IN THE SUPREME COURT S APCR 2016
0233
OF VICTORIA
COURT OF APPEAL
(CRIMINAL DIVISION)

ALLAN AU (Applicant)

- v -

THE QUEEN (Respondent)

APPLICATION FOR LEAVE TO APPEAL AGAINST SENTENCE

APPLICANT'S REVISED WRITTEN CASE

I. Sentence to which this Application Relates

1.1 The particulars of the sentence to which this application relates are:

Learned Sentencing Judge	His Honour Judge Gucciardo
Court at which sentenced	County Court of Victoria at Melbourne
Date on which plea heard	24 June 2016
Date on which sentence imposed	24 August 2016, 8 November 2016

II. Sentences Imposed, Statutory Maximum Penalties and other Relevant Statutory Provisions

2.1 On 5 November 2015, at the County Court of Victoria at Melbourne, the applicant was arraigned and pleaded guilty to an indictment alleging charges of manufacturing a marketable quantity of a controlled drug for a commercial purpose, pre-trafficking in a controlled precursor, possession of a firearm and possession of a silencer. He also pleaded guilty to related summary offences of breaching a suspended sentence of imprisonment and possession of a controlled weapon.

2.2 After a delay due, in part, to the Commonwealth Director or Public Prosecutions seeking to make submissions on the purported unavailability of the utilitarian discount for pleas of guilty in Federal matters,[1] the plea in mitigation was held on 24 June 2016.

2.3 On 24 August 2016, and then as amended on 8 November 2016, the learned sentencing judge sentenced the applicant as follows:

[1] The Crown ultimately decided not to press the issue light of the ruling of Chief Judge Kidd in *DPP (Cth) v Okoka* (Unreported, County Court of Victoria, 15 February 2016), before the issue was determined in *DPP (Cth) v Thomas* [2016] VSCA 237.

Charge	Offence	Maximum	Sentence	Cumulation
3[2]	Manufacturing a marketable quantity of a controlled drug for a commercial purpose (amphetamine, 697.6g pure)[3]	25 years' imprisonment	7 years' imprisonment	4 years (to commence on 24 August 2017)
4	Pre-trafficking in a controlled precursor (pseudoephedrine, 107.4g pure)[4]	7 years' imprisonment	3 years' imprisonment	1 year (to commence on 24 August 2022)
5	Possession of a firearm[5]	10 years' imprisonment	3 years' imprisonment	Base[6]
6	Possession of a silencer[7]	8 years' imprisonment	2 years' imprisonment	-
Related Summary Offences				
1	Breach of a suspended sentence[8]	3 months	Sentence of 12 months' imprisonment restored. No additional penalty.	1 year
4	Possession of a controlled weapon (baton)[9]	12 months' imprisonment	3 months	-

[2] The charge numbers refer to charges on the joint indictment with the co-accused Mr Phuong Huynh, who faced additional charges.
[3] Contrary to s 305.4(1) and s 11.2A of the *Criminal Code Act 1995* (Cth) ("the *Code*"). Pursuant to Schedule 3 of the *Criminal Code Regulations 2002* (Cth), a marketable quantity of amphetamine is 250 grams (pure). A commercial quantity is 750 grams (pure).
[4] Contrary to s 306.4(1) and s 11.2A of the *Code*.
[5] Contrary to s 5(1) of the *Firearms Act 1996* (Vic) ("*Firearms Act*").
[6] For the State offences (charges 5 and 6 on the indictment, together with the two summary offences), his Honour sentenced the applicant to a total effective sentence of imprisonment of 4 years' imprisonment (with charge 5 the base sentence of 3 years' imprisonment, and the suspended sentence of 1 year's imprisonment restored and wholly cumulated). His Honour fixed a non-parole period of 1 year for those State matters. His Honour ordered that the sentence on charge 3 of 7 years' imprisonment should commence after the expiration of that non-parole period. The sentence on charge 4 of 3 years' imprisonment was ordered to commence 2 years before the expiration of the sentence imposed on charge 3, resulting in 1 year's cumulation and a total effective sentence of 9 years' imprisonment. His Honour then set a non-parole period of 6 years.
[7] Contrary to s 5(2) of the *Firearms Act*.
[8] Contrary to s 149D(3) and s 83AB (repealed) of the *Sentencing Act 1991* (Vic). A sentence of 12 months' imprisonment wholly suspended for two years had been imposed at the Magistrates' Court of Victoria at Ballarat on 5 September 2013 for trafficking in amphetamine and possessing proceeds of crime. See reasons for sentence, 24 August 2016, [61].
[9] Contrary to s 6(1) of the *Control of Weapons Act 1990* (Vic).

