Submissions on sentencing ranges

Brin Anniwell reports on *Barbaro and Zirilli v The Queen.*

Introduction

In *Barbaro v The Queen; Zirilli v The Queen*[1] (*Barbaro*), the High Court dismissed two appeals from the Victorian Court of Appeal on sentences imposed on Mr Barbaro and Mr Zirilli (the applicants) who had both pleaded guilty to serious drug offences and were sentenced to life and 26 years imprisonment respectively. The High Court held that the prosecution is not permitted or required to make any submission on sentencing ranges.

The decision carries serious implications for prosecutors when making submissions on sentencing, and legislative reform of the court's decision has been recommended. However, the Federal Court has recognised that the decision does not prohibit the court from taking into account the submissions of the parties as to the agreed penalty amount in civil penalty proceedings.

The facts

The applicants each pleaded guilty to three counts charging offences against laws of the Commonwealth *Criminal Code 1995*, namely conspiracy to commit an offence of trafficking a commercial quantity of a controlled drug (MDMA)[2]; trafficking a commercial quantity of a controlled drug (MDMA);[3] and attempting to possess a commercial quantity of an unlawfully imported border controlled drug (cocaine)[4].[5]

Before the applicants indicated to the Commonwealth director of public prosecutions that they would plead guilty to certain charges, there were discussions between the lawyers for the applicants and the prosecution for the purpose of reaching plea agreements. During those discussions, the prosecution informed the applicants' lawyers of the 'sentencing range' that would apply to each applicant.

In the Supreme Court of Victoria, King J sentenced Mr Barbaro to a total effective sentence of life imprisonment and a non-parole period of 30 years was fixed. Mr Zirilli was sentenced to a total effective sentence of 26 years' imprisonment with a non-parole period of 18 years. The head sentences imposed on each applicant were greater that the 'sentencing range' expressed by the prosecutor.

During the sentencing hearing, King J made it clear to the prosecutor and the defence that she did not intend to ask any party what sentencing range the sentences to be imposed should fall within. Counsel for Mr Zirilli informed King J what the prosecution had said was the sentencing range for his client. Counsel then appearing for Mr Barbaro did not. The prosecutor made no submission about what range of sentences could be imposed on either Mr Barbaro or Mr Zirilli.

On appeal, the Supreme Court of Victoria Court of Appeal[6] held that King J committed no error of law in refusing to entertain a submission from the Crown on sentencing range and that the effective sentences and the non-parole periods imposed were not manifestly excessive.

The High Court appeal

The grounds of appeal before the High Court were, first, that the sentencing hearing was unfair because the sentencing judge refused to hear submissions from the prosecution about what range of sentences she could impose. Secondly, that by not hearing submissions on range of sentences, her Honour precluded herself from taking into account a consideration relevant to sentencing.

The applicants did not contend that King J made a factual or legal error in sentencing; it was not argued that the sentences imposed were manifestly excessive. However, the applicants argued that the prosecutor should have been permitted to submit to the sentencing judge that the sentences should be fixed within a range because plea agreements had been made and the matters had been 'settled' on the basis of what the prosecution had said to be its views of the available sentencing range for each applicant. Further, it was submitted that the applicants could have used these views to their advantage in the course of the sentencing hearing had the prosecution been permitted to put them forward.

The High Court granted special leave but dismissed the appeals[7], finding that the applicants were not denied procedural fairness because the sentencing judge would not receive statements of what the prosecution considered to be the bounds of the available sentencing ranges. Not receiving such a statement was not a failure to take account of some material consideration.[8]

The reasoning in the plurality judgment (French CJ, Hayne, Kiefel and Bell JJ) may be distilled into three key issues.

