Neutral Case Citation	*Barbaro v The Queen & Zirilli v The Queen* [2014] HCA 2
Reported Case Citation	*Barbaro v The Queen* (2014) 253 CLR 58
Date	12 February 2014
Court	High Court of Australia
Bench	Joint Judgment: French CJ, Hayne, Kiefel and Bell JJ Concurring Opinion: Gageler J (Dissenting reasoning but concurring in the result)
Criminal/Civil	Criminal
Parties	**M3/2013** Applicant: Pasquale Barbaro Respondent: The Queen (CDPP) Intervener: DPP (Vic) **M1/2013** Applicant: Saverio Zirilli Respondent: The Queen (CDPP) Intervener: DPP (Vic)
Facts	The Applicants pleaded guilty to Commonwealth drug offences. During plea negotiations, the Crown had conveyed to the Respondents via email, the "sentencing range" submission they would make to the sentencing judge, if the judge called upon the Crown to make such a submission, in accordance with *MacNeil-Brown* (2008) 20 VR 677. [15] During the plea, the sentencing judge told the prosecutor that she did not wish to hear submissions from the Crown regarding "sentencing range". The Crown did not make any such submissions. "Each [Respondent] was sentenced to a very lengthy term of imprisonment: Mr Barbaro to life imprisonment with a nonparole period of 30 years, Mr Zirilli to 26 years' imprisonment with a nonparole period of 18 years. " [1] These sentences were substantially higher than the "sentencing ranges" indicated by the Crown to the accuseds. The Respondents accepted that the sentencing orders were not manifestly excessive. [4]
Procedural History	1 Dec 2011 Arraignment; plea of guilty (SCV) 19 Jan 2012 Plea hearing (SCV) 23 Feb 2012 Sentencing (SCV) 23 Aug 2012 Application for leave to appeal to VSCA heard 30 Nov 2012 Application for leave to appeal to VSCA refused 16 Aug 2013 Application for special leave to appeal to HCA heard and referred to Full Court 27 Nov 2013 Application for special leave to appeal to HCA heard by Full Court 12 Feb 2014 Application granted, appeal treated as instituted, heard instanter and dismissed.
Legal Questions	1. Did the sentencing judge fail to take into account a relevant consideration when she refused to hear a sentencing range submission from the Crown? 2. Should the Crown have been permitted, or required, to submit their "sentencing

	ranges" to the sentencing judge? 3. Did the Applicants suffer procedural unfairness?
Outcome/Answers	1. No 2. No 3. No
Reasons	**French CJ, Hayne, Kiefel and Bell JJ** "The prosecution's statement of what are the bounds of the available range of sentences is a statement of opinion. Its expression advances no proposition of law or fact which a sentencing judge may properly take into account in finding the relevant facts, deciding the applicable principles of law or applying those principles to the facts to yield the sentence to be imposed. That being so, the prosecution is not required, and should not be permitted, to make such a statement of bounds to a sentencing judge." [7] "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. The applicants demonstrate no other form of unfairness in the sentencing hearings." [50] **Gageler J** A prosecutor's submission regarding the sentencing range is a submission of law. However, it is not a submission that a sentencing judge must hear, or, upon hearing, must take into account. It is not one of the *facts* a sentencing judge is mandated to consider when sentencing; rather, it is a submission about how the court ought synthesise those facts, and as such, a court need not consider it. However, if a sentencing judge seeks a sentencing range submission from the Crown, a prosecutor ought to give it, as it may assist the court avoid appealable error. (See, [63]-[64]) "The discrete argument on behalf of the applicant Mr Barbaro that there was in his case a denial of procedural fairness suffers from a discrete conceptual flaw. As counsel for Mr Barbaro quite properly conceded, the prosecution submission her Honour refused to entertain would have been a submission of law which was wrong in law. The submission was therefore one which the sentencing judge would have been bound in law to reject. Procedural unfairness is practical unfairness within the applicable decision-making framework. There is no practical unfairness in the mere failure or refusal of a decision-maker to entertain a submission the decision-maker would have been bound in law to reject. Her Honour's refusal to entertain the foreshadowed prosecution submission was not a denial of procedural fairness and was immaterial." [65]
Other Useful Dicta	**French CJ, Hayne, Kiefel and Bell JJ** ***Sentencing Range Submissions Must Stop***: "To the extent to which MacNeilBrown stands as authority supporting the practice of counsel for the prosecution providing a submission about the bounds of the available range of sentences, the decision should be overruled. The practice to which MacNeilBrown has given rise should cease. The practice is wrong in principle." [23] ***The Sentencing Range Cannot Be Identified***: "[T]he essentially negative proposition that a sentence is so wrong that there must have been some misapplication of principle in fixing it cannot safely be transformed into any positive statement of the upper and lower limits within which a sentence could properly have been imposed." [27]

Crown Is Not A Surrogate Judge: The practice countenanced by MacNeilBrown assumes that the prosecution's proffering a statement of the bounds of the available range of sentences will assist the sentencing judge to come to a fair and proper result. That assumption depends upon the prosecution determining the supposed range dispassionately. It depends upon the prosecution acting not only fairly (as it must) but in the role which Buchanan JA rightly described [17] as that of "a surrogate judge". That is not the role of the prosecution. [29]

Crown May Be Too Soft; Crown Cannot Be Dispassionate, But A Judge Must Be: At [30] - [32], the majority say that in many cases, the prosecution may give "undue weight to the assistance which the offender has given or promised" or to the "utilitarian value" of a plea prior to trial. In such cases, say the majority, "there is 'usually no one to put an opposing or qualifying point of view' and the sentencing judge 'must be astute to ensure that [the court] is being given accurate, reliable, and complete information concerning the alleged assistance and the benefits said to flow from it'." (Quoting from *R v Gallagher*.) The prosecution view is not dispassionate.

