

IN THE COUNTY COURT OF VICTORIA

Revised
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AT MELBOURNE
CRIMINAL JURISDICTION

CR 15-00481

THE QUEEN

v

PHUONG HUYNH
ALLAN AU

JUDGE: HIS HONOUR JUDGE GUCCIARDO
WHERE HELD: Melbourne
DATE OF HEARING:
DATE OF SENTENCE: 24 August 2016
CASE MAY BE CITED AS: DPP v Huynh
MEDIUM NEUTRAL CITATION: [2016] VCC

REASONS FOR SENTENCE

Subject:
Catchwords:
Legislation Cited:
Cases Cited:
Sentence:

<u>APPEARANCES:</u>	<u>Counsel</u>	<u>Solicitors</u>
For the Commonwealth Director of Public Prosecutions	Ms T. Tran	
For the Director of Public Prosecutions	Ms V. Nguyen	
For Accused Huynh	Mr M. Gleeson	
For Accused Au	Mr J. Slucki	

HIS HONOUR:

- 1 Phuong Huynh, you pleaded guilty to five charges contained in the Commonwealth indictment and five charges contained in a state indictment. Allan Au, you pleaded guilty to four charges on the Commonwealth indictment, two of which, Charges 3 and 4, were as co-accused with Huynh. You also pleaded guilty to a related summary offence of breaching a suspended sentence.

- 2 The Commonwealth indictment charged that on 28 February 2014 you, Mr Huynh, imported a marketable quantity of a border controlled precursor, namely pseudoephedrine, intending to use or believing that another person intended to use any of the substance to manufacture a controlled drug. That was Charge 1.

- 3 Charge 2 concerned the intentional importation between 21 April 2014 and 28 April 2014 of firearms, magazines and ammunition. You were further charged that on or about 27 June 2014 you did manufacture a marketable quantity of a controlled drug, namely amphetamine, Charge 3, and that on or about 27 June 2014 you did pre-traffic in a substance, being pseudoephedrine, a controlled precursor. Lastly on the Commonwealth indictment, Charge 7 alleged that you possessed amphetamine on 27 June 2014, amphetamine being a drug of dependence.

- 4 The state indictment contained five charges against you, Mr Huynh. As I have said before, those charges were that a day in January 2014 you possessed a substance, material, documents or equipment for trafficking a drug of dependence, Charge 1; that in January 2014 you possessed ammonia, a precursor chemical, Charge 2; that on a day in January 2014 you trafficked in amphetamine, Charge 3; that also on a day in January 2014 you trafficked in methamphetamine, Charge 4; and finally that on a day in January 2014 you possessed cocaine, a drug of dependence.

- 5 The Commonwealth indictment in relation to you, Mr Au, alleged that on or about 27 June 2014 you manufactured a marketable quantity of amphetamine, a controlled drug, Charge 3; and that on the same day you pre-trafficked a controlled precursor substance, namely pseudoephedrine, Charge 4. That indictment further alleged that you possessed a firearm and a silencer on the same date, while being a prohibited person, Charges 5 and 6; and the related summary offence was the breach of a suspended sentence which had been imposed by the Magistrates' Court on 5 September 2013 for the offence of trafficking in amphetamine and dealing with proceeds of crime. The sentence was for 12 months' imprisonment suspended for two years.
- 6 The offences to which you pleaded guilty on the above-named Commonwealth indictment constitute a contravention of the suspended sentence of imprisonment. You entered a plea of guilty to these charges on 5 November 2015 before the matter was adjourned to this year and I shall deal with this breach as well as the counts on the Commonwealth indictment in a moment.
- 7 Upon your respective plea hearings the prosecution both Commonwealth and State tendered detailed summaries of your offending. Those exhibited documents will be retained on the court file and I have referred to them in preparing my sentence. For purposes of today a brief summary of the allegations will suffice.
- 8 Information provided by United States authorities for the Australian Federal Police led to an investigation into the importation of prohibited items via postal services in Australia. A consignment originating in the Netherlands was intercepted on 28 February 2014 and examination of its contents revealed 481.8 grams of pure pseudoephedrine. The parcel had been delivered to a locker in the name of Chris Wong in Footscray West. That was Charge 1, Commonwealth charge.
- 9 On 21 April 2014 another mail consignment sent from the United States of

- America to Chris Wong was intercepted at a mail locker in North Melbourne. It contained a semiautomatic pistol, two box magazines and rounds of ammunition, Charge 2. The pistol was in working order and capable of being fitted with the imported magazines. Such importation is prohibited.
- 10 On the same day another consignment from the USA was intercepted in West Footscray at a mail locker. The parcel contained a 9-millimetre semiautomatic pistol, box magazine and round of ammunition. On 28 April another consignment from the USA and delivered to the Footscray mail locker was intercepted and found to contain again a semiautomatic pistol, a box magazine and a magazine loader. The pistols were in working order.
- 11 Surveillance evidence conducted during the investigation was able to connect both of you to each other. On 24 June 2014 a controlled delivery organised by the Australian Federal Police to the West Footscray locker led to observations of you, Mr Huynh, attending at the locker using a key and collecting the package. You were then seen to drive to Mr Au's address at Busch Street in Sunshine North.
- 12 A couple of days later you, Mr Au, were seen driving the same vehicle near Mr Huynh's address and near Albion Street, Brunswick West, as well as to Sunshine, where you collected a parcel from the Australia Post offices and then drove to another Sunshine North address. Later that day you were seen with Mr Huynh unloading the car and another vehicle and placing items in the garage at Albion Street mentioned before.
- 13 Those premises were rental premises secured by rental application in the name of Lee but bearing your photograph, Mr Au. The following day you were both seen near Albion Street before leaving. Search warrants were executed that day at your residence, Mr Au, at Mr Huynh's residence as well as Albion Street and an address in Ascot Vale. At your house, Mr Au, police found documents which related to the Albion Street lease in the name of Lee and which included

