97 ALJR 857 and the discussion of the standard of review at [16]-[28]. The applicants submitted that there was "conflicting appellate authority" about whether the correctness standard applied to statutory discretions about whether a claim can be brought, and referred to the decisions in *Trustees of the Christian Brothers v DZY (a pseudonym)* [2024] VSCA 73 at [96]; *Connelly v Transport Accident Commission* [2024] VSCA 20; (2024) 73 VR 257 at [38]; *Star Aged Living Ltd v Lee* [2024] QCA 1 at [95]; *Waldron v O'Callaghan* [2024] VSCA 196; (2024) 75 VR 138 at [43]-[44]. The argument was not developed by reference to the detail of those decisions, nor to the language of the statutory provision being applied in this case.

162 The applicants' submission cannot be accepted. *GLJ* and the other authorities are simply examples of circumstances in which a particular statutory formulation is such as to determine that, rather than involving the exercise of discretion, a decision which may involve a component of evaluative judgment permits of only one outcome. The intermediate appellate decisions do not represent "conflicting appellate authority", but, rather, are determinations that turn on the various different statutory contexts in which they were made. Because of their different statutory contexts, they shed little light upon the

particular statutory question in this case, namely, the power to make an order permitting the proceedings that are commenced outside the one-year limitation period in s 40C(3). The language of that power "unless the court orders otherwise" provides no standard which would provide a foundation for a single answer. The decision clearly involves the exercise of a discretion. As a consequence, the standard of review is that in *House v The King*, as applied above. To the extent that decisions of other courts on different statutory provisions are of any relevance, this conclusion is consistent with the limitation decisions referred to by the applicants, *Star Aged Living* and *Waldron v O'Callaghan*.

163 In any event, if the correctness standard was applicable (or, indeed, if a *House v The King* error was established and the discretion needed to be re-exercised), the outcome would be no more favourable to the applicants than the one which was achieved before the primary judge.

164 In relation to Mr McIver, that was because, for the reasons referred to at [143] above and in light of the subsequent Supreme Court decision and legislative amendment described at [141] above, there was no longer any significant utility in the proceedings, apart from the potential to generate a costs order for the benefit of Mr McIver's lawyers. It would not be appropriate to grant an extension of time to bring proceedings under the HR Act in those circumstances.

165 In relation to Mr Williams, having regard to the earlier decision in *Davidson*, the lack of utility in a declaration of "unlawfulness" having regard to the absence of a cause of action under s 18(7), and the declared invalidity and repeal of the earlier separate confinement policy as a result of the decision in *Davidson*, those declarations would lack utility other than as a tactical adjunct to the common law claim so as to protect Mr Williams' costs position if he was otherwise unsuccessful. Given the lack of substantive utility in the declarations, it would not be appropriate to grant an extension of time to allow them to be pursued.

Disposition

166 Having regard to the course of authority amongst single judges of the Supreme Court relating to the operation of s 18(7) and the significance of the determination of the proper interpretation of s 18(7) for the applicants' claims and the claims of other persons with proceedings currently on foot, it is appropriate to grant leave to appeal. However, each appeal must be dismissed.

Orders

167 The orders of the Court are as follows.

Proceedings ACTCA 9 of 2024 (McIver)

(1) Grant leave to appeal from the orders of the Supreme Court made on 17 April 2024.

(2) Dismiss the appeal.

(3) Direct that, unless the parties notify the Registrar of proposed consent orders in relation to costs by 17 January 2025, the parties are to exchange written submissions limited to not more than three pages and

any evidence in relation to costs by 24 January 2025 and any written submissions in reply limited to not more than two pages by 31 January 2025 and, subject to any order to the contrary, the issue of costs will be determined on written submissions.

Proceedings ACTCA 10 of 2024 (Williams)

(1) Grant leave to appeal from the orders of the Supreme Court made on 17 April 2024.

(2) Dismiss the appeal.

(3) Direct that, unless the parties notify the Registrar of proposed consent orders in relation to costs by 17 January 2025, the parties are to exchange written submissions limited to not more than three pages and any evidence in relation to costs by 24 January 2025 and any written submissions in reply limited to not more than two pages by 31 January 2025 and, subject to any order to the contrary, the issue of costs will be determined on written submissions.

Leave to appeal granted, appeals dismissed

Solicitors for the appellants: *Ken Cush and Associates*.

Solicitors for the respondent: *ACT Government Solicitor*.

DAVID ANTHONY PITTAVINO

INDEX

CRIMINAL LAW — *continued*

EQUITY

LEGAL PRACTITIONERS

STATUTES

STATUTES — *continued*

TRAFFIC LAW

WORDS AND PHRASES

WORDS AND PHRASES — *continued*