Self-Dogging: s.23 *CSPA* getting the most out of those full and frank admissions to police

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Aboriginal Legal Service Annual Conference June 2022

The topic for this paper arises from experiences of representing clients who, when arrested and/or charged for offences, proceed to volunteer information of great evidentiary value to investigating police in circumstances where the case against them may or may not be particularly strong.

This paper is meant to be a practical guide to arguing for a discount over and above that available for a plea of guilty where out of altruism, stupidity, or blithe unawareness, your client gives themselves up. This is so, even where the prosecution and/or police vehemently oppose such a submission and decline to inform the court of the usefulness of the information your client provided.

This paper does not focus on the use of these disclosures as evidence of remorse and contrition under s 21A, or considerations under s 22, although these should certainly be borne in mind by practitioners.

What constitutes "*assistance*" for the purpose of s 23?

1. The first hurdle in obtaining a discount for the kind of assistance described in the introduction is often persuading a Magistrate, Judge, or prosecutor that what your client has said or done is indeed "assistance" for the purpose of s 23 of the *Crimes (Sentencing and Procedure) Act, 1999* ("CSPA").
2. Commonly (in the writer's experience) in the Local Court, and on occasion in the District Court, a client giving themselves up entirely to police on arrest is thought of as a type of *Ellis* situation. This automatically posits the issue in an erroneously narrow framework on what conduct can amount to assistance to authorities.
3. This labelling fails to recognise that the courts have given a broad interpretation to the meaning of "*assistance*" and does not acknowledge that *Ellis* occurred in very unusual circumstances[1] and by no means exhausts the conduct capable of being captured by s 23.

[1] *R v Ellis* (1986) 6 NSWLR 603: Mr Ellis committed seven robberies between September and November 1984. After consulting with a religious minister, he made voluntary disclosures to police in respect of these offences, was charged, and pleaded guilty. The conduct in *Ellis* was confirmed by the High Court in *CMB* as being within the purview of s 23.

4. Since 1999 the CSPA has provided a statutory regime for the affording of a discount to accused persons for assistance to authorities. It states:

> *(1) A court may impose a lesser penalty than it would otherwise impose on an offender, having regard to the degree to which the offender has assisted, or undertaken to assist, law enforcement authorities in the prevention, detection or investigation of, or in proceedings relating to, the offence concerned or any other offence.*
>
> *(2) In deciding whether to impose a lesser penalty for an offence and the nature and extent of the penalty it imposes, the court must consider the following matters—*
>
> > *(a) (Repealed)*
> >
> > *(b) the significance and usefulness of the offender's assistance to the authority or authorities concerned, taking into consideration any evaluation by the authority or authorities of the assistance rendered or undertaken to be rendered,*
> >
> > *(c) the truthfulness, completeness and reliability of any information or evidence provided by the offender,*
> >
> > *(d) the nature and extent of the offender's assistance or promised assistance,*
> >
> > *(e) the timeliness of the assistance or undertaking to assist,*
> >
> > *(f) any benefits that the offender has gained or may gain by reason of the assistance or undertaking to assist,*
> >
> > *(g) whether the offender will suffer harsher custodial conditions as a consequence of the assistance or undertaking to assist,*
> >
> > *(h) any injury suffered by the offender or the offender's family, or any danger or risk of injury to the offender or the offender's family, resulting from the assistance or undertaking to assist,*
> >
> > *(i) whether the assistance or promised assistance concerns the offence for which the offender is being sentenced or an unrelated offence,*
> >
> > *(j) (Repealed)*
>
> *(3) A lesser penalty that is imposed under this section in relation to an offence must not be unreasonably disproportionate to the nature and circumstances of the offence.*

(4) A court that imposes a lesser penalty under this section on an offender because the offender has assisted, or undertaken to assist, law enforcement authorities must—

(a) indicate to the offender, and make a record of the fact, that the lesser penalty is being imposed for either or both of those reasons, and

(b) state the penalty that it would otherwise have imposed, and

(c) where the lesser penalty is being imposed for both reasons—state the amount by which the penalty has been reduced for each reason.