- your photograph. Police also found 18 BlackBerries, 36 SIM cards and \$3,720 in cash and a baton, a controlled weapon, the subject of a related summary offence.
- 14 A search of the vehicle both of you had driven, a Corolla, located a silencer, Charge 6, and contained mobile phones, firearms, accessories, photocopies of 11 licences and a phone contain messages related to the connection of utilities at Albion Street and an SMS from Huynh to Au on 26 June 2014. Police also found a pen gun, a home-made device into which a .22 long rifle calibre cartridge could be loaded and fired. Two keys were also found. One was the key to a car located at your home, Mr Huynh, and another set was to the Albion Street premises.
- 15 At your address, Mr Huynh, police found numerous false documents, some of which contained references to Chris Wong. A Lithuanian passport, an ID card in the name of Lee, contained Mr Huynh's photograph. In your bedroom, Mr Huynh, police found amphetamine and heroin wrapped in foil together with \$2,100 in cash, BlackBerry phones and an ankle holster. In a safe, which you opened for police, they found a box of ammunition and a magazine. The Honda motor vehicle at your premises, Mr Huynh, was searched and police found an item of mail addressed to Lee and another addressed to Wong.
- 16 A phone seized contained documents describing the importation or manufacture of narcotics, documents detailing relevant names like those used for the parcel lockers of Footscray, namely Wong and Nguyen. Another phone contained details of payments to parties in euros and links to the Albion and Burrow Street, Ascot Vale address by way of false documents.
- 17 Charges 3 and 4 of the Commonwealth indictment to which you have both pleaded guilty relates to these two addressees just mentioned. The Ascot Vale premises consisted of a clandestine laboratory which held chemicals such as acetone and sulphuric acid, funnels, bottles, filters and gloves inter alia. Your

- fingerprints, Mr Huynh, were found there. 3.4 grams of amphetamines were found on some items, as were methylamphetamine, ephedrine and pseudoephedrine. The seized chemicals could be used in manufacturing controlled drugs.
- 18 A similar clandestine laboratory set-up was found at West Brunswick, which contained similar items and substances including hydrochloric acid, caustic soda and chemical glassware and equipment. Your fingerprints, Mr Au, were found at those premises on some items found, together with documentation linked the parcel collected by you, Mr Huynh, on 24 June from the locker in Footscray. Substances seized in West Brunswick contained 697.6 grams of pure amphetamine of various purity up to 60 and 70 per cent in various liquids and scrapings. Both the substance and the items of equipment were suitable for the manufacture of amphetamine.
- 19 Chemicals found are diluents and controlled substances. 107.4 grams of pure pseudoephedrine was found. Other vessels contained codeine and over a litre of hydrophosphorous. The combination of these substances can result in the manufacture of 80 grams of methylamphetamine. The value of the imported pseudoephedrine subject of Charge 1 was said to be between ten and 16 thousand dollars. The wholesale value of 542 grams of methylamphetamine hydrochloride capable of being manufactured from the pseudoephedrine is between 140 and 160 thousand dollars.
- 20 As for the indictment alleging five state offences to which you pleaded, Mr Huynh, the matters may be summarised from the prosecution opening which was tendered and exhibited upon the plea. Between July 2013 and November 2013 Victoria Police were advised by Customs and Border Protection Services of certain suspicious importations. In July 2013 one such importation was revealed to contain scientific glassware. An earlier parcel in June 2013 also contained such glassware. The consignee was you, Mr Huynh, and the consignments were delivered.

- 21 Between June and August 2013 a further eight consignments addressed to you were X-rayed and found to contain scientific glassware. Another two such deliveries took place in September and again in November. The relevant address were premises rented by you, Mr Huynh, at Maidstone. This apartment was searched under warrant in January 2014. Equipment and chemicals found are the items which are the foundation for Charge 1, being possession of such items for trafficking in a drug of dependence.
- 22 Liquids and solids found weighed a total of 1725.2 grams with 49.1 grams of amphetamine, Charge 3. 614.2 grams of methylamphetamine were found in containers in the kitchen, Charge 4; two substances analysed contained cocaine, Charge 5. A van located outside the premises was searched and 123 kilograms of ammonia was found. This is a precursor chemical, Charge 2. You had used another person's licence to register the vehicle.
- 23 It suffices to say that these drug-related offences are serious criminal offences. The manufacture, the importation and the dealing in drugs of dependence is an insidious trade which causes havoc in the community and wreaks personal damage to many people and to social structures and has consequences beyond its own criminality into consequential crime, health costs, justice costs, police costs to the community. The community looks to the court for denunciation of such behaviour as being totally unacceptable, and particularly the imposition of just punishment in order to deter those who are like minded from this type of criminal behaviour.
- 24 Mr Huynh, you are almost 30 years old. I take your plea of guilty into account. The chronology in this matter demonstrates that as to the state matters a resolution was reached relatively quickly upon a second committal mention in October 2014. The Commonwealth matters which arise from February 2014 had a longer investigative phase leading to charges being laid up to December 2014.

- 25 At a contested committal hearing in March 2015 pleas of guilty were resolved with joint pleas listed in November 2015. I do not consider that this period, given the extensive investigation, was unusually delayed. Thereafter the pleas had to again be adjourned, one as a result of the argument as to utilitarian benefit being resolved and again due to defence counsel unavailability. Although clearly neither of these eventualities can be sheeted home to you, Mr Huynh, they are not unusual circumstances and they arise from time to time. Nevertheless, in my view it is appropriate that I take this delay from November 2015 to now in consideration when I come to my sentence, particularly as there has been a period spent in reclusion.
- 26 This is somewhat tempered by your counsel's submission that this period has not only been beneficial to you physically in terms of your addiction but also because it has provided the structure and desire to move forward, as demonstrated by efforts which I will outline in a moment. I accept that your plea is some evidence of remorse. Other evidence can be found as expressed by you to Mr Watson-Munro upon his assessment of you for a report he provided to the court, which I have read and considered, as well as the particulars of your efforts whilst in custody.
- 27 I also assign a utilitarian value to the plea. It is a plea which facilitates the course of justice and has avoided a long and complex criminal trial with its attendant costs and inconvenience. I will take this utilitarian aspect into account.
- 28 You have prior criminal history which was said to be modest. Irrespective of whether this description is accurate or not, it is notable that there are priors that are relevant and must give rise to caution in considering your prospects of rehabilitation. This is so because of a number of aspects. The first is your past addiction and use of a number of illicit substances. The presence of past court sanctions which have failed to deter you is an indicator that future prospects must be guarded in the face of this history.

