SUPREME COURT OF VICTORIA
COURT OF APPEAL

S EAPCR 2020 0180

ANTONIOS SAJIH MOKBEL — Appellant

v

THE KING — Respondent

JUDGES:	EMERTON P, BEACH and McLEISH JJA
WHERE HELD:	Melbourne
DATE OF HEARING:	20 February 2023
DATE OF JUDGMENT:	7 March 2023
MEDIUM NEUTRAL CITATION:	[2023] VSCA 40
JUDGMENT SOUGHT TO BE VARIED:	*R v Mokbel* [2012] VSC 255 (Whelan J)

CRIMINAL LAW – Sentence – Appeal – Application to vary sentence pursuant to *Criminal Procedure Act 2009*, s 326E(3) – Sentence sought to be varied took account of conviction subsequently set aside – Whether power to vary sentence before conclusion of appeal – Whether court should exercise discretion not to vary sentence until conclusion of appeal – Power to vary sentence exercised before conclusion of appeal – Sentencing for State and Federal offences – Relevance of time spent in custody on sentence subsequently set aside – Relevance of serious head injury and consequences suffered after sentencing – Serious drug offending – TES of 30 years, with NPP of 22 years varied to TES of 26 years, with NPP of 20 years.

Criminal Procedure Act 2009, ss 326E(3) and (5); *Sentencing Act 1991*, ss 11, 16, 17 and 18; *Crimes Act 1914* (Cth), ss 16, 16A, 16E, 19, 19AB and 19AJ.

R v O'Brien (1991) 57 A Crim R 80, *R v Renzella* [1997] 2 VR 88, *R v Jennings* [1999] 1 VR 352, *Fasciale v The Queen* (2010) 30 VR 643, *DPP v Swingler* [2017] VSCA 305, discussed. *Karpinski v The Queen* (2011) 32 VR 85, *Kheir v The Queen* [2012] VSCA 13, *DPP v Moustafa* [2018] VSCA 331, *R v Hudson* (2016) 125 SASR 171, referred to.

Counsel

Applicant:	Ms J Condon KC with Mr JR Murphy
Respondent:	Ms RJ Sharp SC with Mr SP Thomas

Solicitors

Applicant:	Sarah Tricarico Lawyers
Respondent:	Ms A Hogan, Solicitor for Public Prosecutions

EMERTON P
BEACH JA
McLEISH JA:

1 Following a trial conducted in early 2006, the appellant was found guilty of one charge of being knowingly concerned in the importation into Australia of a prohibited import, a traffickable quantity of cocaine, contrary to s 233B(1)(d) of the *Customs Act 1901* (Cth). On 31 March 2006, he was sentenced by Gillard J to 12 years' imprisonment, with a non-parole period of 9 years.[1] The parties refer to this offence and sentence as 'the Plutonium offence' and 'the Plutonium sentence' respectively. Subsequently, the appellant's application for leave to appeal against his conviction and sentence was refused by this Court,[2] as was his subsequent application for special leave to appeal to the High Court.[3]

2 On 18 April 2011, the appellant pleaded guilty to two charges of trafficking a drug of dependence in an amount not less than a large commercial quantity, contrary to s 71 of the *Drugs, Poisons and Controlled Substances Act 1981*; and a further charge of incitement to import a prohibited import, contrary to s 11.4(1) of the *Criminal Code 1995* (Cth) and s 233B(1) of the *Customs Act*. The parties refer to these charges as 'the Quills charge', 'the Magnum charge' and 'the Orbital charge' respectively. The drugs of dependence involved in the Quills and Magnum charges were MDMA and methylamphetamine respectively, and the prohibited import referred to in the Orbital charge was MDMA.

3 On 3 July 2012, the appellant was sentenced on the Quills, Magnum and Orbital charges by Whelan J to a total effective sentence of 30 years with a non-parole period of 22 years, both commencing on 3 July 2012. Pre-sentence detention of 347 days was declared as already having been served under this sentence (the pre-sentence detention declared being the time the appellant spent in custody in Greece before his extradition to Australia in 2008).[4] A subsequent application for leave to appeal against conviction was refused,[5] and an appeal against sentence was dismissed, by this Court;[6] and the appellant's application for special leave was later refused by the High Court.[7]

4 At the time he was sentenced on 3 July 2012, the appellant had already served 5 years and 72 days of the Plutonium sentence (4 years and 47 days served following the imposition of the Plutonium sentence,[8] together with 390 days of pre-sentence detention declared by Gillard J).

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1 *R v Mokbel* [2006] VSC 119 ('*Plutonium Sentencing Reasons*').
2 *R v Mokbel* [2010] VSCA 11; (2010) 30 VR 115 ('*Plutonium Appeal Reasons*').
3 *Mokbel v The Queen* [2010] HCA Trans 329.
4 *R v Mokbel* [2012] VSC 255 ('*QOM Sentencing Reasons*').
5 The application for leave to appeal against conviction related to Whelan J's refusal to stay the proceedings then on foot against the appellant as an abuse of process.
6 *Mokbel v The Queen* [2013] VSCA 118; (2013) 40 VR 625 ('*QOM Appeal Reasons*').
7 *Mokbel v The Queen* [2013] HCA Trans 321.
8 The appellant commenced serving the Plutonium sentence upon his return from Greece to Australia on 17 May 2008. In the *QOM Appeal Reasons* at (2013) 40 VR 625, 646 [71], the period of time the

5 On 15 December 2020, pursuant to s 326A of the *Criminal Procedure Act 2009*,[9] this Court granted the appellant leave to appeal against conviction in relation to the Plutonium charge, allowed his appeal, quashed the Plutonium conviction and set aside the Plutonium sentence.[10] Those orders were made following a concession by the Commonwealth Director of Public Prosecutions ('the CDPP') that the Plutonium conviction could not stand.[11]

6 On 16 April 2021, notwithstanding that the appellant had served the entirety of the Plutonium sentence (12 years), this Court, by majority,[12] ordered a retrial of the Plutonium charge.[13] Three days later, the Commonwealth Director of Public Prosecutions filed a notice of discontinuance of the Plutonium proceeding.

7 Pursuant to s 326E(3), the appellant now seeks a variation of the sentences imposed upon him on 3 July 2012. Section 326E(3) provides:

> If the Court of Appeal sets aside the conviction of offence A, it may vary a sentence that —
>
> (a) was imposed for an offence other than offence A at or after the time when the appellant was sentenced for offence A; and
>
> (b) took into account the sentence for offence A.

The appellant contends that under s 326E(3), the Quills, Orbital and Magnum sentences (collectively, 'the QOM sentence') now need to be varied, as they were imposed taking into account the earlier Plutonium sentence.

8 Relying upon s 326E(5), the respondent contends that this Court does not presently have power to vary the QOM sentence because the appellant's appeal is an appeal against all of his convictions (Plutonium, Quills, Orbital and Magnum) and the appeal has not yet concluded: the appeals against the Quills, Orbital and Magnum convictions not yet having been heard. The respondent contends that s 326E(5) is the provision which gives this Court power, and that the power is not enlivened until the whole of the appellant's appeal has been heard and determined. Section 326E(5) provides:

> If at the conclusion of an appeal the appellant remains convicted of more than one offence, the Court of Appeal may either —
>
> (a) impose a separate sentence in respect of each offence; or
>
> (b) impose an aggregate sentence of imprisonment in respect of all offences or any two or more offences.

