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

S APCR 2016 0223

ALLAN AU

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:

Charge on Indictment	*Offence*	*Maximum Penalty*	*Sentence*	*Cumulation/ Concurrency*
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	4 years (to commence 24 August 2017)
4	Pre-trafficking 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	1 year (to commence 24 August 2022)
5	Possess a firearm being a prohibited person contrary to s 5(1) *Firearms Act 1996* (Vic)	10 years imprisonment and/or 1,200 penalty units	3 years	Base
6	Possess a silencer being a prohibited person contrary to s 5(2) *Firearms Act 1996* (Vic)	8 years imprisonment and/or 480 penalty units	2 years	-

RELATED SUMMARY OFFENCES

1	Breach suspended sentence contrary to s 149D(3) and s 83A0B[2] *Sentencing Act 1991* (Vic)	3 months	Sentence of 12 months imprisonment restored	1 year
4	Possess a controlled weapon (baton) contrary to s 6(1) *Control of Weapons Act 1990* (Vic)	12 months imprisonment	3 months	-

[1] The sentence was subsequently amended on 8 November 2016
[2] Now repealed

Total Effective Sentence:	9 years imprisonment
Non-Parole Period:	6 years imprisonment
Pre-sentence detention declared:	790 days
6AAA Statement: 11 years imprisonment with a non-parole period of 8 years imprisonment.	

Summary of Relevant Facts

2. The Respondent relies on the agreed Prosecution Summary for Plea Hearing (Amended) (Exhibit A on the plea) annexed hereto as 'Annexure 1'.

GROUNDS OF APPEAL:

Ground 1: The sentences imposed on charges 3, 4, 5 and 6 and related summary offence 4, the orders for cumulation and the non-parole period imposed are manifestly excessive given:

(i) The Applicant's remorse and plea of guilty;
(ii) The Applicant's relative youth;
(iii) The steps taken by the Applicant towards rehabilitation whilst in custody;
(iv) The significant delay;
(v) The principle of totality; and
(vi) The Applicant's lesser role in the offending.

19. 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[3].

20. 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*[4]. Apart from the statements relating to the role of the offender,[5] 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

[3] *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].
[4] (2010) 205 A Crim R 106 at [72]
[5] *Nguyen and Pham v The Queen* (supra) at [72(a) – (f)]

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)[6].

21. It is submitted that the sentences imposed on the Applicant for charges 3, 4, 5 and 6 and related summary offence 4, the orders for cumulation and the non-parole period imposed were not manifestly excessive, having regard to the very serious nature and circumstances of the offending[7] including:

- The maximum penalty prescribed for charge 3 was 25 years imprisonment and charge 4 was 7 years. Charges 5 and 6 involved possession of a firearm and silencer and carried maximum penalties of 10 and 8 years imprisonment respectively. These penalties all reflect the seriousness with which parliament considers the offending[8]. The maximum penalty, taken with other relevant factors, provides a yardstick against which a sentence is to be considered;[9]
- Charge 3 involve the manufacture of 697.6 grams of pure amphetamine. [10] 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;[11]
- Charge 4 involved the pre-trafficking of 107.4 grams of the controlled precursor pseudoephedrine which is 26% of the applicable marketable quantity of 400 grams.[12] The quantity of methamphetamine that can be manufactured from 107.4g of pseudoephedrine is approximately 80g;
- The Applicant had a relevant prior conviction for drug related offending. [13] In September 2013 he was sentenced to a suspended term of imprisonment for trafficking in amphetamine and dealing with property suspected of being proceeds of crime. This offending was not insignificant involving as it did the trafficking of ice for some 2 months, the possession of 37 grams of methamphetamine and evidence of