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

III. Summary of the Relevant Facts

3.1 At the plea hearing the learned prosecutor tendered a "Prosecution Summary for Plea Hearing (Amended)" dated November 2015 (Exhibit A).[10] No issue was taken with that summary, and a copy is provided together with this written case.

3.2 The applicant's offences on the indictment were alleged to have occurred over a single day, on or about 27 June 2014. The charges were not put on a *Giretti*[11] basis.

3.3 Importantly, Crown accepted that the applicant had a lesser role than the co-accused Mr Phuong Huynh, who was sentenced for additional offences, including importation of a marketable quantity of a border controlled precursor (pseudoephedrine) in February 2014,[12] and a rolled-up charge of importing tier 2 goods (three semi-automatic pistols and ammunition) in April 2014,[13] together with various drug offences committed in 2013 on a separate State indictment.[14]

3.4 During the plea, the learned prosecutor observed:[15]

> In terms of [Mr Huynh's] role, the Crown would submit he's got a greater role than Mr Au in the drug manufacture enterprise because he has imported the pseudoephedrine, he has links to both the laboratories at Albion Street and Burrows Street, he's got the literature on how to manufacture the drugs.
>
> In effect, the Crown submits Mr Huynh, with assistance from Mr Au, was running effectively a business and that also involves sourcing false – identification documents which he used to conduct the importation …

3.5 Notwithstanding being sentenced for the additional importation offences and having a greater role than the applicant, on the joint indictment the co-accused Mr Huynh was sentenced to a total effective sentence of 9 years and 9 months' imprisonment, with a non-parole period of 6 years and 6 months. Together with orders for cumulation on the separate

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[10] 24 June 2016, T25.9-10.
[11] *Giretti v The Queen* (1986) 24 A Crim R 112.
[12] Contrary to s 307.12(1) of the Code (maximum penalty 15 years' imprisonment).
[13] Contrary to s 233BAB(5) of the *Customs Act 1995* (Cth) (maximum penalty 10 years' imprisonment).
[14] Reasons for sentence, 24 August 2016, [4], [20]-[22].
[15] 24 June 2016, T50.28 - 51.6.

State indictment, Mr Huynh received a total effective sentence of 12 years' imprisonment with a non-parole period of 8 years.

3.6 Notably, Mr Huynh received the same sentences as the applicant on charge 3 (7 years' imprisonment) and charge 4 (4 years' imprisonment).

3.7 As found by the learned sentencing judge, the applicant:

(1) Was 25 years' old at the time of the offending and 27 years' old at the date of sentence;[16]

(2) Was born in Australia and came from a modest family who had fled Cambodia as refugees;[17]

(3) Had been a drug user since the age of 16 after bullying at school and for several years had been addicted to heroin and methylamphetamine;[18]

(4) Had insight into his addiction;[19]

(5) Was remorseful,[20] and had pleaded guilty at an early stage with significant utilitarian value;[21]

(6) Was experiencing his first time in custody;[22]

(7) Had engaged well while on remand, returning negative drug tests and completing numerous courses, including drug rehabilitation courses,[23] which augured reasonably well for his prospects of rehabilitation;[24]