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appellant spent in custody between 17 May 2008 and 3 July 2012 is incorrectly referred to as 4 years and *57* days.

9 The provision in the *Criminal Procedure Act* which was introduced into that Act in 2019, and which permits a second or subsequent appeal to be brought in particular circumstances.

10 *Mokbel v DPP (Cth)* [2020] VSCA 325.

11 Ibid [6]–[7].

12 Beach and Osborn JJA, with Maxwell P in dissent. Maxwell P would have ordered an acquittal, rather than a retrial, because the appellant had served the entirety of the Plutonium sentence, and the events giving rise to the Plutonium charge occurred more than 20 years ago.

13 *Mokbel v DPP (Cth)* [2021] VSCA 94.

In the alternative, the respondent contends that, as a matter of discretion, this Court should not vary the QOM sentence or resentence the appellant in respect of the Quills, Orbital and Magnum charges until after the appellant's conviction appeal in relation to those charges has been finalised.

The Plutonium charge and the QOM offending

Plutonium charge

9 The Plutonium conviction and sentence (now set aside) concerned allegations that, in 2000, the appellant was knowingly concerned in the importation into Australia of a traffickable quantity of cocaine. In broad compass, it was alleged that the appellant was the principal organiser and financier of an arrangement, with four other men, to import just under 2 kilograms of pure cocaine from Mexico.[14]

Quills offending

10 The Quills offending occurred in 2005. It involved the appellant trafficking a large commercial quantity of MDMA. At the relevant time, the threshold for a large commercial quantity of MDMA (mixed) was 1 kilogram. The amount produced in the activities the subject of this offence was in excess of 30 kilograms. This offending occurred while the appellant was on bail for the Plutonium charge and a number of other drug offences.[15]

Orbital offending

11 In June 2005, the appellant undertook a series of dealings with two people he believed to be potential suppliers of MDMA from international sources, but who were in fact undercover officers of the Australian Federal Police. During the course of this offending, the appellant ordered and sought to import 100 kilograms of MDMA for a price of 800,000 euros. The threshold applicable for a commercial quantity of MDMA at that time was 0.5 kilograms. The Orbital offence was, like the Quills offence, committed by the appellant while he was on bail for other Commonwealth and State drug charges, including Plutonium.[16]

Magnum offending

12 The Magnum offending occurred between July 2006 and June 2007. This offending involved the appellant trafficking in excess of 41 kilograms of methylamphetamine. The relevant threshold for a large commercial quantity of methylamphetamine (mixed) at the time was 2.5 kilograms. The offending occurred while the appellant was on the run, having absconded from the Plutonium trial. The offending involved amounts of

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14 *Plutonium Sentencing Reasons* [2006] VSC 119, [26]–[27], [42], [79]–[80]; *Plutonium Appeal Reasons* [2010] VSCA 11; (2010) 30 VR 115, 117 [4], 118 [10], 132 [63].

15 *QOM Sentencing Reasons* [2012] VSC 255, [14]–[21].

16 Ibid [22]–[25].

money, either paid to the appellant or at his direction, in excess of $4 million. The appellant was the principal or head of the enterprise. It was his business.[17]

Does this Court presently have power to vary the QOM sentence?

13 The respondent's contention that this Court does not presently have power to vary the QOM sentence is premised on two contentions as follows: first, that on the proper construction of s 326E (and in particular sub-ss (3) and (5) thereof), this Court has no power to vary a sentence under s 326E(3) until the conclusion of an appeal; and, secondly, that the appellant's appeal has not been concluded because his application for leave to appeal against the Quills, Orbital and Magnum convictions (contained within the same document as his application for leave to appeal against the Plutonium conviction) has not yet been heard and determined. The respondent's second contention is undoubtedly true. The respondent's argument about whether this Court has power to now vary the QOM sentence under s 326E(3) of the *Criminal Procedure Act* thus turns on whether the power in that section can only be exercised after his appeal against the remaining convictions (Quills, Orbital and Magnum) has been heard and determined.

14 The question of whether s 326E (and in particular, sub-s (3) thereof) permits this Court to vary a sentence before the final hearing and determination of all of the matters raised in the one appeal proceeding depends upon the proper construction of s 326E. As has been said by the High Court on a number of occasions, when engaging in the exercise of statutory construction it is necessary to have regard to the text, context and purpose of the relevant provisions.[18]

15 By its terms, s 326E(3) permits this Court to vary a sentence which took into account a sentence imposed earlier or at the same time for another offence, if this Court has set aside the conviction for that other offence. Nothing in s 326E(3) limits the time at which this Court may vary a sentence to which sub-s (3) applies — either to 'the conclusion of [the] appeal', or at all. On the other hand, s 326E(5) deals with the situation where, at the conclusion of an appeal, an appellant remains convicted of one or more offences. In those circumstances, this Court may either impose a separate sentence in respect of each such offence, or impose an aggregate sentence in respect of any two or more such offences.

16 One difference to be noted between sub-ss 326E(3) and (5) is that the power given under sub-s (3) is one of *varying* a sentence; whereas the power given under sub-s (5) is one of *imposing* a separate sentence, or *imposing* an aggregate sentence. On a plain reading of the subsections, they deal with different matters. Moreover, it is difficult to see what application sub-s (5) could have in the present case. At the conclusion of his appeal, the appellant may 'remain convicted of more than one offence' as provided in sub-s (5). Specifically, he will remain convicted of the Quills, Orbital and Magnum offences if his application for leave to appeal against those convictions fails. However, absent some

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17 Ibid [32]–[43].

18 *Commissioner of Taxation v Consolidated Media Holdings Ltd* (2012) 250 CLR 503, 519 [39] (French CJ, Hayne, Crennan, Bell and Gageler JJ); *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue (NT)* (2009) 239 CLR 27, 46–7 [47] (Hayne, Heydon, Crennan and Kiefel JJ); *SZTAL v Minister for Immigration and Border Protection* (2017) 262 CLR 362, 368 [14] (Kiefel CJ, Nettle and Gordon JJ).

application under sub-s (3) to vary his sentence for any offence of which he remains convicted, at the conclusion of the appeal, there will not be any basis for the imposition of some other 'separate sentence' or 'aggregate sentence' as referred to in sub-s (5). If the appellant is unsuccessful appealing any or all of the QOM convictions, at the conclusion of the appeal he will remain sentenced for the offences for which he remains convicted.

17 Section 326E(1)(c) permits a court, which has set aside a conviction for one offence (offence A), to enter a judgment of conviction for another offence (offence B) in the circumstances set out therein. One potential area of operation for s 326E(5) is to permit the Court to impose a sentence for offence B if, at the conclusion of the appeal, no such sentence has been imposed. While the text of s 326E(1)(c) suggests that this Court can impose a sentence for offence B at the time it enters a judgment of conviction for that offence, it may be that sub-s (5) is capable of having application in respect of any need to impose a sentence for offence B caused by the entry of a judgment of conviction under s 326E(1)(c).