---

[6] *Nguyen and Pham v The Queen* (supra) at [72(g) – (k)]; See for example: *Gajjar v R* (2008) 192 A Crim R 76 at [27][28]
[7] ST[23]
[8] ST[4]
[9] *Markarian v The Queen* (2006) 228 CLR 357 at [30][31]
[10] ST[65]
[11] Pursuant to Regulation 5A, Item 20 of the *Criminal Code Regulations 2002* (Cth); ST[65]
[12] Pursuant to Regulation 5F, Item 13 of the *Criminal Code Regulations 2002* (Cth); ST[65]
[13] ST[10], [52]

considerable drug sales;[14]

- Charges 3 and 4, which were drug offences, constituted a breach of the above suspended sentence;[15]
- It was conceded by the Applicant that there were no exceptional circumstances that would justify the non-restoration of the suspended sentence;
- General deterrence was a primary sentencing consideration and specific deterrence assumed importance given the Applicant's prior conviction and subsequent breach of suspended sentence[16];
- The Applicant's role was very important and included sourcing glassware and narcotic kits, using false documents to rent the clandestine laboratory premises, handling various items at the premises and unloading boxes at the premises the day prior to his arrest.[17] Superior courts have repeatedly stated that illicit drug networks are only able to prosper because people are ready, willing and able to undertake these types of roles and *"Involvement at any level in a drug importation must necessarily attract a significant sentence. Otherwise the interests of general deterrence are not met"*;[18]
- The Applicant's role in holding the keys to the premises represented a level of trust being reposed in him, and the operation was not unsophisticated given the Applicant's use of false documents to rent the premises, including a driver's licence in a false name bearing his photograph;[19]
- In imposing the same sentence on both offenders in respect of the *manufacture and pre-trafficking* aspects of the enterprise, his Honour must have considered that the role of both the Applicant and HUYNH were of similar severity and importance[20];
- The Applicant was sentenced in relation to 3 distinct types of offending, plus a breach of a suspended sentence, which warranted a degree of cumulation between charges. The degree of cumulation imposed was modest, no cumulation was ordered as between the drug and firearm offences and notwithstanding that the offence for which the suspended sentence was imposed was of a similar nature, it was, as his Honour

---

[14] ST[61]
[15] ST[48]
[16] ST[64]
[17] ST[65]
[18] ST[19-21]; *Nguyen v The Queen; Phommalysack v The Queen* (2011) 31 VR 673 at [39]; *R v Budiman* (1998) 102 ACrimR 411, citing with approval the observations of Wells CJ in *Le Cerf* (1975) 13 SASR 237 at 239.
[19] ST[65]
[20] Notwithstanding the Crown concession on the plea that the Applicant's role was less than his co-accused HUYNH.

found 'a discrete matter in place and time' warranting the application of a reasonable measure of concurrency[21]. No further penalty was applied for the breach itself[22].

22. The degree of cumulation ordered between the drug related charges was not excessive and it did not give rise to a sentence which breached the principle of totality. The overall sentence reflected the nature and gravity of the Applicant's offending including the different types of offending involved and the requirement for appropriate cumulation. Further, the sentencing judge made it clear that totality was *"an important principle for me to apply in this sentence generally"*[23].

23. 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.[24] 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[25]. 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 the degree of insight he has developed into his addiction and its consequences.[26]

24. The steps taken by the Applicant towards rehabilitation whilst in custody were 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.[27] 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"*[28]. The Applicant's plea of guilty *"...at an appropriate early time"* was also taken into account, as was its concomitant demonstration of remorse.[29] The onerous conditions the Applicant was subject to when held in "lockdown" for some 3 months was also taken into

---

[21] ST[62-63]
[22] ST[82]
[23] ST[62-66]
[24] ST[48-50],[55]
[25] ST[51]
[26] ST[53-54]
[27] ST[54-58]
[28] ST[64]
[29] ST[59]

consideration in passing sentence.[30]

25. 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..."*.[31] 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 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 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.

Ground 2: The learned sentencing judge erred in failing properly to apply the principle of delay.