The distinction between judge and prosecutor

The High Court held that a statement by the prosecution of the bounds of an available range of sentence might lead to an erroneous view about its importance in the process of sentencing. As a consequence, there would be a blurring of what should be a sharp distinction between the role of the judge and the role of the prosecution in that process.[9]

In *R v MacNeil-Brown*[10], a majority of the Victorian Court of Appeal held[11] that 'the making of submissions on sentencing range is an aspect of the duty of the prosecutor to assist the court'. Accordingly, a sentencing judge could reasonably expect

the prosecutor to make a submission on sentencing range if either 'the court requests such assistance' or, 'even though no such request has been made, the prosecutor perceives a significant risk that the court will fall into error regarding the applicable range unless such a submission is made'.[12]

In *Barbaro*, the court observed that the practice that had developed from *MacNeil v Brown* assumed that the prosecution's submission on the bounds of the available range of sentences would assist the sentencing judge to come to a fair and proper result. It depended on the prosecution acting not only fairly but as a 'surrogate judge'[13], which was not the role of the prosecutor.

Consistency and the use of sentencing statistics

The High Court distinguished the setting of bounds to the available range of sentence from the proper and ordinary use in submissions of sentencing statistics and other material indicating what sentences have been imposed in other comparable cases.[14] The court acknowledged that in seeking consistency, sentencing judges must have regard to what has been done in other cases and those cases may well establish a range of sentences which have been imposed. The court noted that consistency of sentencing is important, however, what is sought is consistency in the application of relevant legal principles, not numerical equivalence[15].

Statement of opinion, not a submission of law

The plurality held that, contrary to the Victorian Court of Appeal's view in *MacNeil v Brown*, a prosecutor's submission about the bounds of an available range of sentence is a statement of opinion, not a submission of law.[16] It purports to identify the points at which conclusions of manifest excess and inadequacy arise, giving rise to an inference of appellable error in the sentencing discretion but without otherwise identifying such an error. Accordingly, a statement of bounds states no proposition of law.

Interestingly, Gaegler J found that a submission on the bounds of the available sentencing range was a submission of law, not opinion. His Honour held that:

> [i]t is a submission that a sentence within that range would or would not meet a limiting condition of the discretion conferred on the court to sentence for the offence and therefore would or would not fall within the limits of a proper exercise of the sentencing discretion. In the specific context of sentencing for a federal offence, it is a submission that a sentence within that range would or would not answer the specific statutory description in s 16A(1) of the Act of a sentence that is of a severity appropriate in all the circumstances of the offence.[17]

Practical implications

While a prosecutor is not permitted to proffer his or her view about an available range of sentence, the High Court has made it clear that the sentencing judge should be properly informed about comparable sentences. To that end, the High Court has distinguished a submission setting bounds to the available range of sentences (which impermissibly assumes responsibility for the judicial exercise of sentencing discretion) from the proper and ordinary use in a submission of sentencing statistics and other material indicating what sentences have been imposed in more or less comparable cases (which assists the judge in determining the appropriate range).[18]

The permissible scope of the prosecution's sentence submissions following *Barbaro* is that, beyond facts and comparative sentence information, the prosecutor must confine itself to addressing the relevant sentencing principles that should be applied by the court in exercising its discretion rather than making submissions as to the sentencing range that may be appropriate in the case at hand. The practical outcome of this limitation is that an accused may not rely on any agreement with or representation from the prosecutor as to the available upper range that may be put to the court when making a decision as to whether to enter a guilty plea.

The New South Wales Bar Association considers that, for a number of reasons, the judgment of the High Court will produce an unsatisfactory situation in sentencing proceedings. The Bar Association has written letters to the attorneys-general of the Commonwealth and New South Wales submitting that the decision will preclude the prosecutor, a party to sentencing proceedings, from making a submission as to the ultimate outcome of those proceedings; will limit the assistance that the prosecutor can provide to the sentencing court to avoid appealable error; is inconsistent with the guidance provided to prosecutors in Rule 93 of the *New South Wales Barristers' Rules*; and will preclude the encouragement of pleas of guilty which might result from plea negotiations where the prosecutor agrees to make a submission as to a specified sentencing range.

The Bar Association has recommended that Part 3 of the *Crimes (Sentencing Procedure) Act 1999* (NSW) and s 16A of the *Crimes Act 1914* (Cth) be amended so as to permit a prosecutor (and the offender) to make a submission as to the penalty to be

imposed for an offence and to require the court to have regard to that submission in determining the appropriate sentence.

Extension to civil penalty proceedings?