(5) Subsection (4) does not limit any requirement that a court has, apart from that subsection, to record the reasons for its decisions.

(6) The failure of a court to comply with the requirements of subsection (4) with respect to any sentence does not invalidate the sentence.

5. In *R v XX* [2017] NSWCCA 90 the court considered in detail the interpretation of the word "*assistance*". XX was being sentenced for three serious sexual offences against his four-year-old daughter. On sentence he relied upon assistance provided to the police some ten years earlier in a conspiracy to murder investigation, entirely unrelated to the instant charges.
6. XX had been approached by two conspirators who were planning to murder one of their spouses. He then:[2]
    a. Reported the approach to police.
    b. Provided them with various items of evidence.
    c. Introduced an undercover police officer to the conspirators.
    d. Provided the prosecution with four statements
    e. Gave evidence at the trial of the conspirators.
    f. Received a payment of $17,000.00 for this assistance.
7. The Crown's primary argument on the discount ground was that XX's conduct did not constitute assistance for the purpose of s 23. The Crown submitted that what constitutes assistance should be interpreted with reference to the common law categories of assistance and that XX's conduct did not fall within one of those categories, for example:
    a. Voluntary disclosure of unknown criminality.[3]
    b. Assistance regarding other crimes in which the offender was the victim.[4]

[2] *R v XX* [2017] NSWCCA 90, [21].
[3] *R v Ellis* (1986) 6 NSWLR 603, confirmed by the High Court in *CMB* as being within the purview of s 23.
[4] *RJT v R* [2012] NSWCCA 280 – offender was arrested for child sex offences and assisted police with historical offences in which he was the victim.

c. Police informers.[5]

d. Giving evidence against co-accuseds.

8. At common law, there had developed a line of authority that the assistance had to have some connection with the offence for which the person was being sentenced[6], and in this respect XX's conduct was completely distinguishable and at common law he would almost certainly not have had a discount available to him.

9. However, the Court rejected the Crown's primary argument as "*misconceived*" and agreed with XX that the interpretation of s 23 should first and foremost give primacy to text of the section.

10. The case law is relevant to the extent that it addresses an ambiguity arising out of the text of the section.[7] In this regard the court noted that:[8]

    a. "assistance" is not defined by the section.

    b. Nothing in the section purports to limit the type of assistance beyond requiring that it be assistance to "*law enforcement authorities" in the "prevention, detection or investigation, or in proceedings relating to an offence*".

    c. Whilst it has previously been interpreted to not to cover unwitting assistance, the section has otherwise "…*not been read narrowly*."

11. After a lengthy analysis of the legislative and common law history of the law regarding discounts for assistance to authority, the court concluded that:[9]

    a. A relatively expansive view of the meaning of "assistance" should be adopted.

    b. The purpose and object of the conferral of the power under s 23 is the "public interest" in encouraging offenders to supply information to the authorities which will assist them to bring other offenders to justice and to provide evidence. This supports a broad view of "assistance".

    c. With respect to the discretion under s 23(2) for assistance provided prior to the commission of the subject offence, "*attention will focus on the extent to which the offence for which assistance was provided was or was not "related" to the subject offence as part of the consideration of all the factors referred to in that provision*."

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[5] *R v Kelly* (1993) 30 NSWLR 64; and *The Queen v Robert John and Trevor Graham Golding* (1980) 24 SASR 161

[6] *R v XX* [2017] NSWCCA 90, [51].

[7] *R v XX* [2017] NSWCCA 90, [26]-[28]. For an in-depth review of the development of the law in relation to discounts for assistance, see [37]-[55].

[8] Ibid, [32].

[9] Ibid, [53]-[55].

XX's conduct was found to constitute "assistance" however the court found that consideration of the factors under s 23(2) were not such as to move the court to afford XX a further discount.

12. There can be no doubt that s 23 captures the conduct of offenders who, in the course of the police investigation, voluntarily disclose information that ends up forming a central part of the brief of evidence against them.[10] The real challenge lies in moving the court to exercise its discretion under s 23(2).