18 In any event, s 326E(5) does not provide that a sentence of the kind referred to therein may only be imposed at the conclusion of an appeal. The section merely provides that *if* at the conclusion of an appeal the appellant remains convicted of more than one offence then a separate sentence may be imposed in respect of each offence; or aggregate sentences may be imposed in respect of all, or any two or more, offences. More importantly, nothing in s 326E(5), dealing with the imposition of separate and aggregate sentences which then need to be imposed for offences for which no sentence is then in existence, puts any temporal limit on the Court's power to vary a sentence in accordance with s 326E(3).

19 Construing each of the subsections of s 326E in context, and having regard to the purpose of each of those subsections, it is plain that s 326E(5) is designed to ensure that if, at the conclusion of an appeal, there remain offences for which an appellant must be sentenced then, under s 326E(5), a sentence of the kind referred to in the subsection may be imposed. Nothing in that subsection, or s 326E more generally, limits this Court's ability to vary a sentence in the circumstances set out in s 326E(3) at any time prior to the conclusion of any appeal.

Should this Court refuse to exercise the discretionary power in s 326E(3) at this time?

20 The respondent submitted that there were two principal reasons why this Court should decline, at present, to entertain the appellant's application to vary the QOM sentence: first, in circumstances where the QOM convictions are the subject of an application for leave to appeal, resentencing is premature; and, secondly, no injustice would result because, even if the appellant was resentenced, he will not be in a position to apply for parole for a number of years. The respondent submitted that any resentencing now 'may be an inefficient use of the Court's resources for no material benefit to the appellant'.

21 If the hearing and determination of the appellant's applications for leave to appeal against the Quills, Orbital and Magnum convictions were imminent, there might be some basis for this Court to conclude that it should not expend its resources hearing a

variation application which might ultimately prove to be moot. However, that is not this case. It is clear that the appellant's applications for leave to appeal the Quills, Orbital and Magnum convictions will not be heard and determined in the near future. There are a significant number of factual matters that must be resolved in the hearing of a reference determination, ordered by this Court[19] to be conducted pursuant to s 319A of the *Criminal Procedure Act*, before this Court can hear the appellant's application for leave to appeal and any appeal in relation to the Quills, Orbital and Magnum convictions.

22 The setting aside of the Plutonium conviction and sentence gives rise to a real possibility that the QOM sentence must be varied, at least to some extent. That being so, the appellant does not currently know with any certainty when he might be eligible for parole, or when he will be eligible for final release. The appellant has been in this state of uncertainty since this Court set aside the Plutonium conviction in December 2020. Such a situation, while perhaps being one that could be tolerated for a short period of time, is not one that can now be permitted to continue.

23 Notwithstanding the possibility that the QOM convictions might be set aside and/or the appellant ultimately acquitted of those charges, thereby resulting in the QOM sentence and any variation being set aside, we are not persuaded that we should deny the appellant the opportunity to have the QOM sentence varied at this stage so that he can know the terms upon which he is currently incarcerated. The appellant will remain convicted of the Quills, Orbital and Magnum charges unless those convictions are overturned. Having regard to the substantial amount of factual disputation between the parties, which must be resolved before the appellant's application for leave to appeal and any appeal can be heard by this Court, there is no realistic prospect that the application for leave to appeal/appeal will be heard and determined before next year at the earliest.

24 In the circumstances, the appellant is entitled to have his application for a variation of the QOM sentence heard and determined by this Court now.

The QOM sentence

25 In the course of setting out the appellant's background, Whelan J referred to Gillard J's characterisation of the appellant's conduct in relation to the Plutonium offence as being at 'the highest level of criminality … that of the instigator, the organiser, the planner and the financier'.[20] His Honour then summarised the QOM offending,[21] before turning to consider:

- the appellant's heart condition, which had resulted in him suffering a mild heart attack in custody in February 2012;[22]

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19 *Mokbel v The Queen* [2022] VSCA 83.
20 *QOM Sentencing Reasons* [2012] VSC 255, [13].
21 Ibid [15]–[43].
22 Ibid [49]–[62].

- the conditions in which the appellant was then incarcerated;[23] and
- the appellant's pleas of guilty.[24]

26 Whelan J accepted expert evidence that, on average, a person with heart disease of the appellant's age at the time of sentencing had a life expectancy of 24 further years, which was 11 years less than the life expectancy of a person without that condition.[25] His Honour expressly took that matter into account,[26] and accepted that imprisonment would be a greater burden on the appellant because of his coronary heart disease.[27]

27 With respect to the conditions in which the appellant was incarcerated, his Honour noted that one feature of those conditions was social isolation.[28] His Honour also noted an expert opinion that, while the appellant had shown 'a remarkable degree of psychological resilience' prior to his sentencing, at the time of sentencing the appellant was experiencing a range of physical manifestations of anxiety'.[29] His Honour concluded that the appellant's incarceration represented 'a serious risk of a gravely adverse effect on [the appellant's health] because depression and social isolation [were] risk factors for the development of coronary heart disease'.[30]

28 Whelan J dealt in some detail with the appellant's pleas of guilty. He did not accept the proposition that the pleas were early pleas. However, he accepted that the pleas had 'a high utilitarian value',[31] noting that if the appellant had not pleaded guilty there would have been 'at least two long and complicated criminal trials which would necessarily have entailed the expenditure of very considerable resources'.[32] The judge, however, noted that an application made by the appellant to change his plea,[33] which was an application that was heard over 18 days between October 2011 and March 2012, reduced 'to some extent, not to a great extent but to some extent, the utilitarian value of [the appellant's] pleas'.[34]

29 On the issue of remorse, his Honour said that he was unpersuaded of the appellant's remorse because of the nature and duration of his offending and in particular because of the circumstances of the Magnum offence.[35] His Honour then said:

> You have offended over a number of years. You were not deterred from that course even though you had previously spent time in jail. You were not deterred by being arrested and charged. You were not deterred by the imposition of bail conditions. You were not deterred by your conviction and sentence. Your

23 Ibid [59].
24 Ibid [63]–[68].
25 Ibid [53].
26 Ibid [62].
27 Ibid [57].
28 Ibid [59].
29 Ibid.
30 Ibid.
31 Ibid [65].
32 Ibid.
33 *R v Mokbel (Change of Pleas)* [2012] VSC 86.
34 *QOM Sentencing Reasons* [2012] VSC 255, [65].
35 Ibid [68].