The High Court's decision in *Barbaro* has broader implications. Present practice and authority recognises a clear role for civil regulators to assist the court through submissions on the appropriate penalty. The Full Court of the Federal Court has recognised in cases such as *NW Frozen Foods Pty Ltd v ACCC*[19] (*NW Frozen Foods*) and *Minister for Industry, Tourism and Resources v Mobil Oil Australia Ltd*[20] (*Mobil Oil*) (decisions which continue to be regarded as binding authority[21]) that a regulator and respondent could jointly propose specific penalty amounts to the court and that there was a strong public interest in imposing that penalty, even if the court may otherwise have selected a different figure for itself. The court has recognised that it will be assisted by the views of the specialist body set up to protect the public interest on whether a proposed penalty will be sufficient to deter particular conduct.

Recently, Middleton J considered the application of the High Court's decision in *Barbaro* to civil penalty proceedings in *Australian Competition and Consumer Commission v Energy Australia Pty Ltd*[22]. His Honour did not consider that the High Court's decision went so far as to prohibit the court from taking into account the submissions of the parties as to the 'agreed' penalty amount in civil penalty proceedings, or that the High Court's decision implicitly overruled *NW Frozen Foods* or *Mobil Oil*.[23] His Honour noted the important differences between the criminal sentencing context and the civil penalty context, and the position of the crown prosecutors and regulators, including that a regulator does not have, and is not expected to have, the independent role and characteristics of the prosecutor.[24]

His Honour disagreed with the approach taken by Logan J in *Australian Competition and Consumer Commission v Flight Centre Limited* (No 3)[25] who assumed the correctness of the application (by analogy) of *Barbaro* to the civil penalty proceeding before him and did not take into account the ranges of penalty referred by the parties in those civil penalty proceedings.[26]

McKerracher J agreed with the reasoning of Middleton J in *Australian Competition and Consumer Commission v Mandurvit Pty Ltd*[27] accepting that parties' joint submission on the quantum of penalty addresses the primary object of civil penalties under the *Australian Consumer Law* so that the parties have informed the court of the penalty that they regard as having appropriate deterrent effect, and the reasons for that conclusion.[28]

Endnotes

1. [2014] HCA 2.
2. Contrary to ss 11.5(1) and 302.2(1) of the Criminal Code (Cth).
3. Contrary to s 302.2(1) of the Criminal Code.
4. Contrary to ss 11.1(1) and 307.5(1) of the Criminal Code.
5. Mr Barbaro admitted his guilt in respect of three further Commonwealth offences and, pursuant to s 16BA of the *Crimes Act 1914* (Cth) asked that the further offences be taken into account in passing sentence on him for the offences to which he pleaded guilty and for which he was convicted.
6. *Barbaro v The Queen; Zirilli v The Queen* [2012] VSCA 288.
7. His Honour Gageler J joined in the orders granting each application for special leave to appeal and dismissing each appeal. However, his reasons for doing so differed from the majority.
8. *Barbaro* [2014] HCA 2 at [50].
9. *Barbaro* [2014] HCA 2 at [33].
10. (2008) 20 VR 677. The first appellant in that case applied for special leave to appeal to the High Court but the application was refused: [2008] HCATrans 411.
11. (2008) 20 VR 677 at 678 [2].
12. (2008) 20 VR 677 at 678 [3].
13. Endorsing observations of Buchanan JA in McNeil-Brown at [128].
14. Barbaro [2014] HCA 2 at [40].
15. Hili (2010) 242 CLR 520 at 535 [48]-[49].
16. Barbaro [2014] HCA 2 at [42].
17. Barbaro [2014] HCA 2 at [59].
18. Para 40.
19. (1996) 71 FCR 285.
20. (2004) ATPR 41-993.
21. *Australian Competition and Consumer Commission v AGL Sales* [2013] FCA 1030 per Middleton J at [12]-[44].
22. [2014] FCA 336.
23. [2014] FCA 336 at [115].
24. [2014] FCA 336 at [140].
25. [2014] FCA 292.
26. [2014] FCA 292 at [56].
27. [2014] FCA 464.
28. [2014] FCA 464at [70].