Exercising the discretion

13. s 23(1) confers upon a sentencing court a discretion (not an obligation) to discount a person's sentence for assistance to authorities.[11] s 23(2) lists factors that the court *must* consider in deciding whether to exercise that discretion. These are mandatory considerations, and the court should bear them in the forefront of its mind, however they are not determinative.[12]
14. Whilst s 23(2) outlines mandatory considerations, the list is not exhaustive, and the court may have regard to considerations not mentioned by the section where appropriate.[13]
15. The considerations are largely self-explanatory, and I will not address each in detail. As a matter of common sense, the more that are present to a significant degree the more likely it is that a court would exercise its discretion to afford a further discount as long as it does not result in a sentence that is *unreasonably disproportionate to the nature and circumstances of the offence.*[14]
16. In giving effect to this principle the courts have held that generally, a person should not receive a greater combined discount (for plea of guilty and assistance) than 50%, and anything above 50% should be reserved for "*exceptional cases*".[15]

<u>"Usefulness" is not the determinative factor</u>

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[10] *R v XX* [2017] NSWCCA 90; *Ahmad v R* [2021] NSWCCA 30; *Mooney v R* [2016] NSWCCA 231, [15], [46]
[11] Ibid, [28] and [31].
[12] *R v XX* [2017] NSWCCA 90 adopting *Warkworth Mining Ltd v Bulga Milbrodale Progress Association Inc* [2014] NSWCA 105; 86 NSWLR 527 at [215] to [216]; see *R v Hunt; Ex parte Sean Investments Pty Ltd* [1979] HCA 32; 180 CLR 322 at 329.
[13] *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* [1986] HCA 40
[14] s 23(3) of the *Crimes (Sentencing and Procedure) Act, 1999*
[15] *SZ v Regina* [2007] NSWCCA 19, [4]-[10], [53]. For cases discussing discounts in excess of 50% see *R v Sukkar* [2006] NSWCCA 92; *NP v R* [2008] NSWCCA 205; and *R v OPA* [2004] NSWCCA 464

17. In respect of assessing the significance and usefulness of the information, practitioners will often be met with a submission from the prosecution that the investigating police had enough evidence to achieve a conviction without the information provided by your client.
18. Assuming this is true (which it often is not) it may not be fatal to the argument that your client is entitled to some discount for assistance.
19. In *Mooney v R* [2016] NSWCCA 231 the offender was sentenced for two serious sexual offences against two residents of a nursing home with two further offences on a Form 1.
20. Some of the offences were observed in part by carers at the home, and there was other circumstantial evidence to support the accusations. The offences were reported by the workers at the nursing home.
21. During the investigation Mooney was interviewed and denied any wrongdoing. He returned to the police station five days later and made admissions to all offences against one of the victims. The Crown conceded that absent the admissions, they would have had difficulty proving the fact of any penetration.[16]
22. Despite this concession, the court noted that:[17]

> *Furthermore, in assessing the significance of the assistance, it is relevant to bear in mind that, without the Applicant's admissions, the Crown may still have been able to prove penetration and in any event would seem to have had some prospect of obtaining a conviction for aggravated sexual assault in respect of the two incidents the subject of the sexual intercourse charges. Of course, the penalty for aggravated sexual assault of 7 years' imprisonment is much less than the 20 years' imprisonment to which the Applicant was liable for the sexual intercourse offences*.

23. The court unanimously upheld Mooney's appeal finding that his conduct did fall within s 23 and the sentencing judge was in error for not considering the factors under s 23(2). After engaging in that exercise, the court determined to afford an additional discount for assistance.
24. More recently, the case of *Vassiliou* v *R* [2022] NSWCCA 91 involved assistance provided by an offender during his evidence on sentence, that was essentially useless. He was still awarded a further 5% discount. He appealed arguing this was inadequate.
25. Mr Vassiliou was charged with several offences including robbery in company. In brief, the circumstances were that the accused's sister lured the victim to a park where he was robbed by Vassiliou and an unknown co-offender.