> offences and the *Magnum* telephone intercepts reveal to me that drug trafficking was your business. It was your area of expertise. It was your career. Things have not turned out as you planned, and no doubt you now regret that, but to describe such feelings of regret as remorse is, I think, misconceived.
>
> Notwithstanding those conclusions, your expressions of contrition are in themselves something to be taken into account in your favour. Those statements and the other matters relied upon are insufficient to enable a finding of genuine remorse, acceptance of responsibility and a desire to facilitate the course of justice.[36]

30 In relation to the circumstances of the appellant's incarceration, Whelan J noted that, since the appellant's return to Australia, he had been in custody in the Acacia Unit at Barwon Prison. His Honour described the Acacia Unit as a high security unit, saying that those in custody in that unit are subjected to a 'harsh regime' — it being harsh because it is 'confined and socially isolated'.[37] His Honour noted that the appellant might be 'reclassified' at some later date, before saying, 'but given your history and your associations, you may well continue to serve your sentence under a more restrictive regime than is usual'. His Honour said that there was a 'real possibility that [the appellant would] continue to be held in very restrictive circumstances for an indefinite period', and that this was 'a significant mitigating factor in [his] case'.[38]

31 His Honour noted that, on the two State offences, Quills and Magnum, the appellant fell to be sentenced as a serious drug offender; noting that he was therefore required to regard the protection of the community as the principal purpose for which those sentences were to be imposed. His Honour observed that those sentences must, unless otherwise directed, be served cumulatively on any other sentence.[39]

32 With respect to the Quills offence, Whelan J noted that it was committed while the appellant was on bail — meaning that a term of imprisonment imposed for that offence must, unless otherwise directed, be served cumulatively on any other sentence.[40] His Honour said that the Magnum offence, while not committed when the appellant was on bail (because his bail had been revoked after he had absconded from the Plutonium trial and a warrant for the his arrest had been issued), was committed after the appellant had breached his bail and been convicted for the Plutonium offence.[41]

33 Whelan J said that he was mindful of the need 'to have regard to the principles of totality, taking into account the sentence [the appellant] was already serving', namely, the Plutonium sentence. His Honour said, however, that he could not allow considerations of totality 'to undermine the legislative policy inherent in the relevant provisions concerning cumulation'.[42]

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36 Ibid [69]–[70].
37 Ibid [72].
38 Ibid [73].
39 Ibid [76].
40 Ibid [77].
41 Ibid [78].
42 Ibid [82].

34 His Honour said that he had given very serious consideration to imposing a life sentence on the Magnum offence, saying that the appellant's commission of that offence revealed 'arrogant contempt for the law, and an incorrigible determination to persist in serious business-like drug trafficking regardless of the circumstances or possible consequences'.[43] His Honour said that he was persuaded not to fix a life sentence because the utilitarian value of the appellant's plea should be reflected in the sentence itself, and not just the non-parole period; and that he was not permitted to speculate as to the appellant's prospects of parole.[44]

35 At the conclusion of the *QOM Sentencing Reasons*, Whelan J:

- sentenced the appellant on Orbital, to 6 years' imprisonment, commencing on the expiry of the Plutonium non-parole period, and fixed a new Federal non-parole period of 6 years 9 months and 19 days commencing on 3 July 2012 in respect of Orbital and Plutonium;
- sentenced the appellant on Quills, to 13 years' imprisonment;
- sentenced the appellant on Magnum, to 20 years' imprisonment;
- directed that 7 years of the sentence on Magnum be served concurrently with the sentence on Quills, making a total effective State sentence of 26 years;
- directed that the State sentences commence 2 years, 9 months and 16 days before the expiration of the new Federal non-parole period; and
- fixed a non-parole period on the State sentences of 18 years, commencing on the commencement of those sentences (being 2 years, 9 months and 16 days before the expiry of the new Federal non-parole period).[45]

36 Additionally, his Honour declared the period of time which the appellant had been in custody in Greece (347 days) as pre-sentence detention pursuant to s 18 of the *Sentencing Act 1991*.

37 The effect of Whelan J's sentences was the imposition of a total effective sentence of 30 years' imprisonment, and a total effective non-parole period of 22 years, with the appellant not being eligible for parole on the State sentences 'until the expiration of 22 years from [3 July 2012], less the period of pre-sentence detention … [of] 347 days'.[46]

Varying the QOM sentence: parties' submissions

Appellant's submissions

38 The appellant submitted that the 'invalidation' of the Plutonium conviction and sentence warranted the variation of the QOM sentence. He submitted that the setting aside of the Plutonium conviction and sentence had the following consequences:

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43 Ibid [86].
44 Ibid.
45 Ibid [96]–[102]. See also *QOM Appeal Reasons* (2013) 40 VR 625, 658–9, Appendix B.
46 *QOM Appeal Reasons* (2013) 40 VR 625, 646 [72].

(1) First, the setting aside of the Plutonium sentence meant that the appellant has served 'dead time', which he contended amounted to 9 years.

(2) Second, the QOM sentence was imposed on the basis that the appellant was a serious drug offender in relation to both Quills and Magnum. The setting aside of the Plutonium conviction and sentence means that the appellant can only be sentenced as a serious drug offender on one of the two State offences, Magnum.

(3) Third, the Plutonium conviction and sentence informed the QOM sentence. The appellant submitted that Whelan J's reference to the appellant having an 'incorrigible determination to persist in serious business-like drug trafficking',[47] 'must have been based on the fact that the Magnum offending came after the Plutonium conviction and sentence'. His Honour also observed that the Plutonium conviction, while not being a prior conviction so far as Quills was concerned, was 'relevant to s 5(2)(f) and s 6 of the *Sentencing Act* … in relation to Quills'.[48] As to the Orbital sentence, his Honour explained that the Plutonium conviction was 'relevant to s 16A(2)(m) of the *Crimes Act 1914*'.[49]

39 The appellant thus submitted that, from the QOM sentencing reasons, it could be seen that the Plutonium conviction and sentence affected the QOM sentence by enhancing the significance of specific deterrence, retribution and community protection; by diminishing the assessment of the appellant's prospects of rehabilitation; and by casting doubt on whether the appellant was in any way contrite in respect of the QOM offending.

40 The appellant submitted that there were four other 'changes in circumstances' which warrant the variation of the QOM sentence, namely:

(1) First, the appellant suffered a serious assault on 11 February 2019, from which he sustained a serious brain injury. The appellant relied upon a number of expert reports which describe the extent of the appellant's injury, its course, the extent to which the appellant has made a recovery and the current consequences of the injury. In short, the appellant was in a coma for 24 days following the assault. While he has made a 'remarkable' recovery, that recovery is incomplete, and he continues to have a range of neurological symptoms. The appellant submitted that, amongst other consequences, it may readily be inferred that the appellant's experience in custody has been, and will continue to be, more burdensome by reason of his injuries. Moreover, his recovery has been, and will continue to be, hampered by him being in prison rather than in the community.

(2) Second, the appellant submitted that his placement and management in prison since his assault has been, and is likely to continue to be, detrimental to his wellbeing. The appellant relied upon various documents showing that his conditions of imprisonment are significantly more burdensome than they would be if he were in the mainstream prison population. Most recently, the appellant has informed those assessing him that he spends in the order of 20 hours alone

47 *QOM Sentencing Reasons* [2012] VSC 255, [86].
48 Ibid n 4.
49 Ibid.

in his cell on most days, and that he has 30 minutes of social contact with one other inmate during periods when he is released from his cell. The lack of social contact has, in and of itself, been an impediment to his recovery from the serious brain injury that he suffered.

