IN THE SUPREME COURT OF VICTORIA
COURT OF APPEAL
(CRIMINAL DIVISION)

S APCR 2016 0234

HAI DUC NGUYEN

Applicant

v.

THE QUEEN

Respondent

RESPONSE TO APPLICANT'S WRITTEN CASE

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Filed on behalf of:	Respondent
Prepared by:	Solicitor's code: 7539
JOHN CAIN	Telephone: (03) 9603 7666
Solicitor for Public Prosecutions	Direct: (03) 9603 7609
565 Lonsdale Street	Reference: 1400607/
Melbourne Vic. 3000	E Rutherford

Part A and B: Particulars of Conviction and Sentence, Relevant Statutory Provisions and Maximum Penalties

1. The Applicant was convicted by jury verdict on 24 August 2016 and was sentenced on 19 October 2016.

Charge on Indictment C1409624.1	**Offence**	**Maximum**	**Sentence**	**Cumulation**
1.	Trafficking in a drug of dependence – large commercial quantity [s 71 of the *Drugs, Poisons and Controlled Substances Act 1981]*	Level 1 (Life imprisonment) and/or 5000 penalty units.	11 years imprisonment	Base
2.	Trafficking a commercial quantity of a controlled drug [s 302.2(1) of the *Criminal Code (Cth) 1995*]	Life Imprisonment and/or 7,500 penalty units	11 years imprisonment	Nil

Charge on Indictment C1409624.1	Offence	Maximum	Sentence	Cumulation
3.	Trafficking in a drug of dependence [s 71AC of the *Drugs, Poisons and Controlled Substances Act 1981*]	Level 4 (15 years imprisonment)	4 years imprisonment	Nil
4.	Trafficking in a drug of dependence [s 71AC of the *Drugs, Poisons and Controlled Substances Act 1981*]	Level 4 (15 years imprisonment)	4 years imprisonment	Nil
5.	Trafficking in a drug of dependence [s 71AC of the *Drugs, Poisons and Controlled Substances Act 1981*]	Level 4 (15 years imprisonment)	4 years imprisonment	Nil
6.	Trafficking in a drug of dependence – commercial quantity [s 71AA of the *Drugs, Poisons and Controlled Substances Act 1981*]	Level 2 (25 years imprisonment)	4 years imprisonment	2 years
7.	Knowingly dealing with proceeds of crime [s 194 (2) of the *Crimes Act 1958*]	Level 4 (15 years imprisonment)	12 months imprisonment	Nil
Total Effective Sentence:		16 years imprisonment		
Non-Parole Period:		12 years imprisonment		
Pre-Sentence detention declaration pursuant to s 18(1) of the *Sentencing Act 1991*:		369 days		
6AAA Statement:				
Other relevant orders:				

Part C: Summary of Relevant Facts

2. The Crown relies upon the Summary of Prosecution Opening dated 27 July 2016.

Part D: Grounds of Appeal – Conviction

3. **Ground 1 – A miscarriage of justice resulted from the admission of the evidence as to the presence of 'filler substance' in the storage locker, and a fingerprint belonging to the Applicant having been located on a bag containing the 'filler substance'.**

3.1. For this ground to be successful the applicant must demonstrate that 'as the result of an error or an irregularity in, or in relation to, the trial there has been a substantial miscarriage of justice.'[1] Further, that the Court of Appeal cannot be satisfied that the error or irregularity did not make a difference to the outcome of the trial.[2]

3.2. When her Honour's ruling is examined, it is clear that the applicant is not able to demonstrate an error or irregularity in the first instance.

