IN THE SUPREME COURT OF VICTORIA
AT MELBOURNE
IN THE COURT OF APPEAL
(CRIMINAL JURISDICTION)

S APCR 2016 0224

PHUONG HUU HUYNH

Applicant

v

THE QUEEN

Respondent

APPLICATION FOR LEAVE TO APPEAL AGAINST SENTENCE

RESPONDENT'S WRITTEN CASE

Particulars of Conviction and Sentence

1. Following plea hearings on 11 November 2015 and 24 June 2016 in the County Court at Melbourne, the Applicant was sentenced by his Honour Judge Gucciardo on 24 August 2016[1] as follows:

COMMONWEALTH INDICTMENT

Charge on Indictment	*Offence*	*Maximum Penalty*	*Sentence*	*Cumulation/ Concurrency*
1	Import a marketable quantity of a border controlled precursor contrary to s 307.12(1) *Criminal Code* (Cth)	15 years imprisonment and/or 3,000 penalty units	6 years	12 months
2	Import Tier 2 goods contrary to s 233BAB(5) *Customs Act 1901* (Cth)	10 years imprisonment and/or 2,500 penalty units	4 years	9 months
3	Manufacture a marketable quantity of a controlled drug contrary to s 305.4(1) via s 11.2A *Criminal Code* (Cth)	25 years imprisonment and/or 5,000 penalty units	7 years	Base
4	Pre-traffick in a controlled precursor contrary to s 306.4(1) via s 11.2A *Criminal Code* (Cth)	7 years imprisonment and/or 1,400 penalty units	3 years	12 months

[1]The sentence was subsequently administratively admended on 24 August 2016 with respect to commencement dates.

Charge on Indictment	*Offence*	*Maximum Penalty*	*Sentence*	*Cumulation/ Concurrency*
7	Possess drug of dependence contrary to s 73(1) *Drugs, Poisons & Controlled Substances Act 1981* (Vic)	5 years imprisonment and/or 400 penalty units	3 months	-
Total Effective Sentence:		9 years 9 months imprisonment		
Non-Parole Period:		6½ years imprisonment		
6 AAA Statement:		11 years with a NPP of 8 years		

STATE INDICTMENT

Charge on Indictment	*Offence*	*Maximum Penalty*	*Sentence*	*Cumulation*
1	Possess substances, documents and or equipment for trafficking in a drug of dependence – *DPCS Act* s.71A	10 years	2 years	3 months
2	Possess a precursor chemical – *DPCS Act* s.71D	5 years	2 years	3 months
3	Traffick a drug of dependence, namely amphetamine – *DPCS Act* s. 71AC	15 years	6 years	6 months
4	Traffick a drug of dependence, namely methylamphetamine – *DPCS* Act s.71AC	15 years	6 years	Base
5	Possess a drug of dependence, namely cocaine – *DPCS Act* s. 73	5 years	12 months	3 months
Total Effective Sentence:		7 years 3 months imprisonment		
Non-Parole Period:		5 years		
		2 years and 3 months of the State sentence cumulated upon the Commonwealth sentence.		
6 AAA Statement:		9 years with a NPP of 6 years 6 months		

Global Total Effective Sentence:	12 years imprisonment
Global Non-Parole Period:	8 years imprisonment
Pre-sentence detention:	790 days

Summary of Relevant Facts

2. The Respondent relies on the agreed Prosecution Summary for Plea Hearing (Amended) tendered on behalf of the Commonwealth (Exhibit A on the plea) and annexed hereto as 'Annexure 1' and the Prosecution Opening on the Plea tendered on behalf of the State (Exhibit B on the plea) and annexed hereto as 'Annexure 2'.