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[16] *R v Mooney* [2016] NSWCCA 231, [15].
[17] Ibid, [48].

26. It became apparent to the judge during proceedings that the unknown co-offender had not been apprehended or charged. The judge raised the s 23 issue with counsel and the offender ended up giving evidence where he informed the court of the co-offender's name and address. Proceedings were adjourned to allow the police to make enquiries.
27. When the matter returned to court, the police had made enquiries and the person named denied any involvement and no charges were laid.
28. In the context of the appellant seeking a 15% discount, the Court of Criminal Appeal was satisfied that:

> "*…a discount of 5% was open to the sentencing judge for the following reasons. First, the offer of assistance came only after a suggestion by the sentencing judge. When the matter was first raised, the applicant's counsel told the sentencing judge that the applicant had not assisted the police and that counsel did not think he intended to do so. Subsequently, after conferring with the applicant, the applicant's counsel led evidence from the applicant of the co-offender's first name only. The information was supplemented during cross-examination when the co-offender's surname was provided and an address was given*."

29. The court summed up the nature of the assistance saying:

> "[59] *The offer of assistance was made one year after the offences were committed. There was no offer by the applicant to give evidence in the event the co-offender was charged. Thirdly, the identity of the co-offender was already known to police, as is apparent from the facts sheet relied upon at the prosecution of the young person prior to the sentencing of the applicant. Fourthly, the identification of the person said to be the co-offender did not result in that person being charged, following his denial of involvement in the incident. The significance and usefulness of the assistance was minimal, particularly in the absence of any advice from the police concerning the usefulness of the information provided. Finally, there was no evidence of any risk or danger to the applicant or his family as a result of providing the co-offender's name and address.*

It is evident from the above passages that none of the considerations under s 23(2) were present to any significant degree, if at all, however the Court still found that the 5% discount was open to the sentencing judge as an exercise of his discretion.

<u>The necessity for evidence establishing the considerations under s 23(2)</u>

30. Generally, discounts for assistance arise in circumstances where an offender has provided evidence to the prosecution/police, has agreed to give that evidence in a court proceeding, or both. This is generally the result of a formal process of negotiation with the prosecutor and/or OIC.
31. A letter of assistance is then drafted and served by the OIC, tendered in the sentencing proceedings, and submissions are made accordingly.[18] In these circumstances, the task of assessing the s 23(2) considerations is ordinarily straight forward.
32. However, if you are arguing that your client is entitled to a discount for "assistance" in circumstances where they may have:
    a. Made full admissions in an ERISP.
    b. Identified co-accuseds in ERISPs or unrecorded conversations with police.
    c. Provided access codes to phones or computers.
    d. Identified themselves in CCTV footage.
    e. Identified their own voice on a phone intercept.
    f. Told police where certain objects are located; or
    g. A combination of the above.

    you will likely not receive a letter of assistance because no undertaking was ever given by the prosecution to provide one in return for the information. Procedures regarding induced statements, letters of assistance, immunities etc generally require the approval of the Director, or police officer of Area/District Commander rank or equivalent. It is unlikely in the extreme that this will occur in the circumstances discussed in this paper.
33. Cases that address discounts for assistance in these circumstances highlight that the onus of proof is on the offender to establish the conditions for the affording of a discount. This must be based on evidence.
34. It is not, in the writer's view, enough to simply rely on submissions or the agreed facts which may say something like "*the offender made full admissions to the offences*".
35. In *R v SS* [2021] NSWCCA 56 the offender pleaded guilty to an offence of recklessly inflicting grievous bodily harm on his infant daughter by "*shaking her like a ragdoll*". He initially denied any knowledge of the offence in an interview, but when reinterviewed made admissions to the offence. On the subject of SS arguing that this should entitled him to a s 23 discount, the court stated that:

    > "[81] *Absent evidence from a police officer, it is speculative to say that police regarded all of the known adults as suspects. The manner in which police asked*

[18] The offender is entitled to view this document see *HT v The Queen* [2019] HCA 40.

questions in interviews gave rise to competing inferences that could only be resolved by evidence which was absent. It was not open to the judge to say that without the respondent's admissions, "as far as the police were concerned, there were a number of potential offenders"."