3.3. In an extempore ruling,[3] her Honour summarised the argument as follows:

> *"The prosecution case is circumstantial, consisting of pieces of evidence said to link the accused to the storage unit and the items placed in there by the accused. The charge is pleaded that the accused was involved from 22 December 2013 to 5 February 2014. The Crown case is that the accused, Duc Nguyen's involvement commenced on ... 22 November 2013, which is the day after Quoc Nguyen was arrested and remanded in custody.*[4]
>
> ...
>
> *The Crown's case has always been that Quoc Nguyen was involved at an earlier period of time. His involvement was preparation of the heroin in Charge 1, and that the accused's involvement started on 22 November.* [5]
>
> ...
>
> *Consequently the Crown case is that Duc Nguyen's involvement as a trafficker was being in possession for sale by connecting him with the items in that unit and his knowledge of the contents of those items. Namely taking goods from the Holland Court flat, where the Heroin was said to be prepared, arranging rental of the unit and later transporting cartons or boxes containing amongst other things, drugs that are the subject of charges 1 to 6, in that unit.*[6]
>
> *The Crown case relies on links between Duc Nguyen and those items as to his knowledge of the contents of those cartons thus the Crown point to his physical involvement, his link to Holland Court to prove his state of mind, carrying those items at the time he did as well as fingerprints on plastic bags, zip lock and freezer bags of the type of which drugs were found in the unit.*[7]

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[1] See s.276(b) of the *Criminal Procedure Act 2009.*
[2] *Baini v The Queen* (2012) 246 CLR 469.
[3] See ruling dated 26 August 2015 at pp443 – 454.
[4] Ruling 26 August 2015 at page 443 and 444.
[5] Ruling 26 August 2015 at page 444.
[6] Ruling 26 August 2015 at page 444 and 445.
[7] Ruling 26 August 2015 at page 443 and 445.

His fingers were not located on zip lock or freezer bags containing the drugs that are the subject of counts 1, 2, 3, 4, 5 or 6.[8]

The items that bear his fingerprints are not items that are visible to a person opening those cartons. One needs to have unpacked the cartons, removing items in each carton and the fingerprints were on those bags that were secreted.[9]

...

Mr Patton opposes the Crown relying on evidence that the substance in the bag containing his client's fingerprints is referred to as a substance of a type used as a filler in the drugs of dependence. He does not oppose evidence being led of the accused's fingerprint on that bag which was located in a carton in the unit.[10]

...

...Mr. Patton has submitted that the evidence of the contents of the bag with the accused's fingerprint is not relevant as it is not alleged that the accused was involved in the preparation, which included the cutting of the drugs. Therefore his submission is that the Crown can rely on evidence that his fingerprint was on that bag in the unit in one of the boxes, but the fact that the substance in the bag was filler does not take the Crown case any further...[11]

3.4. Her Honour ruled as follows:

'the Crown is entitled to rely on the evidence that is in dispute as capable of proving his link to those illicit drugs; that he knew the contents of those cartons. The item was secreted inside other bags, the substance was not just an empty bag; it was a substance linked to the illicit drugs, and the Crown has made it clear ...I will reiterate with the jury – that the involvement of the accused is not the preparation of the heroin, it is that he is linked to the items connected to those illicit drugs.'[12]

3.5. Her Honour ruled that the probative value of the evidence is high and that it is strong evidence of part of a chain. In relation to any unfair prejudice, her Honour referred to *Dupas v R*[13]and *Festa v The Queen,*[14] in support of her conclusion that the jury will abide by her direction and not give the evidence objected to more weight than it deserves or divert the jury from its task. Her Honour was entitled to come to this conclusion.

3.6. Given the applicant is not able to demonstrate an error or irregularity in the first instance, ground 1 of the conviction appeal should fail.

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[8] Ruling 26 August 2015 at page 445.
[9] Ruling 26 August 2015 at page 445.
[10] Ruling 26 August 2015 at page 447. Further, the objection is pursuant to s.55 & 137 of the *Evidence Act 2008.*
[11] Ruling 26 August 2015 at page 448.
[12] Ruling 26 August 2015 at page 451 - 52
[13] *Dupas v R* (2012) 40 VR 182 at [175].
[14] *Festa v The Queen* (2001) 208 CLR 593

Part E: Grounds of Appeal – Sentence

4. **Ground 1 – The sentence imposed on Charge 1 demonstrates disparity with the sentence imposed on a co-accused**

