IN THE SUPREME COURT OF VICTORIA **S APCR 2016**
COURT OF APPEAL
(CRIMINAL DIVISION)

PHUONG HUYNH **Applicant**

and

THE QUEEN **Respondent**

APPLICANT'S REVISED WRITTEN CASE (SENTENCE)

1. ORAL HEARING

1.1 The Applicant exercises his right to an oral hearing.

2. PARTICULARS OF CONVICTION AND SENTENCE

2.1 The Applicant was arraigned on two indictments – one alleging five (5) State offences; the other, five (5) Commonwealth offences. He pleaded guilty to all charges and was, on 24th August 2016, by His Honour Judge Gucciardo as follows:

Charge on Indictment	Offence	Maximum	Sentence	Cumulation
COMMONWEALTH INDICTMENT				
1.	Import marketable qnty of precursor – pseudoephedrine	15 years	6 years	12 months
2.	Import tier 2 goods – firearms and ammunition	10 years	4 years	9 months
3.	Manufacture marketable qnty of a controlled drug – amphetamine	25 years	7 years	Base
4.	Pre-traffick a controlled precursor *simpliciter* – pseudoephedrine	7 years	3 years	12 months
7.	Possess drugs of dependence – heroin and amphetamine	5 years	3 months	--
Total effective sentence	9 years, 9 months' imprisonment			
Non-parole period	6 years, 6 months			

STATE INDICTMENT				
1.	Possess substances, materials etc for trafficking drug of dependence	10 years	2 years	3 months
2.	Possession precursor chemical	5 years	2 years	3 months
3.	Traffick amphetamine *simpliciter*	15 years	6 years	6 months
4	Traffick methylamphetamine *simpliciter*	15 years	6 years	Base
5.	Possess cocaine	5 years	12 m	3 months

Total effective sentence	7 years, 3 months
Non-parole period	5 years
TWO (2) YEARS AND THREE (3) MONTHS OF STATE SENTENCE CUMULATED UPON COMMONWEALTH SENTENCE	
Total effective sentence	12 years
Non-parole period	8 years
Pre-sentence detention	790 days

3. SUMMARY OF RELEVANT FACTS

3.1 The Applicant accepts that the *Prosecution Summary for Plea Hearing (Amended)*, tendered on behalf of the Commonwealth Director of Public Prosecutions (CDPP) at the Applicant's plea hearing,[1] and the *Prosecution Opening on Plea*, tendered on behalf of the State Director of Public Prosecutions (DPP),[2] may be treated on appeal as agreed statements of facts between the parties.

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1 *Plea hearing* at pp 25-34 – Exhibit A.

2 Ibid at pp 34-39 – Exhibit B.

4. **GROUNDS OF APPEAL**

4.1 The Applicant relies on the following grounds of appeal.

1 The sentencing discretion miscarried as a result of the manner in which the judge treated the delay between the Applicant's incarceration on remand and the final disposition of his proceedings. In particular, the judge erred by:

(a) having regard only to the period between November 2015 and the date of sentence in mitigation of the Applicant's penalty; and

(b) by finding that the effect of the delay upon the Applicant was 'tempered' by the Applicant's progress on remand.

[*Sentence* at [25]-[26]]

2. In all the circumstances:

(a) the individual sentences imposed on charges 1, 2 and 4 of the Commonwealth indictment;

(b) the individual sentences imposed on charges 3 and 4 of the State indictment;

(c) the overall total effective sentence; and

(d) the overall non-parole period fixed

are manifestly excessive.

SUMMARY OF ARGUMENT

5. **GROUND 1 – DELAY AND REHABILITATION**

5.1 Counsel for the Applicant on his plea tendered a chronology[3] of the Applicant's proceedings and placed at the forefront of his submissions the two-year delay between the Applicant's incarceration on remand and the date of his plea hearing. He submitted that delay be synthesised in the exercise of the judge's discretion 'and to a

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3 *Plea hearing* at p 40 – Exhibit H1. See also p 49, lines 12-25.

substantial degree because of the rehabilitation [the Applicant had] achieved and continue[d] to be committed to.'[4]

5.2 A further two months elapsed between the Applicant's plea hearing and the date of his sentence.

5.3 Addressing counsel's submission and delay, the sentencing judge found that it was appropriate that he take into account delay but only so much of it that spanned from November 2015 and August 2016. Presumably, that was done because that period represented a delay that was not attributable to the ordinary passage of time during the curial process. Further, his Honour found that delay (or its effect) was 'somewhat tempered' because it had given the Applicant the structure and foundation for the his reform whilst on reform.