26. Delay as a factor mitigating sentence is founded upon considerations of fairness and rehabilitation.[32] 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[33]. 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.[34] Delay may also be relevant if there is evidence of real progress towards rehabilitation having occurred during the period of the delay.[35]

27. *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. He argues 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.

---

[30] ST[60]
[31] [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].
[32] *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]
[33] *R v Todd* [1982] 2 NSWLR 517; *R v Cockerell* (supra) [10]; *Hicks v The Queen* (supra) [23]
[34] *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]
[35] *B v The Queen* [2011] WASCA 40 at [7-8]; *R v Merritt, Piggott & Ferrari* (2007) VR 392

28. As the Applicant himself concedes however, the judge's findings on delay were directed to the sentencing of the co-accused HUYNH and there was no discrete consideration given to the effect of delay in sentencing the Applicant.[36] This was also in circumstances where it was necessary to address specifically the circumstances of the delay in the case of HUYNH.[37]

29. In any event, the actual length of the delay in the present matter, and the period in which the offender had been uncertain of his fate, cannot mandate a significant reduction in sentence. The present delay of just over 2 years, whilst a relevant factor, is not so inordinate or "extraordinary" as to assume great significance in mitigation of the appropriate penalty. 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*"[38] as to warrant a significant reduction in sentence.

30. For example, in *R v Merritt, Piggott and Ferrari*[39] 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*[40] 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*[41]and *Dalton v The Queen*[42] a delay of 6 years between offending and sentencing was considered to be lengthy in terms of fairness to the accused. In *Zhou*[43] a delay of 4 to 5 years was considered extraordinary and inordinate, however in *Scook v the Queen*[44] a delay of nearly 10 years between the offending and conviction was not of itself held to be unreasonable.

31. *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.[45] Again, this

---

[36] Applicant's Revised Written Case dated 20 December 2016 at [4.2]
[37] 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; ST [24-25]
[38]*Zhou v The Queen* [2014] VSCA 123 [16]
[39] *R v Merritt, Piggott & Ferrari* (supra) at [399]
[40] [2016] VSCA 43 at [43]
[41] [2015] VSCA 181
[42] [2015] VSCA 189
[43] *Zhou v The Queen* (supra) at [16]
[44](2008) 185 A Crim R 164;and see *Marasco v The Queen* [2016] VSCA 85; *Hicks v The Queen* [2016]VSCA162
[45] Applicant's Revised Written Case dated 20 December 2016 at [4.1-4.5]

remark was applied in sentencing HUYNH. Further, in his sentencing remarks his Honour referred repeatedly to the rehabilitative progress made by the Applicant during his incarceration and that this would be taken into account in sentencing him.[46] Finally, the authorities reflect that when general deterrence and punishment carry the greatest weight, less weight will be given to factors personal to the offender.[47]

Ground 3: The learned sentencing judge erred in failing to take into account a relevant consideration, namely the deleterious effects of imprisonment upon a relatively youthful offender.

32. The Applicant was aged 25 years at the time of offending and 27 at the time of sentence[48]. Whilst he presented as "vulnerable" and was held on remand in the youth unit of an adult prison,[49] he possessed sufficient maturity to engage in what was sophisticated and organised offending. He did so even after having been convicted of drug offending in the past. He has completed numerous courses whilst in custody and, as submitted by the Applicant and accepted by the learned sentencing judge,[50] has made solid efforts towards rehabilitation whilst in custody. Further, as stated in *R v Thomas*[51], which dealt with a significantly younger offender:

> *"Being 21 at the time of the offence does not, however carry as much weight has it might in other cases. That is partly because of the gravity of the offence, partly because of the pressing need for general deterrence and partly to discourage drug runners from engaging young men or women as couriers on a promise that they will be treated leniently if they are caught."*

Ground 4: The learned sentencing judge erred in failing properly to apply the principle of parity.