29 However, the other side of the coin is that your present detention has been your first period of imprisonment and your progress through it has been positive. In 2008 you were convicted for trafficking in heroin and possession of heroin. The Magistrates' Court released you on a community based order for 12 months to perform 200 hours of community work. Although nothing indicates you did not complete this order, the community based disposition was reflective perhaps of the extent of the offending, your addiction and your age at the time, and it appears to have had no impact upon you or your addiction.

30 Neither did your marriage in 2009 and separation a year later in the context of a miscarriage and continuing drug taking on your part. Indeed in 2014 for an offence in 2013 you were convicted and sentenced to two months' imprisonment, from which you were released forthwith on a recognisance release order to be of good behaviour for 12 months. This order, of course breached by you by the offences of manufacturing in June 2014, pre-trafficking in June 2014 as well as the charges relating to possession on the Commonwealth indictment. At a time when you were the subject of the recognisance order you committed serious offences. There is in this obstinate and contumacious offending an indication of the need for the caution I have mentioned.

31 There are two aspects to be taken into account. Although the corrosive effects upon judgment and moral culpability of drug taking are probably evident in this conduct, and must to a small extent moderate punishment and notions of retribution for wrongdoing as a sentencing consideration, by the time of the commission of these offences I have mentioned, the level of sophistication and involvement by you had reached its apex. You were able to make choices and you should, in this sense, be held fully accountable for your voluntary conduct which was the ultimate product of the lifestyle chosen by you for much of your life.

32 In this sense the sentence of the court, while considering your prospect of rehabilitation, will also need to pay heed to the need to endeavour to protect

the community and give weight to specific deterrence in determining an appropriate sentence, conscious of the paradoxical fact that the two aims are often interconnected. This aspect is also tied to the efforts made by you in the last two years, to which I will come in a moment.

33 You were born in Vietnam and have three brothers. Your father is a builder and your mother was a seamstress. The family left Vietnam when you were three years old and eventually arrived in Australia as refugees. You were educated to Year 12 and then started a Victoria University course in mechanical engineering. This you discontinued because of your drug problem. Your addiction had begun when at a very young age of 13, it would appear on your report to Mr Watson-Munro.

34 You obtained short-term, sporadic employment, although at the time of your arrest you had been unemployed for some three years. It appears your heroin addiction peaked at about \$700 per day, and that may have its origins in some levels of depression, but then extended to ice and, for the last two years, to cocaine. What began as offending primarily motivated by your addiction, as the earliest criminality was, matured into a commercial and sophisticated multifaceted enterprise motivated by gain.

35 This addiction sadly was facilitated by your own brother, who is currently serving a lengthy prison sentence for trafficking in a large commercial quantity of ice. Through him you were able to maintain a significant habit.

36 You commenced your efforts in early 2014 in manufacturing ice, importing glassware in your own name and at your own address. Soon that effort embraced by the Commonwealth offences became more complex, involving co-accused, overseas connections, the importations of substances and goods, the setting-up of premises in various locations as laboratories, the use of false documents, to name some aspects.

37 In this context I am satisfied to the required standard that the firearm and

- firearm-related items imported by you were part and parcel of the business of drug manufacturing and trafficking and pre-trafficking in which you were engaged. The inference that such items by their nature are present and desired and obtained by you is, in my view, irresistible and reasonable. They are associated with your criminal activity.
- 38 The charges related to those items are largely tied and subsumed by the more serious offence on the Commonwealth indictment but will carry some small cumulation in recognition of the different separate criminality attaching to them, while being largely concurrent, as I indicated during the plea.
- 39 You have your family support and this is a positive aspect of your future prospects. You have in the past made some effort at halting your addiction, primarily pharmacological interventions which, without any structure, failed to change this course. That aspect was provided to some extent in the last two years on remand.
- 40 Firstly the detox pack given to you on arrival helped you to detoxify. It was augmented by some anti-anxiety medication. This helped you with sleep and weight gain. Mr Watson-Munro suggests in his report that this period has helped to clarify your ideas and you have gained a moderate insight to the dynamics surrounding your offending behaviour. You still experience a level of depression and anxiety and would benefit from more integrated therapy in the long-term, aided by antidepressants. These matters can be adequately addressed by correctional services.
- 41 For your part you have used your time in custody in a productive manner. Firstly your urine screen tests have been negative. A bundle of certificates were tendered which demonstrated your completion of a number of courses and participating in programs. These have included six vocational courses run by Kangan Institute. A letter from the prisons services, ReGen Uniting Care agency, attest to your participation in a number of drug-related programs.

- 42 You took part in the Insight parenting program, the cognitive behaviour therapy program, which is conducted full-time and is considered full-time prison employment. You have taken part in Buddhist meditation sessions and instruction. Certificates were also tendered in relation to three other programs undertaken by you last year which focused on drug education and relapse prevention. Custody enrolment summary shows your involvement in many short-term educational and vocational courses from microbusiness to digital technology, kitchen operations to cleaning to general education. These efforts are all to your credit and I take them into account.
- 43 A letter of support was received from Ms Ilieski, a prison fellowship volunteer who attests to your participation and enthusiasm in relation to "A Change on the Inside" course, an educational initiative on positive character development. She attests to your positive influence and support of others in your unit.
- 44 I was informed that you are a peer support officer and Marngoneet, a position which allows you to facilitate the integration of new prisoners, particularly those on remand and particularly those who are assisted by your ability to speak Vietnamese and English. Your conduct whilst on remand shows that even after such a long period of addiction there are some prospects that it may be able to be broken. Such a long-term addiction must call for caution, but it appears that you have at least endeavoured to take advantage of the opportunity afforded you.
- 45 Although there is clearly a great incentive for you to demonstrate this effort prior to sentence, this does not diminish its value and I will take it into account and in my view give it weight in the assessment of your prospects of rehabilitation; however, it should be clearly understood that your conduct escalated so that by the time of your arrest you had moved well beyond offending relating to your addiction and I am satisfied to the required standard of the aggravating circumstances of gain as the primary purpose.