GROUNDS OF APPEAL:

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

(a) Having regard only to the period between 20 November 2015 and the date of the sentence in mitigation of the Spplicant's penalty; and

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

3. Delay as a factor mitigating sentence is founded upon considerations of fairness and rehabilitation.[2] The principle of fairness concerns the degree to which delay has meant an offender has been kept in *"uncertain suspense"* as to their ultimate fate whilst awaiting sentence[3]. When considering whether a delay requires fairness to be taken into account, a court must assess the reasons for the delay and the degree, if any, to which an offender had control over the length of the delay.[4] Delay may also be relevant if there is evidence of real progress towards rehabilitation having occurred during the period of the delay.[5]

4. *First*, the Applicant argues that the learned sentencing judge improperly limited the period of delay in the resolution of the Applicant's matters from November 2015 (the first date of the plea hearing) and the date of sentence.[6] He argues essentially that the period from 27 June 2014 when the Applicant was first remanded in custody, until sentence on 24 August 2016 ought to have been taken into account.

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[2] *R v Cockerell* (2001) 126 A Crim R 444, 447 [10]; *Chandler v The Queen* [2010] VSCA 388 [19]; *R v Merritt, Piggott & Ferrari* (2007) VR 392, 409 [35]; *Hicks v The Queen* [2015] VSCA 162 [23]

[3] *R v Todd* [1982] 2 NSWLR 517; *R v Cockerell* (supra) [10]; *Hicks v The Queen* (supra) [23]

[4] *R v Merritt, Piggott & Ferrari* (supra) [35]; *Hicks v The Queen* (supra) at [23]; *Arthars v The Queen* (2013) 39 VR 613, 621 [27]; *Sergi v DPP* [2015] VSCA 181 [45]

[5] *B v The Queen* [2011] WASCA 40 at [7-8]; *R v Merritt, Piggott & Ferrari* (2007) VR 392

[6] Applicant's Revised Written Case dated 17 December 2016 at [4.1, 5.3-5.8]

5. *Secondly*, the Applicant challenges the finding of the learned sentencing judge that the effect of the delay on the Applicant was "tempered" by his progress on remand.[7] His Honour found that the Applicant's progress was only *"somewhat tempered"* based on the Applicant's own submission that he had benefited physically on remand in terms of his drug addiction and because it provided him with structure and an impetus towards rehabilitation.[8] Further, the learned sentencing judge took into account the rehabilitative efforts the Applicant had undertaken during that period, including a number of educational courses completed, and the fact that his incarceration represented the first time he had been imprisoned.[9] The authorities also reflect that when general deterrence and punishment carry the greatest weight, less weight will be given to factors and circumstances personal to the offender.[10]

6. Despite not taking into account the entire period the Applicant spent on remand when assessing the weight to be given to delay,[11] that extra period of delay (16 months) and the overall period of delay (just over 2 years) was not, in any event, so inordinate or "extraordinary" as to have attracted substantial weight in mitigation. This submission is borne out when the delay in this case is viewed against the length of delays which appellate courts have said were so unreasonable, "*lengthy*" or *"extraordinary and inordinate"*[12] as to warrant a significant reduction in sentence.

7. For example, in *R v Merritt, Piggott and Ferrari*[13] a 3 year delay between the commission of complex offences and the laying of charges and a further delay of 2 years from charge until sentence was described as *"quite extraordinary"* (although in the context of the offenders having acquired a legitimate expectation that they would not be charged). In *Fattah v The Queen*[14] a delay of 3 years between the detection of the offending and the laying of charges and a further delay of 2 years between charge and sentence was held to be a very powerful mitigating factor. In both *Sergi v DPP*[15]and *Dalton v The Queen*[16] a delay of 6 years between offending and sentencing was considered to be lengthy in terms of fairness to the accused. In

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[7] Applicant's Revised Written Case dated 17 December 2016 at [5.6-5.8]
[8] ST[26,39,41-44]
[9] ST[29]
[10] See for example: *Gajjar v R* (2008) 192 A Crim R 76 at [27][28]
[11] His Honour found that the delay in the listing of HUYNH's plea hearing for November 2015 occurred because he had pleaded guilty to separate State drug offences in October 2014 at a time when he was aware that he subject to an extensive investigation involving Commonwealth drug offences, which were ultimately laid in December 2014. It was clearly desirable for HUYNH to have both matters dealt with at the same sitting.
[12] *Zhou v The Queen* [2014] VSCA 123 [16]
[13] *R v Merritt, Piggott & Ferrari* (supra) at [399]
[14] [2016] VSCA 43 at [43]
[15] [2015] VSCA 181
[16] [2015] VSCA 189

Zhou[17] a delay of 4 to 5 years was considered extraordinary and inordinate, however in *Scook v the Queen*[18] a delay of nearly 10 years between the offending and conviction was not of itself held to be unreasonable.