(8) Had a trusted role as a unit billet and induction billet, the first point of call for new prisoners;[25]

(9) Had experienced strenuous and harsh conditions of imprisonment when Port Phillip Prison was locked down for three months;[26] and

(10) Continued to have the support of his family and partner.[27]

3.8 On the plea, it was submitted on the applicant's behalf that because of his fewer charges and lesser role, a combined community correction order ("CCO") and/or a recognizance

[16] Reasons for sentence, 24 August 2016, [49].
[17] Ibid, [49].
[18] Ibid, [50]-[51].
[19] Ibid, [53].
[20] Ibid, [55], [59].
[21] Ibid, [59].
[22] Ibid, [60].
[23] Ibid, [56]-[58].
[24] Ibid, [64].
[25] Ibid, [57].
[26] Ibid, [60].
[27] Ibid, [55].

release order was within range.[28] It was emphasised that the applicant did not fall to be sentenced for the importation of precursor and firearms offences. He had a discrete involvement, with the most serious matter involving a single day manufacture of a marketable quantity of amphetamine.[29] Further, it was submitted that while the applicant had done well in custody, it was important to recognise the deleterious effects of a protracted sentence of imprisonment upon a relatively youthful offender.[30]

IV. Grounds of Appeal

4.1 The applicant relies upon four grounds of appeal.

Ground 1: ***The sentences imposed on charges 3, 4, 5, 6, related summary offence 4, orders for cumulation and the non-parole are manifestly excessive. In particular, insufficient weight was given to the applicant's remorse, plea of guilty, relative youth, significant steps taken towards rehabilitation whilst in custody, the significant delay, the principle of totality, and the applicant's lesser role in the offending.***

4.2 It is acknowledged that manifest excess is a stringent ground, difficult to make good.[31] However, it is submitted that the sentences were outside the range.[32]

4.3 The applicant was found to be remorseful and had pleaded guilty at an early stage. The utilitarian benefits of his plea were significant. His efforts towards rehabilitation whilst in custody were exceptional.

4.4 As noted above, the offending on the indictment occurred on a single day.[33] The firearm and silencer the subjects of charges 5 and 6 were found in the boot of a vehicle that had been driven by the applicant, but there was no evidence that he had used those items. The applicant has no priors for firearms offences.[34]

4.5 The applicant has a limited but relevant prior history, with a prior conviction in 2013 for trafficking *simpliciter* and dealing in proceeds of crime for which he received a suspended sentence of 12 months' imprisonment, wholly suspended for 2 years. However, he had never previously served a sentence of immediate imprisonment.

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[28] 24 June 2016, T63.23 - 64.6, T67.16-21.
[29] 24 June 2016, T70.1-6.
[30] 24 June 2016, T71.24 - 72.8.
[31] *Ayol v The Queen* [2014] VSCA 151, [30] (Maxwell P) citing *Clarkson v the Queen* (2011) 32 VR 361, 384 [89] (Maxwell ACJ, Nettle, Neave, Redlich and Harper JJA); *Young v The Queen* [2016] VSCA 149, [128] (Ashley, Whelan and Kaye JJA).
[32] *McPhee v The Queen* [2014] VSCA 156, [9]-[11] (Redlich and Priest JJA).
[33] 24 June 2016, T58.29.
[34] 24 June 2016, T59.13.

4.6 The applicant was still relatively youthful at the time of offending, at 25 years of age. He had been remanded in custody at the Penhyn Youth Unit at Port Phillip Prison. He was described by Mr Newton as immature.[35]

4.7 In the "Prison Progress Report" from Ms Ann Hooker, Youth Development Officer from Port Phillip Prison dated 9 November 2015,[36] it was noted the applicant had:[37]

(1) A positive attitude to programs and appeared willing to actively engage in discussion and activities as required;

(2) Been an extremely positive influence on other young Asians who had come into the unit and had maintained a positive attitude;

(3) *Presented as a young offender who is considered vulnerable* in the prison system;

(4) Presented as a young man who is polite, well-mannered and respectful, but he appeared to lack confidence;

(5) An extremely positive attitude to work, and at one stage to help the prison held two jobs as Programs Billet and Visits Billet, with both of those positions having highly trusted duties that required the top security clearance for prisoners; and

(6) Been made an Induction Billet because of his ability to remain calm and be a positive role model.