- 46 Denunciation and general deterrence take on particular importance as the purposes to be put into effect by this sentence. At the beginning of the plea on your behalf it was pointedly said, "There are two features to your plea: what your life was like leading up to this offending and what you have done since offending". That encapsulation leaves out a very significant aspect. The sentence must deal with the criminality involved in your offending and be concerned with addressing it appropriately.
- 47 The length of the offending is significant. Your role in this conduct is central and primary. The potential benefit for gain was substantial. The complexity and sophistication of the enterprise was significant and the potential damage to the community very real. The maximum involved in the penalties reflect the gravity of the offending and the criminality of the enterprise must be punished accordingly to denounce it and to deter such conduct through just punishment.
- 48 Allan Buntong Au, you pleaded guilty to four Commonwealth offences and related summary offence which was triggered and laid, once you pleaded guilty to the Commonwealth offence committed in June 2014, in November 2015 and which contravened a suspended sentence of 12 months' imprisonment suspended for two years which had been imposed on 5 September 2013 for trafficking amphetamine and dealing with property suspected of being proceeds of crime.
- 49 You are 27 years old and were 25 at the time of the offending. Your family came from Cambodia in the late 70s. You were born in Australia, the eldest of four children. Your family's circumstances was conflicted and hard-up financially with you being required as a consequence to work part-time and to actively care for your younger siblings. Your family has kept visiting you and are supportive of you.
- 50 You faced bullying at school and, since the age of 16, have been a drug user and struggled with the consequences of that choice. This use was part of your

life as a member of a group of disaffected youths. You ceased studies in Year 11 and obtained a cabinetmaking apprenticeship which you could not take up because of a leg injury. You obtained work as a printer's assistant, but your work history has been sporadic and you have not worked since 2010.

51 For several years you were addicted to heroin and this affected significantly your capacity to study, work and sustain relationships. You also used ice alternatively and life became centred on this use. Your heroin use abated in the early 20s, but you regularly used ice until your arrest. You participated in some drug counselling in 2012 and, during this treatment, you achieved some abstinence, but soon after you relapsed.

52 Whilst you had hoped to complete a TAFE pre-vocational course in electro technology, you could not get employment and the drug use escalated. You turned to trafficking and in September 2013 at Ballarat you were sentenced, as noted above, to a suspended sentence of imprisonment. That is a relevant prior, different in nature to the driving and dishonesty priors which had preceded it. You also experienced a very problematic gambling behaviour since about the age of 18, exacerbating your financial problems and reinforcing your ice use and related activities.

53 Mr Patrick Newton, a clinic and forensic psychologist, provided a report to the court in which he outlined your mental status. You were emotionally distressed and anxious in response to your legal predicament. You are immature for your age, failing to transition to adult maturity, leaving you inadequate and incompetent when managing life issues. You are in a period of remission from your severe drug addiction. He states that you have shown a good degree of insight into your addiction and the factors which it triggered.

54 There is no indication of any active psychosis or thought disorder. He opined that you have made good use of your time on remand to bring your drug-related, gambling-related and mood disorders under control. There is continued need

for a supervised context to facilitate your reclamation, including education and counselling, and this should continue after your release.

- 55 You have had the ongoing support of Anna Phan, your girlfriend who has visited you and has written a reference on your behalf, as have your brother's girlfriend Ms Nguyen and your other sister Julie. Each speak of your concern for your parents, your family, your expressions of remorse and regret, your ability to contribute positively to work and their fervent hopes for your future. Despite your prior criminal history, which is of some relevance to this issue, your recent time on remand appears to indicate that your prospects of rehabilitation are reasonable.
- 56 Much of the plea was taken up with an explanation of your recent efforts whilst on remand. A report from the youth development officer at Port Phillip Prison, Anne Hooker, was tendered. You have spent time at units there and at Marngoneet correctional facility from October of last year. There has been no indication of drug use, with drug tests returning negative results. I was shown these results notifications.
- 57 You have enrolled in and completed a number of courses, which were outlined in the report, and through certificates. You have displayed a positive attitude and engagement, particularly as a manufacturing manager in the "Doing Time" small business program, including being a positive influence to other young Asian offenders, with improving attitude and genuine effort. You have been a programs billet and a visits billet, trusted duties within the correctional structures, as well as induction billet, a first-point-of-call role for all new prisoners.
- 58 All of this augers well for your rehabilitation, which I take into account. To confirm this progress, certificates and references were tendered in relation to a large number of courses including relapse prevention programs, youth substance-use programs, emotional management, general education,

vocational, cleaning and kitchen operations and the "Change on the Inside" educational initiative. The executive director, Mr Fairweather, provided a short report and wrote positively of your participation and engagement. I take all of this material into consideration as demonstrating the reasonableness of your future prospects.

59 I take your plea into account. Your plea of guilty, I accept, is accompanied by remorse and was made at an appropriate early time. It has a utilitarian value which I take into account as having avoided a costly criminal trial and thus having saved the community that cost and the witnesses the inconvenience of that time. I accept this aids the administration of justice and the proper allocation of resources.

60 I take into account the fact that during your reclusion at Port Phillip, before your removal to another facility, you experienced lockdown for some three months. This was your first experience of incarceration and it was consequent upon a riot which took place at the prison. The conditions of this type of imprisonment are strenuous and harsh and I consider that such unusual detention must be taken into consideration.