5.4 The sentencing judge's analysis betrays a number of errors.

5.5 First, by the time the Applicant was sentenced, he had served (some) two years, two months' on remand. That period – in its entirety – represented the delay that ought to have informed the judge's discretion. There was no basis to confine the delay which mitigated the Applicant's offending and plight only to the period that followed the first adjournment of his plea hearing in November 2015. By so doing the sentencing judge erred. The error is material.

5.6 Secondly, it was not open to the judge to find that the delay (or its effect upon the Applicant) was 'somewhat tempered' because it had given the Applicant the foundation for his reform whilst on remand.

5.7 Delay may be relevant to sentence in two principal ways.[5] First, an offender is to be given the benefit of any rehabilitation he or she has achieved and, to the extent that circumstances permit, that rehabilitation ought not to be jeopardised. Secondly,

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4 Ibid at p 41, lines 12-16.

5 *Hicks v The Queen* [2016] VSCA 162, [23]; *R v Cockerell* (2001) A Crim R 444, 447 [10]; *Arthars v The Queen* (2013) 39 VR 613, 621 [25].

fairness dictates that the fact that an offender has been kept in suspense awaiting his or her fate, that too should be taken into account in mitigation.

5.8 The two ways in which delay operates to mitigate sentence are not alternatives of one another. When both are present, one does not counterbalance the weight given to the other. In the Applicant's case, fairness dictated that his time on remand – in its entirety – mitigate his sentence for the time he was kept in suspense awaiting his sentence and a fortiori for the rehabilitation he had demonstrated during that period. There was no basis to 'temper' the first because of his progress on the other.

5.9 The sentencing judge again erred. The errors into which he fell caused the sentencing discretion to miscarry.

6. GROUND 2 – MANIFEST EXCESS

6.1 The Applicant called in aid of his plight on sentence the following mitigating features:

- his early pleas of guilty entered on the date of his committal proceeding before any evidence was adduced or anyone cross-examined – *Sentence* at [24]-[25];
- the utility of his pleas and their facilitation of the course of justice – *Sentence* at [27];
- remorse – *Sentence* at [26];
- delay and the Applicant's progress during his time on remand – *Sentence* at [25]-[26];
- his modest criminal history (two court appearances, neither of which led to immediate gaol) – *Sentence* at [28]-[29];
- his long-standing drug addiction, commencing in his early adolescence – *Sentence* at [31] and [33]-[35];
- the continued support of his family and its importance for his prospects – *Sentence* [39]; and
- an unusually impressive and determined commitment to reformation, evidenced by his progress on remand and its implications for his future prospects – *Sentence* at [26], [29] and [41]-[45].

6.2 Against those considerations the sentencing judge weighed appropriately the need to deter the Applicant and others from future offending; the Court's denunciation of his

crimes, their scale and sophistication;[6] and the protection of the community. Further, the Applicant's offending breached a two-months Recognizance Release Order,[7] imposed for attempting to export 7g of heroin for his personal use during a seven-day holiday *in Bali*.

6.3 No 'comparable cases' or statistics were relied upon by the Prosecutors on the plea.

6.4 It is with those considerations in mind that this Court is invited to scrutinise the impugned sentences the subject of Ground 2.

Commonwealth Indictment – Charge 1

6.5 By his guilty plea on Charge 1 of the Commonwealth Indictment the Applicant admitted to importing a marketable quantity of a border control precursor.[8] The quantity imported was 481g. The marketable quantity threshold under the *Criminal Code* is 400g.[9] The commercial quantity threshold is 1.2kg.

6.6 The Applicant pleaded guilty and did so early. He attracted – for importing a precursor in a quantity just over the marketable threshold (by 81g) – a sentence that fell between one-third and one-half the maximum penalty prescribed by Parliament. That sentence was plainly excessive.

6.7 It is instructive to query rhetorically: what order of sentence would he have attracted had he imported just under a commercial quantity, contested a trial and not have disclosed two years of (unusually impressive) rehabilitation.

6.8 The sentence imposed is (manifestly) outside the range of sentences properly open to the judge in the sound exercise of his discretionary judgment.

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6 *Sentence* at [31]-[32].