4.8 As submitted on the plea, the applicant could not have done more in relation to his rehabilitation whilst in custody. His urinalysis screens were clean, he had not been involved in any incidents, and he had completed various courses including four 12-hour drug rehabilitation courses.[38]

4.9 It was the applicant's first experience of incarceration,[39] and he had served a significant period of that time in what was properly described by the learned sentencing judge as strenuous and harsh conditions due to the prison lockdown after the riots.[40]

4.10 Further, there had been significant delay through no fault of the applicant.

4.11 In those circumstances, the sentences imposed were manifestly excessive. They reflect that insufficient weight was given to matters in mitigation and excessive weight was given to general deterrence and denunciation.

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[35] Report of Mr Patrick Newton, 5 June 2015 (Exhibit A2), [25], [38]; see further "Outline of Submissions on Plea" (Exhibit A1), [8].
[36] Report of Ms Ann Hooker, 9 November 2015 (Exhibit A3), p 2.
[37] Ibid.
[38] 24 June 2016, T62.2-21.
[39] 24 June 2016, T62.2-5.
[40] 24 June 2016, T61.20 - 62.1.

4.12 The orders for cumulation were also manifestly excessive and failed to give sufficient weight to the principle of totality.

4.13 On the plea the learned prosecutor did not provide any "comparative cases", or any other material with regard to establishing current sentencing practices.

4.14 It was accepted by the applicant that charge 3 was the most serious offence, and there was very little material from which current sentencing practices could be determined.[41] However, the applicant placed limited reliance on *R v Atiyeh and Marguglio*[42] as a yardstick, where the Crown had accepted that the sentences imposed for State offences of cultivating a narcotic plant in a commercial quantity (also with a maximum penalty of 25 years' imprisonment) may provide a benchmark for an offence against s 305.4(1) of the *Code*.[43] To that end, the applicant provided the Court with the relevant sentencing snapshot.[44]

4.15 It is submitted that, in the applicant's circumstances, a combined CCO[45] and/or recognizance release order was within range, and would have given due weight to federal sentencing principles pursuant to s 16A of the *Crimes Act 1914* (Cth).

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

4.1 The applicant respectfully adopts the submissions made by the applicant Mr Phuong Huynh with regard to delay in the related application for leave to appeal against sentence.

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[41] 24 June 2016, T64.11-21.

[42] Unreported, County Court of Victoria, 7 November 2008, Judge Murphy, 7 November 2008.

[43] Ibid, [33]. See 24 June 2016 T64-66. The offender *Marguglio* was sentenced for manufacturing a marketable quantity of MDMA for a commercial purpose and firearms offences. Unlike the applicant he did not have a prior history and the quantity of MDMA was only a small amount above the marketable quantity. However, unlike the applicant he had manufactured the drug over 6 days, and he was not a relatively youthful offender (*Marguglio* was 37 years' old at the date of sentence). On the manufacturing charge, *Marguglio* was sentenced to 2 years' imprisonment, and to a total effective sentence of 2 years and 3 months' imprisonment, to be released on his own recognizance after serving 15 months. In contrast see *DPP v MO* (Unreported, County Court of Victoria, Judge Gaynor, 20 December 2012), where the offender pleaded guilty and was sentenced to a total effective sentence of 8 years and 6 months' imprisonment for numerous drug offences including two charges of manufacturing a marketable quantity of a controlled drug (he received 6 years' imprisonment on each charge). That was in circumstances where the manufacturing offending occurred over a lengthy period (from May 2010 – December 2011), the offender occupied a significant role in the criminal hierarchy, he was significantly enriched from his offending, and he had a significant prior criminal history. He faced difficult conditions of imprisonment in isolation.