(3) Third, the impact of the COVID-19 pandemic resulted in imprisonment being considerably more burdensome than normal for those who are incarcerated during the pandemic.

(4) Fourth, the appellant's coronary heart disease resulted in him suffering 'a heart attack on 31 March 2022, followed by a "mini heart attack" on 1 April 2022', after which the appellant underwent stent surgery. The appellant submitted that the materialisation of the risk of further heart attacks (a risk which was recognised by Whelan J) warrants a greater degree of mitigation than was available on the evidence when the original QOM sentence was imposed.

Respondent's submissions

41 The respondent submitted that any dead time caused by the setting aside of the Plutonium conviction and sentence should not lead to any variation of the QOM sentence for the following reasons:

(1) First, the QOM offending was different from the Plutonium offending. In this regard, the respondent noted the different time periods of the offending, the different charges the appellant faced, and the fact that there were different co-offenders involved in each matter.

(2) Second, the Plutonium conviction was set aside because of the CDPP's concession that there had been a substantial miscarriage of justice. It was, however, never suggested that there was a lack of sufficient evidence to support the appellant's conviction on the Plutonium charge. Specifically, in the course of resisting an order that the appellant be retried on the Plutonium charge, the appellant did not dispute the fact that there was admissible evidence given in the original trial which was sufficiently cogent to justify conviction. Moreover, he advanced no reason for doubting Gillard J's characterisation of the Crown case in Plutonium as 'compelling and overwhelming'.[50] The appellant was not retried on Plutonium because he had already served the entirety of his sentence. This was distinguishable from dead time of the kind referred to in *R v Renzella*.[51] The appellant has already received the benefit of the so-called dead time — being that he is no longer liable to be convicted for an offence, the evidence of which was described as 'compelling and overwhelming'.[52]

(3) Third, any sentence variation in relation to Orbital is governed by the provisions of the *Crimes Act 1914*, and in particular s 16A. Properly construed, those provisions do not permit the *Renzella* discretion to be taken into account in

50 *Mokbel v DPP (Cth)* [2021] VSCA 94, [55].
51 [1997] 2 VR 88 ('*Renzella*').
52 *Plutonium Sentencing Reasons* [2006] VSC 119, [26]; *Plutonium Appeal Reasons* (2010) 30 VR 115, [22]–[24], [28].

varying the sentence imposed for the Orbital offence (assuming, in the appellant's favour, that the discretion is otherwise engaged).

42 The respondent accepted that the Plutonium conviction was a matter taken into account by Whelan J when he imposed the QOM sentence. It contended, however, that the effect of the Plutonium conviction 'should not be overstated'. Other aggravating factors taken into account by Whelan J included:

- the appellant had previously served a term of imprisonment in 1992 for doing an act tending and intended to pervert the course of justice;[53]
- the QOM offending resulted from separate and distinct criminal enterprises, committed at different times in respect of different drugs, and it occurred over a number of years;
- the Quills and Orbital offending was committed while the appellant was on bail;
- the Magnum offending was committed when the appellant was a fugitive, and was used to fund his continuing evasion of the authorities;
- each of the offences involved a quantity significantly greater than the relevant threshold quantity: in Quills, more than 30 times the large commercial quantity; in Orbital, 200 times the commercial quantity; and in Magnum, more than 16 times the large commercial quantity.

43 The respondent submitted that the appellant's character was not assessed by Whelan J purely by reference to the Plutonium conviction. His Honour's reasons for sentence disclose a history of the appellant which, absent Plutonium, more than justified his Honour's unfavourable conclusions about the appellant and his roles in the Quills, Orbital and Magnum offending.

44 In answer to the appellant's submission that the existence of the Plutonium conviction played a part in the judge 'casting doubt on the appellant's contrition', the respondent submitted that there was no basis upon which Whelan J could conclude, and no basis upon which this Court could now conclude, that there was any element of contrition on the part of the appellant in respect of his offending.

45 The respondent characterised the appellant's submissions regarding his assault and subsequent brain injury, his management in custody, the impact of COVID-19 and his coronary heart disease as amounting to a submission that imprisonment will be a greater burden on the appellant than it would otherwise have been. The respondent accepted that where there was a 'significantly greater burden', then that was a matter which could be taken into account as a mitigating factor. While the respondent accepted that the appellant's brain injury in custody was significant, it contended that 'neither [his] placement and management in prison nor the developments in relation to his heart disease should have a significant impact on the sentence to be imposed [scil, as varied]'.

46 In relation to the burden on the appellant caused by his coronary heart disease, the respondent observed that Whelan J had accepted that imprisonment would be a greater

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53 *QOM Sentencing Reasons* [2012] VSC 255, [11].

burden on the appellant because of his coronary heart disease, and that the appellant would suffer from an attendant level of anxiety in relation to his health.[54]

47 In relation to the appellant's placement and management in custody, the respondent submitted that Whelan J had sentenced the appellant on the basis that he was held under a regime that was 'harsh because it is confined and socially isolated', and that the appellant may well continue to serve his sentence under a more restrictive regime than is usual, possibly indefinitely.[55] Additionally, the respondent relied upon an affidavit sworn by Jennifer Ann Hosking, the Assistant Commissioner, Sentence Management Division of Corrections Victoria, in which Ms Hosking summarised the circumstances of the appellant's custody from the time when he was first received at Barwon Prison on 17 May 2008 until February 2023.

Sentencing for State and Federal offences

48 Before coming to the question of what (if any) variation should be made to the QOM sentence, it is necessary to say something about the difficulties involved in sentencing (or varying sentences) where both State and Federal offences fall for consideration. Some of the 'very real difficulties' in such cases were identified by this Court in *DPP v Swingler*.[56]

49 That said, it is well established that when sentencing for both State and Federal offences, separate sentences have to be imposed. While cumulation and concurrency for State offences is ordinarily dealt with by fixing a base sentence and making orders for cumulation, cumulation and concurrency in relation to Federal offences are dealt with by making orders differentiating the dates upon which the particular Federal sentences are to commence. Putting to one side s 16(4) of the *Sentencing Act* (to which we will return), generally speaking, State sentences commence on the day on which they are imposed.[57] Additionally, it is not possible to fix a single non-parole period in relation to both State and Federal sentences. If a non-parole period is required, a separate such period must be fixed for the State sentences, and another for the Federal sentences, with the commencement dates of both being identified. Finally, in sentencing an offender in respect of State and Federal offences, there can be no gaps, either between periods of incarceration, or between a Federal non-parole period and a State non-parole period.[58]

50 In *Swingler*, this Court identified three approaches a sentencing judge might take when sentencing for State and Federal offences as follows:

> 1. The judge can simply sentence for each offence on the indictment, in the order in which each offence is listed. He or she can then differentiate

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54 Ibid [57].