36. In *R v Ahmad* [2021] NSWCCA 30, Mr Ahmad made admissions to the Crown during negotiations, on a without prejudice basis, resulting in him pleading guilty to manslaughter instead of murder. He argued that the Crown case was weak in certain respects and his admissions in negotiations and subsequent plea of guilty were of assistance. The court stated that:

> "*The Court was told that the applicant made admissions on a without prejudice basis in the course of agreeing to the facts on which he would be sentenced for an offence of manslaughter following his guilty plea. But there was no evidence of what precisely those admissions were, as opposed to what could be established on the Crown case. There was nothing resembling a letter from investigating authorities identifying the nature of the assistance provided or its value to ongoing investigations and prosecutions. Indeed, save for one matter, there is no evidence before this Court (or before the sentencing judge) as to the strength of the Crown case*."[19]

Mr Ahmad was still afforded a 5% discount for his assistance, however the difficulty in assessing the assistance was noted several times by the court.

37. In *Le v R* [2019] NSWCCA 181, the offender was found at the scene of a cultivation and made some admissions about the length of time he had been there and fertilising but not touching the plants. He participated in a walk through and thereafter refused to answer any more questions. The CCA was not persuaded that this amounted to assistance. Putting that issue to one side, the court emphasised:

> "*Even if I was satisfied that the admissions were capable of coming within the terms of s 23(1) of the Sentencing Act, that is not the end of the inquiry. As Beech-Jones J (with whom Bathurst CJ and RA Hulme J agreed) observed in R v XX [2017] NSWCCA 90 at [56], just because a form of assistance is capable of falling within s 23(1) it does not necessarily warrant the imposition of a lesser sentence. That decision depends upon the application of the criteria in s 23(2) of the Sentencing Act which are as follows…*"

[19] *Ahmad v R* [2021] NSWCCA 30, [27].

38. In *Browning v R* [2015] NSWCCA 147 the appellant argued that having participated in an ERISP and having given a version of events (essentially that he couldn't remember aspects of the offending having blacked out), the court should have had regard to this in mitigation under s 21A and s 23. The court stated that:

> "[123] *Here, the evidence did not suggest any provision of assistance to authorities. It merely suggested that the applicant, having been arrested, agreed to participate in an electronically recorded interview, and gave an account of the incident. Beyond that, there is no factual material to support any conclusion of co-operation or assistance. The mere fact that an applicant participates in an electronically recorded interview about the incident, the subject of the offence, even though not obliged to, is not a matter which is entitled to any weight, of itself, in mitigation of any sentence*."[20]

39. What these cases highlight is the need for an evidential foundation on which to base submissions and findings under s 23(2). The onus lies with the offender to establish the facts relied upon.

<u>Sources of Evidence</u>

40. As referenced in the introduction, this paper focusses on circumstances where there may be a relatively weak prosecution case up until your client begins interacting with the investigating officers and giving themselves up. Whilst this is not a necessary pre-condition for the conferring of a discount, it often lies at the heart of an argument that the client should be afforded an additional discount.
41. In such a matter, the sources of evidence that you can draw on is largely dependent on the facts and circumstances of the matter. With no letter of assistance likely to be forthcoming it will be necessary to explore other avenues of evidence to persuade the court of the usefulness, truthfulness, significance, timeliness etc[21] of the information provided.

The brief of evidence

42. If it is an EAGP matter or has been elected upon, you will naturally have the brief of evidence prior to the sentence proceeding which will allow you to see exactly how strong the case is absent your client's assistance, prior to the sentence date.
43. If it is a table offence being dealt with summarily you will only have the brief if your client has pleaded not guilty.

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[20] *Browning v R* [2015] NSWCCA 147, [123].
[21] *Crimes (Sentencing and Procedure) Act 1999,* s 23(2).