[44] Sentencing Advisory Council, Sentencing Snapshot No 165, "Cultivating a Commercial Quantity of Narcotic Plants", August 2014. Between 2008-2013, 400 people were sentenced for that offence, with the median total effective imprisonment length 2 years and 5 months' imprisonment, the median principal imprisonment length of 2 years and 3 months' imprisonment, and the most common sentence of imprisonment 2 years' imprisonment with a non-parole period of 1 year.

[45] *DPP (Cth) v Boyles (a pseudonym)* [2016] VSCA 267, [65] (Maxwell P and Osborn JA).

4.2 While the findings in relation to delay were made when considering matters relevant to Huynh, they must have applied with equal force to the applicant, although the issue was not given discrete consideration.[46]

4.3 In short, it is submitted that the learned sentencing judge erred in:

(1) Only having regard to the period between November 2015 and the date of sentence in mitigation;[47] and

(2) Finding that the effect of delay was "tempered" by the applicant's progress on remand.[48]

4.4 The entire period from when the applicant was remanded in custody on 27 June 2014 until he was sentenced on 24 August 2016 (790 days, or about 2 years and 2 months) was relevant for the reasons given in *R v Merrett, Piggott and Ferrari*.[49]

4.5 Further, delay is "a powerful mitigatory factor" which focuses attention on issues of rehabilitation.[50] The fact that the applicant had done well on remand should not have resulted in delay being given less weight in the intuitive synthesis.

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.

4.6 On the plea it was submitted that the applicant was relatively youthful offender, and while he had done well in custody, there was a well-recognised danger that a protracted sentence of imprisonment would have a deleterious impact.[51]

4.7 The learned prosecutor submitted that the applicant was not typically of the age where the youthful offender considerations "come into play".[52]

4.8 As noted above, the applicant had been remanded in the Youth Unit at Port Phillip Prison. Ms Ann Hooker observed that he presented as a young offender considered vulnerable in the prison system.[53] He was assessed as being immature by Mr Newton.[54]

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[46] See "Outline of Submissions on Plea" (Exhibit A1), [6].
[47] Reasons for sentence, 24 August 2016, [25].
[48] Ibid, [26].
[49] (2007) 14 VR 392, [34]-[35] (Maxwell P, with whom Chernov JA and Habersberger AJA agreed) (citations omitted).
[50] Ibid.
[51] 24 June 2016, T71.24 - 72.8.
[52] Ibid, T72.31.
[53] Report of Ms Ann Hooker, 9 November 2015 (Exhibit A3), Page 2.
[54] Report of Mr Patrick Newton, 5 June 2015 (Exhibit A2), [25], [38]; see further "Outline of Submissions on Plea", [8].

4.9 As also noted above, the applicant was 25 years' old at the time of offending and was 27 years' at the date of sentence in part due to delay caused by the Crown. In any event, it has been held that a 27 year-old offender was a "youthful offender" for the purposes of sentencing.[55]

4.10 In *DPP v Tokava*,[56] the Court of Appeal cited with approval the observations of Fox J in *R v Dixon* ("*Dixon*"):[57]

> When... a court has to consider whether to send a young person to gaol for the first time, it has to take into account the likely adverse effects of a gaol sentence. A distinct possibility, particularly if the sentence is a long one, is that the person sent to gaol will come out more vicious, and distinctly more anti-social in thoughts and deed than when he went in. His own personality may well be permanently impaired in a serious degree. If he could be kept in gaol for the rest of his life, it might be possible to ignore the consequences to society, but he will re-enter society and often while still quite young. His new-found propensities then have to be reckoned with. A substantial minority of persons who serve medium or long gaol sentences soon offend again.