61 In relation to the restoration of the suspended sentence, the summary of that offence relates to your arrest on 8 May 2013 in company of others in possession of drugs and other accoutrements. When interviewed you admitted trafficking ice for approximately two months. You had 37 grams of methamphetamine in your possession with a street value in excess of \$37,000 and a tick book with values of money owed for drug of approximately \$126,000. You had gone to Ballarat to sell ice for money.

62 It was candidly submitted upon your plea that there were no exceptional circumstances which would impact upon the orders in relation to the restoration. Rather, it was put that there should be, "A very large degree of concurrency in relation to all offences, including the restored sentence". This was said to follow

by an application of the principles of totality. I agree that this is an important principle for me to apply in this sentence generally and in particular pertaining to each of you.

63 It is the case that in delivering the ultimate sentence I have taken into consideration this principle; however, the offence for which the suspended sentence was imposed is a discrete matter in place and time, though of a similar nature. In recognition of this my view is that it can only reasonably contain a measure of concurrency.

64 In relation to your offending, general deterrence must be a primary consideration as well as specific deterrence; however, I have not lost sight that your recent efforts augur reasonably well for your future as long as you can abstain from drug use.

65 Your role was adequately described by the prosecutor: your fingerprints were on various items at the Albert Street clandestine laboratory; the day prior to the arrest you were seen unloading boxes and you had the keys to those premises, indicating the level of trust reposed in you; you used false documents to rent those premises, including a false New South Wales licence bearing your photograph, emblematic of a sophisticated operation; you sourced glassware and narcotic test kits. The amount of pseudoephedrine involved was 107.4 grams and the manufacture charge involved a quantity just short of a commercial quantity.

66 In sentencing each of you, I have taken into account the matters set out in the relevant section, s.16A(1) and (2), as well as the applicable state sections which address sentence considerations, as well as the totality principle under s.16B. By virtue of s.16E the time you have already spent in custody will be taken into account. Having considered all available options, it is clear that imprisonment must be the sentence of the court.

67 Madam Prosecutor, can you advise me as to the pre-sentence detention dates

for each.

68 MS TRAN: Your Honour, I have calculated 790 days including today. I believe my learned friend has calculated 791 days.

69 MR SLUCKI: Your Honour, my instructor did a check and she got 791 days including today.

70 HIS HONOUR: Yes. And in relation to Mr Au?

71 MS TRAN: The same, Your Honour.

72 HIS HONOUR: The same?

73 MS TRAN: Yes.

74 HIS HONOUR: I will declare 790 days excluding today.

75 MR SLUCKI: Thank you, Your Honour.

76 HIS HONOUR: Could you please stand, each of you.

77 Firstly, in relation to Mr Au, on the Commonwealth charges, Charge 3, manufacture a marketable quantity of controlled drug of dependence for a commercial purpose, a charge which carries a maximum of 25 years, you are convicted and sentenced to seven years' imprisonment.

78 On Charge 4 of pre-trafficking in a controlled precursor, a charge which carries a maximum of seven years, you are convicted and sentenced to three years' imprisonment.

79 On Charge 5, possession a firearm, being a prohibited person, a charge which carries a ten-year maximum, you will be convicted and sentenced to three years' imprisonment.

80 On possessing a silencer, being a prohibited person, a charge which carries an eight-year maximum, you are convicted and sentenced to two years'

imprisonment.

- 81 On the related summary charge of possessing a controlled weapon, the baton, you are convicted and sentenced to three months' imprisonment, which will be concurrent with other sentences.
- 82 On the breach of the suspended sentence, I restore your sentence of 12 months, which was suspended for two years, for trafficking amphetamines. I restore that sentence wholly. I will not impose a further penalty on the contravention.
- 83 The base sentence will be a sentence of seven years on Charge 3. I order that one year on Charge 4, three months on Charge 5, three months on Charge 6 be cumulative and I also order that six months on the breach of the suspended sentence be cumulative upon that sentence, making a total sentence of nine years. I order a non-parole period of six years.
- 84 In relation to that particular sentence, Madam Prosecutor, the exercise to be performed there and which you can check in relation to the commencement periods, I intended the restored state sentence - the suspended sentence - to commence today, 24 August 2016, and that the federal sentence commence six months hence on 24 February 2017. The federal sentence will expire on 24 August - I am not sure about that number. It says - I think it should read 26th. The non-parole period which I have imposed begins five and a half years after the commencement of the federal sentence. That is on 24 August 2023.
- 85 I have set that out diagrammatically. I will hand that down to you in relation to Mr Au's sentence. So I will just hand that down for the prosecutor and you can check that schema and see if it makes any sense and it is appropriate. If you need clarification you can certainly seek clarification from me about that. I do not know if it will make any sense to you, but I think it is much less complicated in relation to Mr Au.

- 86 MS TRAN: Your Honour, just in terms of that, and I will work out the dates, usually commencement dates need to be put in place in relation to each charge - - -
- 87 HIS HONOUR: To each charge, yes.
- 88 MS TRAN: - - - to give effective cumulation.
- 89 HIS HONOUR: That is what I am looking for.
- 90 MS TRAN: I will work that out for Your Honour.
- 91 HIS HONOUR: Yes.
- 92 MS TRAN: Yes, certainly, sir.
- 93 HIS HONOUR: I should declare that 790 days was served by way of pre-sentence detention and that but for your plea I would have sentenced you to 11 years with a non-parole period of eight. So that is in relation to Mr Au. You can be seated.
- 94 In relation to Mr Huynh, just pardon me for a moment. In relation to Charge 1, a charge which carries a 15-year maximum, you were convicted and sentenced to six years' imprisonment.
- 95 In relation to Charge 2, which carries a maximum of ten years, you are convicted and sentenced to four years' imprisonment.
- 96 In relation to Charge 3, which carries a maximum of 25 years, you are convicted and sentenced to seven years' imprisonment. That will be the base sentence.
- 97 In relation to Charge 4 ,which carries a maximum of seven years, you are convicted and sentenced to three years' imprisonment.
- 98 In relation to Charge 7, which carries a maximum of five years, you are convicted and sentenced to three months' imprisonment, which will be

concurrent.