55 Ibid [72]–[73].

56 See *DPP v Swingler* [2017] VSCA 305 (Ferguson CJ, Maxwell P and Weinberg JA), [63]–[82] ('*Swingler*'). See further, *R v O'Brien* (1991) 57 A Crim R 80 (Crockett, McGarvie and Phillips JJ) ('O'Brien'). See also *Burbridge v The Queen* [2016] NSWCCA 128, [45] (per Rothman J, with whom MacFarlan JA and Bellew J agreed); *Hayes v The Queen* [2017] VSCA 285, [57].

57 See s 17(1) of the *Sentencing Act* and *R v Jennings* [1999] 1 VR 352 ('*Jennings*').

58 See ss 16E, 19, 19AB and 19AJ of the *Crimes Act 1914*; ss 11, 16, 17 and 18 of the *Sentencing Act*; *O'Brien* (1991) 57 A Crim R 80; *Jennings* [1999] 1 VR 352; *Fasciale v The Queen* (2010) 30 VR 643 (Ashley and Weinberg JJA) ('*Fasciale*').

between them by making orders as to cumulation or concurrency with regard to the State offences and orders as to commencement with regard to the Commonwealth offences. The sentencing judge adopted that approach in the present case but, as can be seen, it was not an unqualified success.

2. The judge can group all the State offences together, and first sentence upon them individually. This has the advantage of enabling the sentences for the Commonwealth offences to be directed to commence at, for example, the expiration of the relevant State non-parole period. That avoids any gap in the custodial term, and seemingly simplifies the process, by ensuring that relevant rules as to cumulation and concurrency are applied appropriately, and within the proper sphere of each sentencing regime.

3. The judge can group all the Commonwealth offences together, and deal with them first. This potentially gives rise to the difficulty that State offences ordinarily operate from the date of sentence, as per s 17(1) of the *Sentencing Act*. They cannot, as a general proposition, be made to commence at the expiration of a Commonwealth sentence, subject only to s 16(4).[59]

51 For completeness, we note that when referring to the fact that a sentence of imprisonment for a State offence ordinarily commences on the day that it is imposed, the Court in *Swingler* observed that, in *O'Brien*,[60] the Court of Criminal Appeal held that a 'somewhat differently worded legislative precursor to s 17(1) [of the *Sentencing Act*] enabled a State sentence to be imposed cumulatively upon a Commonwealth sentence'. In *Swingler*, however, the question of whether the reasoning in *O'Brien* could be extended to the language of the current s 17(1) was a matter which it was said might have to be addressed on another occasion, and after full argument. In the present case, no party sought to submit that the reasoning in *O'Brien* permitted this Court to delay the commencement of a State sentence in circumstances other than those set out in s 16(4) of the *Sentencing Act*. While the matter was not the subject of any argument before us, it seems to us that, as presently worded, ss 16 and 17 of the *Sentencing Act* do not permit the commencement of a State sentence to be deferred other than in the circumstances set out in s 16(4).

52 Section 16(4) of the *Sentencing Act* relevantly provides:

> A court that imposes a term of imprisonment for an offence against the law of Victoria on a person already undergoing a sentence or sentences of imprisonment for an offence against the law of the Commonwealth must direct when the new term commences which must be no later than immediately after—
>
> (a) the completion of that sentence or those sentences if a non-parole period or pre-release period (as defined in Part 1B of the *Crimes Act 1914* of the Commonwealth) was not fixed in respect of it or them; or
>
> (b) the end of that period if one was fixed.

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59 *Swingler* [2017] VSCA 305, [78] (footnotes omitted).
60 (1991) 57 A Crim R 80.

It was this section which permitted Whelan J to direct that the sentences he imposed on Quills and Magnum (the total effective State sentence, and the State non-parole period) commence 4 years after he imposed the QOM sentence.[61] Whelan J was able to sentence in this way because, within the terms of s 16(4) of the *Sentencing Act*, the appellant was 'already undergoing a sentence of imprisonment for an offence against the law of the Commonwealth', namely, the Plutonium sentence.

53 As the circumstances in *Swingler* demonstrated, the first of the three methods identified by the Court is not a realistic option. In reality, and perhaps dependent upon the circumstances of the case, only options 2 and 3 are likely to produce a result that possibly conforms with the relevant provisions of both the *Crimes Act 1914* and the *Sentencing Act*. In *Swingler*, the Court first considered option 3, before turning to option 2. We propose to take the same approach.

Option 3

54 In considering option 3, the first matter that requires consideration is whether s 16(4) of the *Sentencing Act* would permit this Court to direct that the commencement of any State sentence be deferred. Such a course could only be permitted under s 16(4) if this Court made orders in such a way that, when it varied the Quills and/or Magnum sentences, the appellant was 'already undergoing' a sentence in respect of Orbital within the meaning of s 16(4). In *Swingler*, the Court doubted whether s 16(4) could be held to have application in a case where an offender was sentenced on a joint Commonwealth/State indictment.[62] That said, one way of possibly overcoming this difficulty in the present case might be for this Court not to vary the Orbital sentence in any way (whatever variations we might make to the Quills and Magnum sentences) so that it could be said that, at the time of varying the Quills and/or Magnum sentences, the appellant was 'already undergoing' the Orbital sentence.

55 For the reasons given by the Court in *Swingler*,[63] in the absence of the Plutonium sentence which the appellant was serving at the time the QOM sentence was imposed, we doubt that s 16(4) of the *Sentencing Act* would have permitted Whelan J to defer the sentences imposed by his Honour in respect of the Quills and Magnum offending. Similarly, on the assumption that any variation of the Quills and/or Magnum sentences made by this Court operates from the day Whelan J imposed sentence (3 July 2012),[64] it is doubtful that s 16(4) could be given any application by this Court.

56 Moreover, even if this Court left the Orbital sentence completely untouched, and simply varied the Quills and/or Magnum sentences, the Orbital sentence was a sentence of six years' imprisonment, commencing at the expiration of the Plutonium non-parole period. That sentence was served in its entirety some years ago. So far as s 16(4) of the *Sentencing Act* is concerned, it could not be said that, at the time this Court orders any variation of the Quills and/or Magnum sentences, the appellant was 'a person already

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61 Or, in the terms of his Honour's order, 2 years, 9 months and 16 days before the expiration of the new Federal non-parole period imposed by him.

62 *Swingler* [2017] VSCA 305, [79]–[81].

63 Ibid.

64 *Jennings* [1999] 1 VR 352.

undergoing a sentence or sentences of imprisonment for an offence against the law of the Commonwealth'.

57 It follows that, like the court in *Swingler*, we are driven to consider option 2.

Option 2

58 Under option 2, a sentencing judge groups all the State offences, sentences them individually, makes orders for cumulation (creating a total effective State sentence) and fixes a State non-parole period, before dealing with the Federal sentences, the first of which needs to commence no later than the expiration of the State non-parole period. For example, using the figures fixed by Whelan J, the total effective State sentence was 26 years, with a State non-parole period of 18 years, upon which one would order the Federal (Orbital) sentence to commence at the expiration of the 18 year State non-parole period. Assuming a separate Federal non-parole period, for Orbital, of four years, this would produce a total effective sentence for Quills, Orbital and Magnum of 26 years, with a total non-parole period of 22 years — to be contrasted with the total effective sentence imposed by Whelan J of 30 years, with a total non-parole period of 22 years.