Public Perception Risk: "The statement by the prosecution of the bounds of an available range of sentences may lead to erroneous views about its importance in the process of sentencing with consequential blurring of what should be a sharp distinction between the role of the judge and the role of the prosecution in that process. If a judge sentences within the range which has been suggested by the prosecution, the statement of that range may well be seen as suggesting that the sentencing judge has been swayed by the prosecution's view of what punishment should be imposed. By contrast, if the sentencing judge fixes a sentence outside the suggested range, appeal against sentence seems wellnigh inevitable." [33]

***Judge As Sole Determiner And Weigher Of Facts*: "**If a party makes a submission to a sentencing judge about the bounds of an available range of sentences, the conclusions or assumptions which underpin that range can be based only upon predictions about what facts will be found by the sentencing judge. In some cases, there may be little controversy about the facts. But that will not always be so. [36] … the synthesis of the "raw material" which must be considered on sentencing, including material like sentencing statistics and information about the sentences imposed in comparable cases, is the task of the sentencing judge, not counsel." [41]

***Crown's Opinion Unnecessary*: "**If a sentencing judge is properly informed about the parties' submissions about what facts should be found, the relevant sentencing principles and comparable sentences, the judge will have all the information which is necessary to decide what sentence should be passed without any need for the prosecution to proffer its view about available range." [38]

***Sentencing Range Submission is A Statement Of Opinion, Not A Submission Of Law*: "**Contrary to the view of the majority in *MacNeil-Brown*, the prosecution's conclusion about the bounds of the available range of sentences is a statement of opinion, not a submission of law. A statement of the bounds of the available range of sentences is a conclusion which depends upon identifying (and in many cases assuming) the facts and circumstances relevant to the offence and the offender and striking a balance between the many competing considerations which may bear upon the sentence. [42] A statement of bounds, on its face, purports to identify the points at which conclusions of manifest excess and manifest inadequacy of sentence become open. Leaving aside the evident difficulties which attend such pretended accuracy, it is important to recognise that manifest excess or manifest inadequacy of sentence founds an inference of error in the exercise of the sentencing discretion. But the nature of the error that has been made is not, and cannot be, identified. All that is known is that, because the result "upon the facts ... is unreasonable or plainly unjust, the appellate court may infer that in some way there has been a failure properly to exercise the discretion which the law reposes in

the court of first instance". Hence, stating the bounds of the available range of sentences states no proposition of law. [43] … Once it is understood that a submission by the prosecution about the bounds of the available range of sentences is no more than a statement of opinion, it follows that the sentencing judge need not, and should not, take it into account in fixing the sentences to be imposed." [49]

Gageler J (Concurring Opinion)

Prosecution Properly Concerned With Sentence: "The earlier common law view that sentence was of no concern to the prosecution could not survive the enactment by State and Territory legislation of prosecution rights to appeal against sentence, picked up in respect of sentences of persons for federal offences by s 68(2) of the *Judiciary Act 1903* (Cth). Once it became open to the prosecution under statute to seek to have a sentence set aside on appeal, it would have been perverse for the common law to have prevented the prosecution from making submissions to the sentencing court to assist that court to avoid appealable error in imposing the sentence. To the contrary, it came firmly to be established that the prosecution has a common law duty to assist the court to avoid such appealable error." [57]

Submission of law: "Whether made on behalf of the prosecution or on behalf of the offender, a submission that a sentence within a given range would or would not be available to be imposed by a sentencing court in the circumstances of a particular case is a submission of law. It 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. The character of such a submission as one of law does not depend on the extent of the assistance a court might derive from such a submission, which may vary from court to court. Nor does it depend on the extent to which elaboration of the submission might be possible or appropriate, which may vary from case to case " [59] – [60]

"The majority of the Court of Appeal of the Supreme Court of Victoria in R v MacNeil-Brown (Maxwell P, Vincent and Redlich JJA) was in my view correct to hold that the prosecution duty to assist a sentencing court to avoid appealable error requires the prosecutor to make a submission on sentencing range if the sentencing court requests such assistance or if the prosecutor perceives a significant risk that the sentencing court would make an appealable error in the absence of assistance. If a sentencing court can be told after the event on an appeal by the prosecution that the sentence it has imposed is outside the available range for reasons articulated after the event by an appellate court which may or may not "admit of lengthy exposition", the same sentencing court should in principle be able to expect to be assisted before the event by a prosecution submission as to the available range supported by such exposition of the reasons for that range as might at that time seem both possible and appropriate. Such a prosecution submission, where made, has no greater or lesser status than any other submission of law. The sentencing court is not bound to accept the submission and may or may not in the event be assisted by it. The sentencing court remains obliged to reach, and to give effect to, the court's own conclusion as to the appropriate sentence but remains entitled to expect to be assisted in so doing by appropriate submissions of law." [62]