- 99 I order that one year of Charge 1, nine months of Charge 2, one year of Charge 4 will be cumulative on the base sentence, Charge 3, making a total effective sentence of nine years and nine months with a non-parole period of six years and six months.
- 100 In relation to the state sentences, on Charge 1, which carries a maximum of ten years, you will be convicted and sentenced to two years imprisonment.
- 101 In relation to Charge 2, you will be convicted and sentenced to two years' imprisonment.
- 102 In relation to Charge 3, which carries a maximum of 15 years, you will be convicted and sentenced to six years' imprisonment.
- 103 In relation to Charge, which carries a maximum of 15 years, you are convicted and sentenced to six years' imprisonment.
- 104 In relation to Charge 5 you will be convicted and sentenced to one month imprisonment. Sorry, that should read - I will just clarify that last one in a moment. Yes, that is three months' imprisonment. That should be one year imprisonment with cumulation of three months' imprisonment.
- 105 I order that, on the base sentence of six years of Charge 4, three months on Charge 1, three months on Charge 2 and three months on Charge 5 and six months on Charge 3 be cumulative on the base of six years on Charge 4 making a total effective sentence of seven years and three months. I would order a non-parole period of five years on those state charges. My intention is to cumulate part of the state charge onto the Commonwealth charge of two years and three months, making a total of 12 years with an eight-year non-parole period.
- 106 I have endeavoured to on many occasions do that diagrammatically, but I just

have not been able to do so. Of course I have not been able to set out the separate commencement times, so, Madam Prosecutor, given my intention as to the overall sentence and those individual sentences, I would ask that perhaps some indication be given to me as to how to structure that in terms of commencement period so that the effect of that sentence is put in place.

107 MS TRAN: Certainly, Your Honour.

108 HIS HONOUR: But for Mr Huynh's plea I would have sentenced him on the Commonwealth offences to 11 years and eight months - sorry, 11 years with an eight year non-parole period. On the state offences I would have sentenced him to nine years with six and a half non-parole period. In his case I declare 790 days excluding today as pre-sentence detention.

109 MR SLUCKI: if Your Honour pleases.

110 MR GLEESON: Thank you, Your Honour.

111 HIS HONOUR: Are there ancillary orders to be - - -

112 MS TRAN: Yes, there are, Your Honour. Could I just clarify in terms of the "but for" for Mr Huynh?

113 HIS HONOUR: Yes.

114 MS TRAN: Your Honour indicated 11 years, but I do not think I quite - - -

115 HIS HONOUR: Eight.

116 MS TRAN: Eight? Thank you, Your Honour.

117 HIS HONOUR: Take a seat, Mr Huynh.

118 MS TRAN: Your Honour, in terms of Mr Huynh there were two ancillary orders, including a disposal order for some drugs.

119 HIS HONOUR: Yes.

120 MS TRAN: And also a proceeds order for a quantity of \$2,100 that was seized.

121 HIS HONOUR: Yes.

122 MS TRAN: I have got draft orders if Your Honour has not already signed them.

123 HIS HONOUR: Yes, thank you.

124 MS TRAN: Similarly in relation to Mr Au there is a forfeiture order for the gun and silencer and again proceeds of \$3,720, Your Honour.

125 HIS HONOUR: Yes, certainly I will sign those orders.

126 MS TRAN: As Your Honour pleases.

127 HIS HONOUR: Now, you will require - - -

128 MS NGUYEN: Your Honour - - -

129 HIS HONOUR: Yes, I am sorry.

130 MS NGUYEN: Your Honour, I am the state instructor. Mr Saunders sends his apologies.

131 HIS HONOUR: Yes.

132 MS NGUYEN: I do not know if Your Honour already has a copy of the forensic sample orders and the disposal orders. I can hand up - - -

133 HIS HONOUR: If you have them - I have a bundle of papers, but if you hand them up I will sign those orders.

134 MR GLEESON: Your Honour, while that is being done, could I just briefly run off to the Magistrates' Court?

135 HIS HONOUR: Yes.

136 MR GLEESON: I just want to have quick chat to - thank you.

137 MR SLUCKI: I am sorry, Your Honour, can I also indicate there is an issue for application for costs that was raised by Mr Kassimatis on 11 November.

138 HIS HONOUR: Just give me a moment. I will sign these orders and we will deal with that. Mr Huynh, I have signed orders for the taking from you of a forensic sample for placement of your DNA on a database. That will be a scraping from the mouth. If at that time that that request is made of you you do not consent to the taking of a scraping from the mouth, an authorised member of the police force may take a blood sample from you. Do you understand? Yes.

139 Now, Mr Slucki, you were mentioning - - -

140 MR SLUCKI: Yes, Your Honour, on 11 November an application for costs was made by Mr Kassimatis on behalf of Mr Huynh and joined by Mr Moglia on behalf of Mr Au on the basis that the matter was adjourned because the Commonwealth at the last minute raised an issue in relation to some stuff that was before the Court of Appeal. Your Honour reserved his decision on that. Your Honour's words were to "adjudicate in due course".

141 HIS HONOUR: What are the details of those costs?

142 MR SLUCKI: In terms of quantum or the base?

143 HIS HONOUR: Yes.

144 MR SLUCKI: It will just be for the day. So from Ms Au's perspective it will be Mr Moglia's fees and the instructing fees. So it will be \$3,960, Your Honour.