59 The above example discloses that, even when using a method that has been held to be compliant with the relevant statutory provisions, there is the potential for unsatisfactory outcomes when sentencing for State and Federal offences at the same time. In a case where the State sentence is relatively lengthy with a long parole period, and the Federal offence attracts a short term of imprisonment (which must commence no later than the conclusion of the State non-parole period), the entirety of the Federal sentence will likely be served concurrently with the total effective State sentence. Whether such an outcome is appropriate in particular circumstances will depend upon whether the sentence ultimately imposed, together with any increase to the total non-parole period caused by the addition of any separate Federal non-parole period, is 'sufficient to encompass the entire criminality associated with both the State and Commonwealth offences'.[65]

60 Notwithstanding some of the difficulties associated with adopting option 2, in the circumstances of the present case, we think it offers the best possibility that any variation ordered by this Court will be made in conformity with the relevant provisions of both the *Crimes Act 1914* and the *Sentencing Act*.

Should the QOM sentence be varied?

61 The appellant relies upon the setting aside of the Plutonium sentence, the 2019 assault, his placement and management in custody, the COVID-19 pandemic, and the progression of his coronary heart disease, as all being matters justifying a variation of the QOM sentence. The respondent does not dispute that, on the variation application, this Court can take into account significant matters that have occurred since sentencing, and which were not anticipated at the time of sentencing. Neither side, however, suggested that, in varying the QOM sentence, s 326E(3) of the *Criminal Procedure Act*

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65 *Fasciale* (2010) 30 VR 643, 648 [33].

required this Court to sentence afresh, as when this Court sets aside a sentence for error and then imposes the sentence it considers appropriate.[66]

The setting aside of the Plutonium conviction and sentence

62 In accordance with *Jennings*,[67] any variation of the QOM sentence conducted in accordance with the statutory provisions to which we have already referred will result in whatever total sentence is imposed, commencing on 3 July 2012. It follows that this Court would, pursuant to s 18 of the *Sentencing Act*, declare that the period which the appellant had served from that date (3 July 2012) to the date of this Court's order, together with the 347 days declared by Whelan J, is pre-sentence detention already served under the varied QOM sentence. On that basis, as explained in [4] above, the so-called dead time served by the appellant referrable to the impugned Plutonium conviction is 5 years and 72 days.

63 Contrary to the respondent's submissions, the principles in *Renzella* can have application in circumstances where the offending giving rise to the sentence in respect of which dead time is claimed, was unrelated to the offending for which the offender is being sentenced.[68] However, as the authorities in this area have also made clear,[69] the period treated as relevant to dead time should not be approached with 'mathematical precision'. In *Karpinski*, it was noted that the more recent approach has been to allow something less than the entire period of pre-sentence detention, and certainly it is not necessary to credit the whole of that period.[70]

64 Next, we reject the respondent's submission that the *Renzella* discretion should not be exercised by this Court because the principal reason the appellant was not retried on Plutonium was because he had already served the entirety of that sentence, noting that the case against the appellant on the Plutonium charge was 'compelling and overwhelming'. The Plutonium conviction was set aside because, as was conceded by the CDPP, there was a substantial miscarriage of justice. The time the appellant spent in custody solely attributable to the Plutonium sentence was thus time which cannot be justified by reference to any conviction or sentence imposed on the appellant. In those circumstances, the fact that the Crown case on the Plutonium charge might have had real strength cannot disentitle the appellant from having this Court give appropriate consideration to exercising the *Renzella* discretion.

65 Finally (on the issue of dead time), we would reject the respondent's submission that the *Renzella* discretion has no application when sentencing for Federal offences. While s 16A(1) of the *Crimes Act 2014* requires a court to impose a sentence for a Federal offence that is 'of severity appropriate in all the circumstances of the offence', and s 16A(2)(k) obliges a court sentencing for a Federal offence to take into account 'the

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66 See s 282(1)(a) of the *Criminal Procedure Act*; and *Kentwell v The Queen* (2014) 252 CLR 601, 617–8 [40]–[42].

67 [1999] 1 VR 352.

68 See *Karpinski v The Queen* (2011) 32 VR 85, 100 [60] ('*Karpinski*').

69 See, for example, *Kheir v The Queen* [2012] VSCA 13, [16]–[18]; *DPP v Moustafa* [2018] VSCA 331, [83] ('*Moustafa*').

70 *Karpinski* (2011) 32 VR 85, 103 [73]; *Moustafa* [2018] VSCA 331, [83].

need to ensure that the person is adequately punished for the offence', these sections do not require a court to disregard matters personal to an offender. Indeed, s 16A(2)(m) requires a court sentencing on a Federal offence to take into account, among other things, the offender's 'antecedents'. There is no reason for thinking that an offender's antecedents would not, in an appropriate case, include time served on a sentence subsequently set aside.[71]

66 In any event, given that there are two State offences (Quills and Magnum), both of which gave rise to sentences which were longer than the sentence imposed on the Federal offence (Orbital), any exercise of the *Renzella* discretion in the present case can be accommodated by the alteration of one or more of the elements of the State offences, without the need to specifically take dead time into account in respect of the Federal offence.

67 While there is some force in the appellant's submissions that Whelan J regarded the offences for which he sentenced the appellant as being more serious than they might otherwise have been (and in particular, the offending in Magnum, which came after the appellant absconded from the Plutonium trial) because the appellant had been found guilty of committing the Plutonium offending, and that matters personal to the appellant were viewed less favourably to the appellant because he had committed the Plutonium offending, the respondent was correct to submit that the effect of the Plutonium conviction on the QOM sentence should not be overstated. The aggravating matters relied upon by the respondent in respect of the Quills, Orbital and Magnum offending were matters of real substance on their own. At the risk of repetition, they included that:

- Quills and Orbital were committed while the appellant was on bail; and
- Magnum was committed after the appellant had breached bail, and his bail had been revoked, and while he was on the run and a fugitive from justice.

68 Notwithstanding the now absence of the Plutonium conviction, it is to be remembered that the QOM offending was, as this Court put it when it dismissed the appellant's appeal against the QOM sentence, of the 'very highest order', calling for 'severe punishment' and 'emphatic denunciation'.[72]

The assault and the appellant's placement/management in custody

69 It is not necessary for us to describe in any detail the material tendered on this application concerning the consequences of the 2019 assault and the details of the appellant's management and placement in custody since that time. It is sufficient to observe that the head injury suffered by the appellant was a serious one with ongoing consequences. The appellant's injuries and their consequences have made the burden of his incarceration over the last four years greater than it would otherwise have been, both by reason of the actual physical and psychological consequences of the assault, and also

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71 See *R v Hudson* [2016] SASCFC 60; (2016) 125 SASR 171, 178 [16], where Nicholson J (with whom Parker and Lovell JJ) agreed said:

> The consideration in (m) embraces an offender's personal circumstances. In particular, the notion of 'antecedents' is broad enough to pick up any period spent on home detention bail.