33. The principle of parity in the punishment of co-offenders demands that the sentence imposed reflects differences in the culpability and personal circumstances of co-offenders and avoids unjustifiable differences in co-offender sentences[52]. The principle is based upon the notion of equal justice and the need for consistency of sentencing[53]. The critical question is whether there were reasonable grounds for differentiating, or not differentiating, between the

---

[46] ST[56-58]
[47] See for example: *Gajjar v R* (2008) 192 A Crim R 76 at [27][28]
[48] ST[49]
[49] Applicant's Revised Written Case dated 20 December 2016 at [4.12]
[50] ST[58]
[51] [1999] VSCA 204
[52] *Lowe* (1984) 154 CLR 606; *Postiglione* (1997) 189 CLR 295
[53] *Lowe* at [610-611] per Mason, J; *Postiglione* at [301]

offender and co-offender[54]. An appeal on the ground that the parity principle has been breached is to be approached in the same way as an appeal alleging manifest excess[55]. An appeal will only succeed where the error is manifest, and the disparity is such that it engenders a justifiable and legitimate sense of grievance in an objective observer[56].

34. HUYNH received an overall head sentence of 12 years imprisonment with a non-parole period of 8 years. The Applicant was sentenced to a total effective sentence of 11 years imprisonment with a non-parole period of 8 years. They received the same sentences for the 2 offences for which they were jointly charged.[57]

35. It was reasonably open to the sentencing judge to sentence the Applicant as he did. First, the Applicant and HUYNH were sentenced at the same time, by the same experienced sentencing judge, who gave detailed reasons for imposing the sentences he did. As this honourable court has held *"Where the same judge sentences co-offenders and gives detailed reasons for imposing the sentences, an appellate court should be cautious in reaching the conclusion that the parity principle has been infringed".*[58] Essentially, there is a risk that the symmetry of the sentencing process employed by the judge may be upset with the appellate court potentially introducing its own disparity into that process.[59] Secondly, it appears, as he was entitled to do, that the learned sentencing judge perceived the roles played by both offenders as being of not too dissimilar severity.

36. Thirdly, the Applicant had a relevant and recent (2013) prior conviction for trafficking drugs and possessing proceeds of crime. Very importantly, the Applicant's offending breached a suspended sentence that had been imposed in relation to the 2013 offending. This resulted in his overall sentence being increased by 1 year following reinstatement of the period of the sentence that was suspended and the order that that sentence be wholly cumulative on other sentences imposed. It was a circumstance of significant aggravation that the Applicant was committing drug offences when he had only months before been given the benefit of avoiding a term of imprisonment for offending also involving drugs. Specific deterrence undoubtedly

---

[54] *Wolfe* [2008] VSCA 284 [9]; *Anthony v The Queen* [21016] VSCA 22 at [12].
[55] Or manifest inadequacy as the case may be.
[56] See *Taudevin* (1996) 2 VR 402 at 404; *Mercieca* [2004] VSCA 170 at [17]; *Barbaro & Zirilli* [2012] VSCA 288 at [63]; *DPP (Cth) v KMD* [2015] VSCA 255 at [109]
[57] Charges 3 and 4 on the Indictment
[58] *Kim v The Queen* [2016] VSCA 238 [at 50]; See also *R v Swan* [2006] NSWCCA 471 at [71].
[59] *Spizzerri* [2001] VSCA 49 at [10]

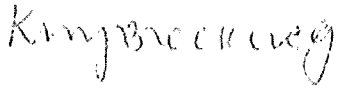
carried significant weight in sentencing the Applicant. Whilst HUYNH had relevant prior drug convictions, his present offending did not breach a suspended sentence.

37. In summary, sentencing the Applicant as he did, the sentencing judge gave sufficient weight to and balanced the relevant mitigatory factors with the factors outlined in paragraph 21 above as required by sub-section 16A(2) of the *Crimes Act* 1914 (Cth) and gave careful consideration to the relevant sentencing principles for this type of offending[60]. 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

[60] ST[66], [27]