Ground 2: The individual sentences imposed on charges 1, 2 and 4 of the Commonwealth indictment, the individual sentences imposed on charges 3 and 4 of the State indictment, the overall total effective sentence; and the overall non-parole period fixed are manifestly excessive.

8. The ground of manifest excess will only succeed where it can be shown that the sentence imposed was *"wholly outside the range of sentencing options available"* to the sentencing judge or that no reasonable judge could have imposed this sentence on this offender for these offences in these circumstances[19].

9. The principles relevant to sentencing for drug offences contrary to the *Criminal Code* (Cth) are uncontroversial and well established. They are conveniently summarised in *R v Nguyen and Pham*[20]. Apart from the statements relating to the role of the offender,[21] for this appeal the following principles are particularly relevant; general deterrence is to be given chief weight on sentence and that stern punishment will be warranted in almost every case, that involvement at any level must attract a significant sentence otherwise the interests of deterrence are not served and that factors personal to the offender are therefore given less weight than might otherwise be given (eg: good character, youth etc)[22].

10. It is submitted that the sentences imposed on the Applicant for Commonwealth charges 1, 2, and 4 were not manifestly excessive, having regard to the very serious nature and circumstances of the offences[23] as follows:

COMMONWEALTH INDICTMENT

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[17] *Zhou v The Queen* (supra) at [16]
[18] (2008) 185 A Crim R 164; And see: *Marasco v The Queen* [2016] VSCA 85; *Hicks v The Queen* [2016] VSCA 162
[19] *R v Abbott* (2007) 170 A Crim R 306 at [13]-[15],[32]; *Clarkson & Ors v R* [2011] 32 VR 361 at [89]; *DPP v Karazisis* [2010] VSCA 350 at [127]; *Hards v R* [2013] VSCA 119 at [4].
[20] (2010) 205 A Crim R 106 at [72]
[21] *Nguyen and Pham v The Queen* (supra) at [72(a) – (f)]
[22] *Nguyen and Pham v The Queen* (supra) at [72(g) – (k)]
[23] ST[23]

- The offences were objectively very serious.[24] The maximum penalty prescribed for charge 1 was 15 years imprisonment and for charge 4 was 7 years. Charge 2, which involved the importation of firearms, ammunition and magazines, carried a maximum penalty of 10 years. These penalties all reflect the seriousness with which Parliament considers the offending. The maximum penalty, taken with other relevant factors, provides a yardstick against which a sentence is to be considered;[25]
- Charge 1 involved the importation of 481.8g of pure pseudoephedrine which is just over the applicable marketable quantity of 400 grams[26] and which is a critical ingredient in the manufacture of methamphetamine;
- The value of the imported pseudoephedrine was between $10,000-$16,000;[27]
- The wholesale value of methamphetamine capable of being manufactured from the pseudoephedrine was between $140,000-$160,000;
- Charge 4 involved the pre-trafficking of 107.4 grams of the controlled precursor pseudoephedrine. The quantity of methamphetamine that can be manufactured from 107.4g of pseudoephedrine is approximately 80g;[28]
- Charge 2 involved the importation on 3 occasions of pistols, detachable box magazines and ammunition. The pistols were examined and found to be in working condition and capable of being fitted with the detachable box magazines also imported;
- Charge 2 was "rolled up" and involved 3 episodes of importing of weapons and accoutrements. Accordingly, the criminality involved in the charge is greater than with a charge involving only one episode of criminal conduct;[29]
- The drug related offending involved the establishment and use of 2 clandestine drug manufacturing laboratories;[30]
- The Applicant was in possession of a phone containing details of how to import items and avoid detection, how to manufacture narcotics and links to names used to facilitate the importation of substances. He had another phone containing details of payments