72 *QOM Appeal Reasons* (2013) 40 VR 625, 652 [104].

because of the concomitant alteration in the appellant's placement and management in custody, and the effect of that placement and management on his recovery from his brain injury. Those changed circumstances, including the likely ongoing effects of the assault on the appellant, need to be taken into account in the appellant's favour in any variation of the QOM sentence.

The COVID-19 pandemic

70 The appellant was sentenced on 3 July 2012. The effects of the COVID-19 pandemic (which started in this country in early 2020) will, at least to some extent, have made the burden of the appellant's incarceration during the period of the pandemic, greater than it would otherwise have been — notwithstanding Whelan J's conclusion on sentencing that the regime under which the appellant was then being held was harsh, and that there was a real possibility that he would continue to be held in 'very restrictive circumstances for an indefinite period'.[73] While the period of the COVID-19 pandemic is a relatively small fraction of the QOM sentence, in our view, some regard should be had to it in any variation of the QOM sentence.

The progress of the appellant's coronary heart disease

71 We accept the respondent's submission that little (if any) regard should be had by this Court to what the appellant describes as the progress of his coronary heart disease. In our view, this issue was well accounted for in the original QOM sentence. We are not persuaded that the heart attacks suffered by the appellant while in custody represent anything more than the continuance of the condition taken into account by Whelan J when his Honour imposed the QOM sentence.[74]

What variation of the QOM sentence should be made?

72 The QOM sentence was imposed after, and took into account, the Plutonium sentence. The setting aside of the Plutonium conviction and sentence resulted in the appellant's time in custody between 17 May 2008 and 2 July 2012 and the 390 days of pre-sentence detention declared by Gillard J being dead time within the meaning of *Renzella*.[75] The QOM sentence should be varied to take into account the setting aside of the Plutonium conviction and sentence, both in terms of dead time and on the basis that the alleged Plutonium offending is no longer part of the appellant's background circumstances. In varying the QOM sentence, this Court should also have regard to: the serious assault perpetrated upon the appellant in 2019 and its consequences; the more restrictive conditions of the appellant's incarceration following the assault and the effect of that restrictive regime on his recovery from the assault; and the effects of the COVID-19 pandemic on conditions in custody.

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73 *QOM Sentencing Reasons* [2012] VSC 255, [72]–[73].
74 Ibid [50]–[62].
75 [1997] 2 VR 88.

73 While Whelan J was mindful of the need to have regard to the principles of totality, taking into account the Plutonium sentence,[76] we note that his Honour said that he '[could] not allow considerations of totality to undermine the legislative policy inherent in the relevant provisions concerning cumulation'.[77] In the result, we are not persuaded that there was any substantial compression of the QOM sentence that now requires a variation of sentence which is adverse to the appellant.

74 We should note that the appellant was sentenced by Whelan J on the basis that his pleas of guilty had a 'high utilitarian value'.[78] It might be said that the appellant's application for leave to appeal against the Quills, Orbital and Magnum convictions (an application that has expended, and will continue to expend, a not insignificant amount of court time and resources) diminishes, at least somewhat, the utilitarian value of the original pleas of guilty. On this issue, however, we would take the same approach that Whelan J took in relation to the appellant's application to change his plea prior to being sentenced for the Quills, Orbital and Magnum offences: namely, that the time and resources expended by the application for leave to appeal the Quills, Orbital and Magnum convictions 'does reduce to some extent, not to a great extent but to some extent, the utilitarian value of [the] pleas',[79] and that some regard (albeit limited) should be given to that matter.

75 In the result, we would vary the QOM sentence as follows:

- The individual sentences imposed on the Quills, Orbital and Magnum charges will not be varied. The appellant will remain sentenced to 13 years, six years and 20 years' imprisonment on each of those charges respectively.
- The declaration that the appellant was sentenced as a serious drug offender in respect of the State offences is varied so as to declare that he has been sentenced as a serious drug offender only in respect of the Magnum offence.
- The order that seven years of the sentence on the Magnum offence be served concurrently with the sentence on Quills, making a total effective State sentence of 26 years will not be varied, nor will the State non-parole period of 18 years. Consistently with this Court's decision in *Jennings*,[80] we note (without needing to make any order) that the State sentence and State non-parole period commenced on 3 July 2012.
- A Federal non-parole period of four years will be fixed.
- The Federal sentence and Federal non-parole period will commence two years before the expiration of the State non-parole period, making a total effective sentence of 26 years with a total non-parole period of 20 years.

76 While s 19(1)(b) and s 19(3)(d) of the *Crimes Act 1914* refer to Commonwealth sentences commencing 'immediately after' the end of the State non-parole period, as

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76 *QOM Sentencing Reasons* [2012] VSC 255, [82].
77 Ibid.
78 Ibid [65].
79 Ibid.
80 [1999] 1 VR 352.

this Court said in *Fasciale*,[81] those references are not a prescription that this is what must occur. The bar in those sections is only on any later commencement date being fixed — so as to avoid the creation of any 'gap' in incarceration or non-parole periods.[82] Thus, this Court's order that the Federal sentence and Federal non-parole period commence two years before the expiration of the State non-parole period complies with ss 19(1)(b) and 19(3)(d) of the *Crimes Act 1914*.

77 The variation of the QOM sentence we propose results in total concurrency between the State head sentence and the Federal sentence, but increases the total non-parole period from 18 years to 20 years. Having reviewed all of the circumstances of the appellant's offending, we have concluded that the head sentence imposed on the State offences is sufficient to encompass the entire criminality associated with both the State and Federal offences, but with the appellant's conviction on the Federal matter requiring the additional period (two years) to be served before being eligible to be released on parole.[83]

78 Finally, in varying the QOM sentence as we propose, the appellant, having previously served the entirety of the Orbital sentence, will be required to serve a period of time referable to the Orbital offending before being eligible for parole. While this might be thought to be anomalous, it reflects the sentencing method that Whelan J would have been required to follow if the appellant had not been serving the Plutonium sentence at the time the QOM sentence was imposed. Moreover, if we were to make orders that did not vary the commencement of the Orbital sentence, we would need to vary the State non-parole period from 18 years to 20 years so as to properly reflect the entire criminality associated with the State and Federal offences in the way discussed in *Fasciale*.[84] In exercising the discretion under s 326E(3) of the *Criminal Procedure Act*, we have concluded that the varied QOM sentence should not be structured in a way that makes the Orbital sentence wholly concurrent (both as to head sentence and non-parole period) with the State sentences.

Conclusion

79 We will make orders varying the QOM sentence from one which was a total effective sentence of 30 years' imprisonment with a non-parole period of 22 years, to a total effective sentence of 26 years, with a non-parole period of 20 years.

80 Pursuant to s 18(1) of the *Sentencing Act*, we will declare that the period of pre-sentence detention declared by Whelan J (347 days), together with the period the appellant has spent in custody between 3 July 2012 and the date of the order we will make varying the QOM sentence, is time that the appellant has already served under the QOM sentence as varied by this Court.

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81 (2010) 30 VR 643, 649 [37].
82 Ibid 649 [36].
83 Ibid 648 [33].
84 Ibid.