7 Ibid at [30].

8 Section 307.12(1) of the *Criminal Code* (Cth).

9 Section 314.3.

Commonwealth Indictment – Charge 4

6.9 For similar reasons, the sentence imposed on Charge 4 of the Commonwealth Indictment does not withstand scrutiny.

6.10 By his plea to Charge 4 the Applicant admitted to 'pre-trafficking' 107.4g (or approximately one-quarter) the marketable quantity of a border control precursor.[10] The offence carries a maximum sentence of seven (7) years' gaol. Despite his guilty plea and other features mitigating his penalty the Applicant was sentenced to three (3) years' imprisonment – 6 months short of half the maximum penalty.

6.11 Again, it is submitted, the sentence is manifestly excessive.

Commonwealth Indictment – Charge 2

6.12 Charge 2 of the Commonwealth indictment related to the importation of tier 2 goods in breach of s 235BAB(5) of the *Customs Act 2901* (Cth). The offence carries a maximum penalty of 10 years' imprisonment.

6.13 The Applicant's liability arose as a result of his importation – over a period spanning a week and three consignments[11] – of three semi-automatic pistols and (in respect of each pistol) associated magazines and (for two of the pistols) ammunition.

6.14 The sentencing judge was satisfied to the criminal standard that the firearms and related items that were imported by the Applicant 'were part and parcel of the business of drug manufacturing and trafficking' in which he had involved himself.[12]

6.15 Despite that finding and having regard, in particular, to the maximum penalty by which the sentencing judge was constrained to steer, and to the Applicant's early

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10 Sections 306.3(1) and 11.2A of the *Criminal Code* (Cth).

11 *Sentence* at [9]-[10].

12 Ibid at [37].

guilty plea and rehabilitation, the sentence imposed on charge 4 is manifestly excessive.

6.16 No 'comparable cases' were placed before the Court.[13] That is not a criticism of the prosecution. There appears to be a paucity of authority – certainly at the intermediate appellate level – capable of providing useful guidance to judges sentencing offenders for this species of s 233BAB offending.

6.17 In any event, the question whether a sentence is manifestly excessive is primarily one of impression.[14] In the Applicant's case, one's impression is that the sentencing discretion has miscarried. The Applicant was sentenced on a single rolled-up charge to an individual term that represented 40% of the maximum penalty or (to put it another way) to a sentence one year short of half the ten-year maximum. On that charge, he was a person without relevant prior convictions and had pleaded guilty early. The sentence imposed was, it is submitted, manifestly excessive.

State Indictment – Charges 3 and 4

6.18 The Applicant received for trafficking *simpliciter* in amphetamine and methylamphetamine, individual sentences (on each charge) of six (6) years' imprisonment. Charge 3 related to 49.1g of amphetamine;[15] Charge 4 to a quantity of liquid and other substances amounting in total to 614.2g which contained methylamphetamine (in an unspecified amount).

6.19 Ordinarily, bare sentencing statistics are of little or no utility. For the purpose however of scrutinising the sentences imposed by the judge on charges 3 and 4 of the State Indictment in this particular instance, they are compelling; perhaps even determinative.

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13 *Plea hearing* at p 73, lines 1-18.

14 *Creamer v R* (2012) 221 A Crim R 284, [46]-[47]; *R v Dinsdale* (2000) 202 CLR 321, 325.

15 Cf Schedule 11, Part 3 to the *Drugs Poisons and and Controlled Substances Act* 2011.

6.20 In its most recent *Sentencing Snapshot*[16] the Sentencing Advisory Council reported that of those sentenced for trafficking *simpliciter* in a drug of dependence over the period 2010-11 to 2014-15 only one person was sentenced to a term of six (6) years and six (6) years was the highest sentence imposed.

6.21 It is impossible to reconcile the sentences attracted by the Applicant on charges 3 and 4 with those figures and current sentencing practices. The sentences imposed are, it is submitted, plainly or manifestly excessive

Total effective sentence and non-parole period

6.22 Finally, the orders for cumulation made between charges and, in particular, between the two indictments also contributed to a total effective sentence and non-parole period that are manifestly excessive.

6.23 Further, with so many sentences attended by error, the sentencing exercise ought, it is submitted, to be undertaken afresh. In doing so, it would be open to this Court not only to impose lower individual terms on the charges whose sentences are impugned, but to moderate the orders for cumulation further, and to exercise (overall) greater clemency than did the sentencing judge.

6.24 The end result ought, it is submitted, better to reflect the Applicant's progress and prospects.

Theo Kassimatis, SC
Counsel for the Respondent

17th December 2016

16 *Sentencing Snapshot,* No 193 (June 2016) – Sentencing Trends in the higher courts of Victoria 2010-11 to 2014-15, p 3 (Figure 3).