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[24] ST[23]
[25] *Markarian v The Queen* (2006) 228 CLR 357 at [30][31]. The maximum penalty serves as a yardstick and a basis for the comparison between the case before the court and the worst case.
[26] Pursuant to Schedule 3, *Criminal Code Regulations 2002* (Cth); ST[65]
[27] ST[19]
[28] ST[19]
[29] See *R v Richard* [2011] NSWSC 866, at [65(f)]; *R v De Leeuw* [2015] NSWCCA 183
[30] ST[17-18]

made to others and links to false documents related to the 2 clandestine laboratory addresses;[31]

- The Applicant's role was central to the offending and included sourcing false identification documents to use to conduct the importation, operating parcel locker accounts in false names to minimise detection with respect to the import, being actively involved in the manufacture and pre-trafficking of drugs, importing significant quantities of laboratory glassware, sourcing chemicals for manufacture/pre-trafficking[32]. He had links to both the Albion Street and Burrowes Street clandestine laboratories; and
- The offending covered a period of over 4 months.

STATE INDICTMENT (Counts 3 and 4)

11. The Applicant contends that the individual sentences imposed on counts 3 and 4 of the State indictment are manifestly excessive.[33] It is to be noted that both counts alleged trafficking in a drug of dependence on a single day. However, the offending must be assessed in view of the following facts:

- In each case the maximum penalty of 15 years imprisonment reflects the objective seriousness of this kind of offending;
- The Applicant has relevant prior convictions, including a sentence of imprisonment[34] for the same offence;
- Count 3 related to a number of substances located in the Applicant's kitchen with a gross weight of 1725.2 grams. These substances contained a pure quantity of 49.1 grams of amphetamine;
- Count 4 involved a total quantity of substances weighing 614.2 grams that contained methylamphetamine. The precise quantity of pure methylyamphetamine was not known;
- In each case the quantity involved was significant and the substances containing the drugs were there as part of the Applicant's trafficking business;

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[31] ST[16,19]
[32] Invoices for chemicals related to manufacture were addressed to Chris Wong, an alias used by Huynh
[33] No challenge is made to the other sentences on the State Indictment
[34] Albeit a wholly suspended sentence

- Both general and specific deterrence loomed large in sentencing the Applicant for these offences;
- Very modest cumulation of 6 months imprisonment was ordered in respect of count 3.[35]

12. It is accepted that the individual sentences imposed for counts 3 and 4 are at the upper end of sentences imposed for this type of offending. For the reasons set out above it is nonetheless submitted that the sentences are within range when regard is had to all relevant factors.

OVERALL TOTAL EFFECTVE SENTENCE AND NON-PAROLE PERIOD

13. The overall sentence of 12 years imprisonment with a non-parole period of 8 years was not manifestly inadequate for the following reasons in addition to those outlined above:

a) The Applicant was sentenced for 5 separate instances and types of offending on the Commonwealth Indictment and 5 separate instances and types of offending on the State Indictment;
b) On the Commonwealth Indictment this included the manufacture of a marketable quantity of amphetamine for a commercial purpose, namely 697.6g pure amphetamine located at 10/399-401 Albion Street[36] in addition to the drug charges represented by 1, 4 and 7. A commercial quantity of amphetamine is 750 grams and accordingly, the amount manufactured was 92% of the applicable commercial quantity and 2.78 times the prescribed marketable quantity of 250 grams;[37]
c) The Applicant had relevant prior convictions for drug related offending;[38]
d) General deterrence was a primary sentencing consideration and specific deterrence assumed importance given the Applicant's prior drug related matters[39]; and
e) It was conceded by the Applicant that his offending – at least in the latter part – escalated and was for financial gain;[40]
f) The Applicant's offending was accompanied by the use of false document including