Court of Appeal. The principle argument put by Atco below was that as the proceedings that realised the assets (which had resulted in the creation of the fund) had not been in Atco's interests, it would be unconscientious for the liquidator to retain the fund to meet his claim for an equitable lien.

The High Court identified three main grounds upon which Atco relied in the Court of Appeal to distinguish this matter from one to which the *Universal Distributing* principle should apply:[6]

- that a challenge to Atco's security was involved;
- that the proceedings were not brought to pursue Atco's interests as a secured creditor; and that the proceedings were in fact in the interests of Seeley.

In accepting those submissions, the Court of Appeal came to the view that the appropriate test was whether Atco would be acting unconscientiously if it were to receive the fund without meeting the costs of its creation.[7] The Court of Appeal accepted Atco's submission that it had not willingly participated in the creation of the fund and that it had not 'come in' to the liquidation by proving and surrendering its security, factors which should distinguish *Universal Distributing*.

The High Court found that the reference to 'com[ing] in' in *Universal Distributing* is not a technical term and simply means a secured creditor who makes a claim against a fund created by the actions of a liquidator in realising assets.[8] Moreover, the subjective intention of a liquidator in bringing proceedings to recover an asset is not relevant in applying the *Universal Distributing* principle.[9] Accordingly, Atco's resistance to, and lack of participation in the creation of the fund was not relevant to the application of the principle.

The High Court emphasised that the proper, and perhaps only, enquiry which flows from the *Universal Distributing* test is whether the remuneration the subject of the asserted lien was generated in the getting in or realisation of the assets which in turn create the fund.[10]The High Court also rejected an argument by Atco that no lien could have arisen at equity at the time of creation of the fund as the liquidator had been paid his costs and expenses under the indemnity agreement by Seeley. The court held that that argument ignored the obligation of the liquidator, under the indemnity agreement, to repay to Seeley any amount paid by it under that agreement. Similarly, Atco's argument that a clause in the indemnity agreement purporting to engage s 564 of the Corporations Act (which provides a court with power to make orders regarding the distribution of property which has been recovered under an indemnity for costs of litigation that give the creditors providing the indemnity an advantage over others, in consideration of the risk assumed by them) was held not to prevent a lien arising, because it was inapplicable to the interests of third party creditors.[11]

Ultimately, the High Court emphasised that the nature and purpose of an action brought by a liquidator to get in or realise assets, which in turn create a fund, is irrelevant to the determination of whether an equitable lien will arise in priority to a secured creditor's claim.

The liquidator's statutory duty to get in and realise assets is one which exists independently of, and is not subject to, the wishes or demands of any one or more creditors, secured or otherwise. Even to the extent that proceedings may be said to be in the interests of one creditor only (here Seeley), that *per se* will be insufficient to prevent an equitable lien arising.[12]

It remains the case that secured creditors who wish to challenge the priority of a liquidator's equitable lien will have to establish that the work carried out by the liquidator was not referable to the getting in or realisation of the assets which ultimately create the fund against which the secured creditor makes a claim. It similarly remains the case that a secured creditor laying claim to a fund created by the actions of a liquidator in realising assets will be 'coming in' to the liquidation within the meaning of *Universal Distributing*, regardless of the creditor's attitude to the conduct of the liquidator in getting in the fund.

Endnotes

1. Section 443F of the *Corporations Act 2001* (Cth) creates a statutory lien over the company's assets generally for the balance of their remuneration and properly incurred costs and expenses, but that statutory lien is subject to the priorities specified in s 556 of the Corporations Act.
2. *Shirlaw v Taylor* [1991] FCA 415.
3. *Re Universal Distributing Co Ltd (in liq)* (1933) 48 CLR 171 at 174.
4. *Atco Controls Pty Ltd v Stewart (in his capacity as liquidator of Newtronics Pty Ltd (In Liq))* unreported, Supreme Court of Victoria (Commercial and Equity Division), 20 April 2011.
5. (1933) 48 CLR 171 at 174.
6. *Stewart and Anor v Atco Controls Pty Ltd (in liq)* [2014] HCA 15 at [29].
7. Ibid., at [30].
8. Ibid., at [37].
9. Ibid., at [40].
10. Ibid., at [41].
11. Ibid., at [56].
12. Ibid., at [61].