44. A brief will often contain all kinds of documents recording your client doing the investigators job for them, for example:
    a. ERISPs containing admissions – this can include identifying one's voice on phone intercepts, identifying oneself in CCTV, admissions to the *actus reas* and *mens rea* of the offence, provision of codes to phones or passwords to email addresses etc.
    b. Body worn video containing admissions.
    c. Search warrant videos of client's participating in walk throughs.
    d. Consent forms for searching properties.
45. Bear in mind that absent further evidence, simply proving your client provided information that might seem useful will not be enough to engage s 23(2) in a meaningful way – this is discussed below.

Agreement by prosecution

46. If available, this is the most pragmatic way to approach this situation, particularly in the Local Court. Speaking to the prosecutor before the sentence proceeding and having them agree to make concessions regarding the requirements under s 23(2) would largely do away with the need for other avenues discussed below.
47. It may be overly optimistic to expect this from prosecutors who, for various reasons, may not be across the brief in the matter. In such situations you may be able to speak with the officer in charge with the prosecutor before the proceedings and arrange for the concession that way.

Require the Officer in Charge

48. Acknowledging that it may be overly optimistic to think that an OIC will simply concede that they had a weak case without your client's assistance, the next step is to ask for a statement from them on the matter and require them for cross examination.
49. Do not be disheartened if they give a statement about the uselessness of the information your client disclosed. You will have ample opportunity to explore the accuracy of that view in cross-examination and it is helpful to know in advance how they might seek to diminish the value of your client's assistance.
50. Taking this step requires practitioners to have an intimate understanding of the brief of evidence. Perhaps of equal importance is the timeline of the investigation and when evidence was gathered and received. For example, if the brief is overwhelming and all the pertinent evidence was gathered after your client gave an ERISP directing police towards

various sources of evidence, the inference that the information provided by your client to the police was essential in the prosecution is irresistible.

51. Conversely, if they already had all the evidence and your client only made admissions after being confronted with it, you may have much more difficulty in persuading a court of the usefulness of the assistance.

Subpoenas

52. Throughout the course of plea negotiations, brief service, or preparing for sentence, you might consider issuing subpoenas for documents relevant to the investigation, for example:
    a. The COPS event,
    b. Police notebooks.
    c. Notebook statements of witnesses.
    d. Tasking sheets.
    e. Correspondence with other investigating officers.
53. This will further give you an idea about the significance of any information your client provides to the police and can be very useful in cross examination of the OIC.

Practical Approaches

54. Embarking on this kind of submission can often turn into an enquiry within the sentence proceeding. You can assist the bench with practical and pragmatic approaches to adducing and tendering evidence of your client's assistance.
55. As mentioned above – the OIC may provide a statement or affidavit of their view on the value of anything your client told them throughout the investigation. You may consent to this being read as their evidence in chief, or simply ask that the prosecution make them available for cross-examination.
56. If you are going to rely on pieces of evidence from the brief, *précis* documents can be very useful particularly where you are taking the court to extracts from lengthy documents or recordings eg an ERISP. You should speak to the prosecutor first about having these in an agreed form before trying to tender them out of the blue.
57. Annexure A is a *précis* of an offender's ERISP tendered in a sentence proceeding.
58. Annexure B is a *précis* of evidence against an offender used as a tool in cross-examining an OIC.
59. Having these tools available to you also ensure that you have an in-depth familiarity with the brief and will be able to effectively cross-examine the OIC – preparation is essential.

Conclusion

60. Obtaining a discount for a client in the circumstances outlined above can be a difficult and time-consuming process. It is important to bear in mind that it is not a submission to pursue when the admissions to police are minor or immaterial in the grand scheme of the matter.
61. Not only will you probably fail in the attempt at trying to obtain the discount, but you will potentially use a lot of court time and resources and lose credibility with the bench if you take the point in every matter.
62. However, in an appropriate case this pursuit can result in discounts varying from the minimal to very significant, which in reality can mean months or years off a sentence or in some circumstances the imposition of a less serious sentence altogether.

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