[35] With count 4 being the base sentence
[36] ST[65]
[37] Pursuant to Section 5C(1), Item 12 of the *Criminal Code Regulations 2002* (Cth); ST[65]
[38] ST[28]
[39] ST[28-30]
[40] ST[34]

a passport and ID cards.[41]

14. The learned sentencing judge took into account the Applicant's family circumstances and support, employment history and his age at the time of the offending.[42] His Honour noted the Applicant's regular use of drugs since age 16 – most recently, his use of ice until the time of his arrest[43]. Whilst psychological examination revealed no psychosis or thought disorder, his Honour took into account the conclusions made as to the Applicant's immaturity, the emotional distress and anxiety he has suffered since being charged with the present offences and his degree of insight the Applicant has developed into his addiction and its consequences.[44]

15. The steps taken by the Applicant towards rehabilitation whilst in custody were clearly taken into account by the learned sentencing judge who concluded that the Applicant's prospects of rehabilitation were 'reasonable' when his positive efforts to rehabilitate himself whilst on remand were balanced with his prior conviction for drug related offending.[45] Importantly, whilst his Honour acknowledged the importance of general and specific deterrence in sentencing the Applicant, he explicitly stated that he had nevertheless *"...not lost sight that your recent efforts augur reasonably well for your future as long as you abstain from drug use"*[46]. The Applicant's plea of guilty *"...at an appropriate early time"* was also taken into account, as was its concomitant demonstration of remorse.[47] The harsh and onerous conditions the Applicant was subject to when held in "lockdown" for some 3 months was also taken into consideration in passing sentence.[48]

16. The sentences imposed and the total effective sentence and non-parole period reflect the nature and circumstances of the offending and reflect the primacy to be given to the *"...principles of ...general deterrence, condemnation and denunciation, protection of the community and just punishment..."*.[49] There was nothing in the Applicant's subjective personal circumstances that were so unusual or remarkable from others who fall to be sentenced for the

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[41] ST[15]
[42] ST[48-50],[55]
[43] ST[51]
[44] ST[53-54]
[45] ST[54-58]
[46] ST[64]
[47] ST[59]
[48] ST[60]
[49][25]. *Nguyen v The Queen; Phommalysack v The Queen* (2011) 31 VR 673 at [39]; see also *Director of Public Prosecutions (Cth) v Bui* (2011) 32 VR 149, para [37]-[42]; *DPP (Cth) v Estrada* [2015] VSCA 22 at [47]; ST [11], [39].

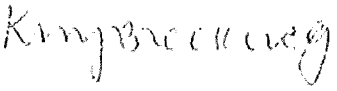
same or similar offending or to warrant any displacement of the primacy to be given to the need for general deterrence in offending of this nature. The sentence clearly reflects consideration having been given to the various mitigating factors put on the Applicant's behalf. These factors were appropriately synthesised with the relevant sentencing principles for this type of offending.

17. In summary, sentencing the Applicant as he did, the sentencing judge gave sufficient weight to and balanced the relevant mitigatory factors with the circumstances of the offending outlined above as required by sub-section 16A(2) of the *Crimes Act* 1914 (Cth)[50] and gave careful consideration to the relevant sentencing principles for this type of offending[51]. The resultant sentences accorded with sub-section 16A(1) of the *Crimes Act 1914* (Cth) by reflecting *'a severity appropriate in all the circumstances of the offence'*.

CONCLUSION

19. The application for leave to appeal should be refused because, pursuant to s 280 of the *Criminal Procedure Act* 2009 (Vic), there is no reasonable prospect that the Court of Appeal would impose a less severe sentence. This is so, even if a ground of appeal is reasonably arguable: section 280(3).

3 February 2017



Krista Breckweg
Counsel for the Respondent
Commonwealth DPP Melbourne Office

Matthew Phillips
Counsel for the Respondent
Victorian Office of Public Prosecutions

[50] ST[66]
[51] ST[27]