145 HIS HONOUR: Who was Mr Moglia's instructor?

146 MR SLUCKI: That was me, Your Honour.

147 HIS HONOUR: Yes. Do you know what the situation in relation to Mr Kassimatis is? You might know, Mr Gleeson.

- 148 MR GLEESON: Your Honour, he made the application. He was present, as was I, and he had Ms Burchill as junior. I had not turned my mind to the quantum; I can do that quickly now. But if Your Honour is minded to make an order we could resolve that issue with the Crown to look at quantum, but I can quickly check now what his fees were.
- 149 HIS HONOUR: Let me just ask the prosecutor - - -
- 150 MR GLEESON: Thank you, Your Honour.
- 151 HIS HONOUR: - - - what the attitude of the Crown is in relation to it.
- 152 MS TRAN: Thank you, Your Honour. Your Honour, that application is opposed on terms of costs and I can make submissions in relation to that application if Your Honour has time.
- 153 HIS HONOUR: Yes.
- 154 MS TRAN: Firstly, Your Honour, that issue related to a matter before the Court of Appeal in a matter of Thomas that related to an issue as to whether a plea of guilty was to be taken into account in the course of a willingness to facilitate the course of justice or whether it was on a subjective view as to a utilitarian value. The position of the Director at that time was that *Cameron* still applies, which is that the plea of guilty was only related to a willingness to facilitate the course of justice.
- 155 There was never a dispute in this case that both accused pleaded at the earliest opportunity, Your Honour. It was a very discrete issue. It was one of the factors to be taken into account under s.16A of *Crimes Act*. It was submitted on the day by the learned prosecution Ms Breckweg that the matter could start, the Crown was in a position where it could open its case, deal with certain of the matters and adjourn part-heard for the learned defence counsel to consider the matter.

156 He had a junior with him and I think it was Your Honour who indicated that Your Honour did not want to fragment the plea hearing and wanted to really deal with the matters in one occasion and that was the reason for the adjournment, Your Honour. When the matter came before Your Honour in June of this year this issue was never raised by counsel. The matter is still now before the court, but the Crown's position is still the same, Your Honour, that *Cameron* still applies.

157 HIS HONOUR: Although the Crown made submissions that it would - even though it had that position and holds that position, it would not argue that the court has fallen into error by taking into account utilitarian benefit for purposes of this sentence.

158 MS TRAN: That is correct, Your Honour. Also it was conceded by the learned prosecutor that the materials or those submissions had been filed the afternoon before, but at the time it was a new matter that had arisen. The Director's general position was that it should be served to all defence counsel in fairness in case that matter was an issue that wanted to be - that defence counsel wanted to address. As I indicated, Your Honour, on the subsequent occasion that matter was never argued or ventilated.

159 HIS HONOUR: Yes.

160 MS TRAN: They are my submissions, Your Honour.

161 HIS HONOUR: That is not of so much importance. I think it was clearly understood that the position was either developing or it simply was not a matter that was raised. It was simply said by the prosecutor that that was their position but that it would not lead into error. So, yes, Mr Slucki.

162 MS TRAN: Yes, Your Honour.

163 MR SLUCKI: The issue I take, Your Honour, the document that was handed - that was provided to defence the day before and then a revised version on the morning was dated 12 days prior to it being provided.

- 164 HIS HONOUR: Sorry, say that again.
- 165 MR SLUCKI: The document was dated 30 October that was provided and this
- and it was provided to defence on the afternoon of 10 November.
- 166 HIS HONOUR: Yes.
- 167 MR SLUCKI: It was also a document that had - and an issue that had been
raised on the prosecutor - in the prosecutor's words, it had been raised before
"several of your brother judges", which indicates it was not an issue that simply
just arose, it was something that defence could have been put on notice - - -
- 168 HIS HONOUR: Yes. Unfortunately that argument cuts both ways. I remember
distinctly saying to Mr Kassimatis on the day that clearly that was not an issue
which was either surprising to him or caught him by surprise or caught him
unawares or unaware of the argument even.
- 169 MR SLUCKI: No, I believe, Your Honour - - -
- 170 HIS HONOUR: I mean that is the problem. The problem that you have with
this application is that it may have been served very late, but that issue was a
very live issue and it has been and had been and everyone was aware of it.
Irrespective of whether a document outlining the argument was communicated
at a particular time, there was little doubt in my mind that the adjournment was
required at that time, because it was said that it was likely to be resolved by the
Court of Appeal before this matter came back.
- 171 It was agreed that it was a significant matter, a significant matter for everyone
concerned, and of significance too to the defence in order to argue that that
particular benefit should still accrue to the accused when the plea came back
on.
- 172 MR SLUCKI: Your Honour, I believe Mr Kassimatis' response when it was
raised that he knew about this was that in he in fact did not know about it.

- 173 HIS HONOUR: He might not have known that, the argument as it was fully put or as to the position - or that he was going to get a document outlining it, but I think that the discussion on the day - I see that you have got the transcript there and I do too. Where is the exchange?
- 174 MR SLUCKI: The initial exchange is - - -
- 175 HIS HONOUR: I see, it is at p.3 and 4.
- 176 MR SLUCKI: I believe it begins on p.2. Mr Kassimatis outlines when he received it and comment from the prosecutor that, "Well, you know what it says anyway", and then it goes from there.
- 177 HIS HONOUR: In a sense that too becomes relative of importance in this sense. Even if an experienced counsel like Mr Kassimatis says that he had not learnt about a submission of this kind until he received the document, there is no doubt that that then became the subject of the adjournment and that it was important not just for the prosecution to get an indication from the Court of Appeal as to the value of its argument but for the benefit of the defence in order to see whether more benefit could accrue, as it usually does in these courts, to the utilitarian value of that plea and the resolving of that matter.
- 178 It does not really fall for the lateness of the submission. I agree that that was not acceptable and that that was unfortunate, but that does not in my view give rise to an order for costs in those circumstances.
- 179 MR SLUCKI: As Your Honour pleases.
- 180 MR GLEESON: Could I make a submission about this.
- 181 HIS HONOUR: Yes, Mr Gleeson.
- 182 MR GLEESON: Would Your Honour be prepared for that day to aware an appeals cost certificate? Because they are state matters as well.