4.11 That passage of *Dixon* was also cited with approval in *Azzopardi v The Queen*,[58] where Redlich JA held:[59]

> ...courts sentencing young offenders are cognisant that the effect of incarceration in an adult prison on a young offender will more likely impair, rather than improve, the offender's prospects of successful rehabilitation. While in prison a youthful offender is likely to be exposed to corrupting influences which may entrench in that young person criminal behaviour, thereby defeating the very purpose for which punishment is imposed. Imprisonment for any substantial period carries with it the recognised risk that anti-social tendencies may be exacerbated. The likely detrimental effect of adult prison on a youthful offender has adverse flow-on consequences for the community.

4.12 Those principles should apply when considering a person, such as the applicant, who had presented as young and vulnerable and had been held on remand at a youth unit of an adult prison.

4.13 In the reasons for sentence, the learned sentencing judge failed to have regard to this matter. Notwithstanding that the applicant was only relatively youthful at the time of offending and sentence, it was still a relevant sentencing consideration that needed to be given due weight. There is a real danger that a protracted period of imprisonment will undermine the applicant's exceptional efforts towards rehabilitation whilst in custody, and that is not in the interests of the community.

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[55] *R v Lovett* [2008] VSC 60, [17], [24] (Lasry J). Appeal dismissed in *DDP v Lovett* [2008] VSCA 262. The Crown did not press the submission that the respondent was not a "youthful offender", and acknowledged that the respondent could rely upon his "relative youth", see [22] (Maxwell P).
[56] [2006] VSCA 156, [22] (Maxwell P).
[57] (1975) 22 ACTR 13.
[58] (2011) 35 VR 43.
[59] Ibid, 54 [36] (citations omitted).

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

4.1 As noted above, it was expressly accepted on the plea by the learned prosecutor that the applicant had a lesser role than the co-offender Mr Huynh.[60] In addition, he did not face the additional importation offences (charges 1 and 2) on the joint indictment.

4.2 For that reason, in part, it was submitted on the applicant's plea that a combined CCO and/or recognizance release order was open.[61]

4.3 The applicant's lesser role was not considered in any detail by the learned sentencing judge, who remarked that the applicant's "... role was adequately described by the prosecutor".[62]

4.4 As observed in *R v Benbrika*,[63] "[a]ppropriate relativity of sentencing between co-offenders is a fundamental aspect of equality before the law".[64] In *Postiglione v The Queen*,[65] Dawson and Gummow JJ stated that "[e]qual justice requires that like should be treated alike but that, if there are relevant differences, due allowance should be made for them...".[66]

4.5 In *Green v The Queen*[67], French CJ, Crennan and Kiefel JJ held that regard must be had to the qualitative and discretionary judgments required of the primary judge in drawing distinctions between co-offenders.[68] Nevertheless, it is submitted that the learned sentencing judge, in sentencing the applicant to the same sentences as Mr Huynh on charges 3 and 4, failed to properly apply the principle of parity. Accordingly, the applicant has a justifiable sense of grievance in light of the sentences imposed on charges 3 and 4.

V. Conclusion

5.2 It is respectfully submitted that the application for leave to appeal against sentence should be granted, the appeal allowed, and the applicant re-sentenced.

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Counsel for the Applicant

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[60] 24 June 2016, T50.28 - 51.6.
[61] See further the "Outline of Submissions on Plea" (Exhibit A1), [18].
[62] Reasons for sentence, 24 August 2016, [65].
[63] (2010) 29 VR 593.
[64] Ibid, 713 [551] (Maxwell P, Nettle and Weinberg JJA).
[65] (1997) 189 CLR 295.
[66] Ibid, 301.
[67] (2011) 244 CLR 462.
[68] Ibid, 474-475.

Date: ~~29 November 2016~~ 20 December 2016