183 HIS HONOUR: Yew, I would.

184 MR GLEESON: We cannot get one for the Commonwealth matters, but we could get one for the state matters.

185 HIS HONOUR: Yes.

186 MR GLEESON: That might be a fall-back position.

187 HIS HONOUR: I think that that is a reasonable compromise.

188 MS TRAN: Yes, Your Honour.

189 MR GLEESON: Thank you, Your Honour.

190 HIS HONOUR: Yes. There is no doubt that the matter was adjourned in a sense at the behest of the prosecution for its own position. I do consider that that is appropriate.

191 MR GLEESON: Thank you, Your Honour.

192 MR SLUCKI: As Your Honour pleases.

193 MS TRAN: Yes, Your Honour.

194 HIS HONOUR: That applies to both of the prisoners. Are there any other matters?

195 MR SLUCKI: No, Your Honour.

196 HIS HONOUR: Yes. You may remove the prisoners, thank you. Just a moment. Just hang on for a moment, please. The learned prosecutor - sorry, I had intended to say that when you have done that work that I have asked you to do, we will reconvene. So I expect the prisoners to be available and present when that takes place whenever that is. It is about 11 o'clock. I will certainly give you, say, till 2.15 if you wish to do that. If that is convenient, I am not sure whether it is convenient to either Mr Gleeson or Mr Slucki.

- 197 MR GLEESON: I'm part-heard in a matter at I think 2 o'clock before (indistinct), but in this court though, so that might work.
- 198 HIS HONOUR: Yes.
- 199 MS TRAN: Would Your Honour allow me about 15 minutes now? I am just working through it now.
- 200 HIS HONOUR: Yes.
- 201 MS TRAN: So there is a bit, but I think I could do it within the next 15 minutes, if that pleases the court.
- 202 HIS HONOUR: Look, if you can, that is terrific. Perhaps if we just remove them for a moment but are able to bring them back when we can reconvene and we will contact Mr Slucki and Mr Gleeson so that they can be present in court when that is done.
- 203 MR GLEESON: Your Honour, I have got someone who is admitted but they have not quite got their practising certificate. They seek leave to appear. I have got to go to the Magistrates' Court for a matter which - - -
- 204 HIS HONOUR: As long as there is someone from your office who can make a notation, I am content with that.
- 205 MR GLEESON: Yes, and they have been admitted to practice.
- 206 HIS HONOUR: Yes, thank you.
- 207 MR GLEESON: Thank you.
- 208 HIS HONOUR: Yes, all right, I will excuse the state instructor as well.
- 209 MS NGUYEN: Thank you, Your Honour.
- 210 HIS HONOUR: Yes, all right. I will stand down.

(Short adjournment.)

211 MS TRAN: Your Honour, I apologise for giving an underestimate of my mathematical abilities, but I think hopefully we have got it right.

212 HIS HONOUR: Thank you.

213 MS TRAN: I indicated to your associate that I will have Ms Breckweg review it and send in a message CCing my friends just to make sure we have got it accurate, Your Honour.

214 HIS HONOUR: Certainly.

215 MS TRAN: If we could start with Mr Huynh, to give effect to Your Honour's overall intention of a total effective sentence of nine years, nine months and a non-parole period of eight years, taking into account the state sentences - - -

216 HIS HONOUR: Just before you go on, I had indicated that I wanted the overall total effective sentence to be 12 years.

217 MS TRAN: Yes, Your Honour.

218 HIS HONOUR: Yes.

219 MS TRAN: Yes, indeed.

220 HIS HONOUR: Yes. The nine years was for the Commonwealth offences as the total effective sentence in relation to those.

221 MS TRAN: Yes, indeed, Your Honour.

222 HIS HONOUR: Yes, all right.

223 MS TRAN: So the state sentence will commence today with then the Commonwealth sentence, which is the base sentence, Charge 3, to commence at the expiry of the non-parole period for the state sentence, which is a year and six months. Then if we go to Charge 1, that sentence is to commence five

years before the expiration of the sentence on Charge 3, then Charge 4 to commence one year before the expiration of the sentence on Charge 3. So we're working backwards, Your Honour. Then Charge 2 commences a year and three months before the expiration of Charge 3.

224 In relation to Mr Au, Your Honour, similarly the sentence for the breach commences today, so six months is to be served before the Commonwealth sentence on Charge 3 commences. So that sentence commences six months after the state sentence or the breach.

225 HIS HONOUR: So as I have put it in that diagram, effectively.

226 MS TRAN: Yes, Your Honour, although I think you need to stipulate the commencement dates and I think Your Honour added an extra year.

227 HIS HONOUR: Yes.

228 MS TRAN: But that was not intended, Your Honour. So Charge 3 on the Commonwealth indictment commences six months from today with Charge 4 commencing five years at the expiration of the sentence on Charge 3.

229 HIS HONOUR: Sorry, Charge 4 commences five years after?

230 MS TRAN: Five years before the - yes, before the expiration of the sentence on Charge 3. Charge 5 commences one year, nine months before the expiration of the sentence on Charge 3 and Charge 6 commences six months before the expiration of the sentence on Charge 3.

231 HIS HONOUR: Right.

232 MS TRAN: Thank you, Your Honour.

233 HIS HONOUR: Can you do me the favour of writing that down - - -

234 MS TRAN: Absolutely, Your Honour.

- 235 HIS HONOUR: - - - and electronically making it available to my associate.
- 236 MS TRAN: I will have it double-checked as well, Your Honour. Yes, Your Honour.
- 237 HIS HONOUR: So that I can make sure that the order which I sign is in that form - - -
- 238 MS TRAN: Yes, Your Honour, absolutely.
- 239 HIS HONOUR: - - - and we do not get any confusion happening. Then if the defence wanted any clarification, they can obtain it from my associate once the order is signed.
- 240 MS TRAN: I will CC my learned friends into that, Your Honour. Thank you, Your Honour.
- 241 HIS HONOUR: Well, thank you very much for that. Thank you very much, Ms Tran.
- 242 MS TRAN: As Your Honour pleases.
- 243 HIS HONOUR: Yes, all right. Now I have another matter, so you are all excused. Thank you very much.
- 244 MR SLUCKI: Thank you, Your Honour.
- 245 MS TRAN: May it please the court.

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