4.1. "The principles relevant to the disposition of a ground of appeal pleading disparity of sentence may be distilled from the well known authorities of *Lowe v The Queen,*[15] *Postiglione v The Queen,*[16] *R v Taudevin*[17] and *DPP v Bulfin*[18]. They are that relevant disparity must be manifest and that the parity principle of sentencing is offended when disparity between sentences imposed on co-offenders is 'such as to engender a justifiable sense of grievance or give the appearance in the mind of an objective observer that justice has not been done.' per Callaway, J.A. in *Taudevin* at 404. In *Postiglione*, Dawson, Gaudron and Kirby, JJ. noted the need when assessing a sentence imposed on a co-offender for regard to be had to the difference circumstances of co-offenders." [19]

4.2. The applicant's grievance is in regard to the offence of traffick a large commercial quantity of a drug of dependence, namely heroin which is Charge 1 on the indictment. It is the only charge that the applicant has in common with his co-offender Quoc Huy Nguyen ("Quoc").

4.3. The submission is that the sentence imposed on charge 1 for the applicant (11 years) is disproportionate to the sentence imposed on the same charge for Quoc (12 years). This assertion is based on the following factors which are said to distinguish Quoc from the applicant and should have led to a much lower sentence being imposed for that charge on the applicant:[20]

a. Quoc had a relevant prior conviction for trafficking heroin in 2001 where he was sentenced to 7 years imprisonment with a non-parole period of 5 years.

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[15] Lowe v The Queen (1984) 154 CLR 606. Citation removed from quote.
[16] Postiglione v The Queen (1995-1996) 189 CLR 295. Citation removed from quote.
[17] R v Taudevin [1996] 2 VR 402. Citation removed from quote.
[18] DPP v Bulfin, Court of Appeal, Victoria, judgment given on 17 April, 1998. Citation removed from quote.
[19] R v Tinti [1999] VSCA 20 at [20]
[20] See paragraphs 15 – 25 of the applicant's written case.

b. Quoc's status on charge 1 was as a Serious Drug Offender which enlivened s.6D of the *Sentencing Act 1991* which requires the protection of the community to be of greater importance in sentencing.

c. The basis for the sentence for charge 1 was that Quoc was involved in trafficking heroin 'on a commercial basis for gain' and that his motive was purely for profit. Further that it was appropriate to sentence on the basis of trafficking not less than 4 kg's of heroin.

d. Quoc's role was different to the applicant's in that he was involved in the preparation of the heroin into discs.

4.4. The points of difference relied upon by the applicant however, do not create a manifest disparity between the sentence imposed on the applicant and that imposed on Quoc that would warrant a significant lowering of the applicant's sentence on charge 1 for the following reasons:

a. The applicant like Quoc has a prior conviction in 2001 for traffick heroin, as well as additional charges of possess heroin, use heroin and being in possession of the proceeds of crime. Although the disposition imposed indicates that the gravity of offending was lower than in Quoc's case, (the applicant's offending attracting an aggregate sentence of 2 months imprisonment to be served by way of an Intensive corrections order), the offending is relevant offending and demonstrates that like Quoc the applicant has engaged in conduct previously denounced by the court.

b. The applicant like Quoc, was sentenced (although not for charge 1, but for charge 6 & 7) as a Serious Drug Offender. In the final analysis the fact that this required the court to consider as paramount the protection of the community (albeit for different charges) left them in the same position. Further, no disproportionate sentence was sought for Quoc on charge 1 and so the disparity given this factor, is negligible.

Further, the sentencing judge (quite separate to the Serious Drug Offender provisions) indicated that protection of the community along with other

considerations, was a sentencing consideration to be taken into account for both accused.[21] This was due to the nature of the offending and what her Honour described as a 'pernicious trade'[22]and that 'the use of drugs of dependence such as heroin results in misery and death for those caught in the web, as well as an escalation of crime as people desperate to have this drug commit further crimes.'[23]

c. In regard to the applicant, the basis for the sentence was that there was no explanation for the offending, but in the circumstances her Honour indicated that she was satisfied beyond reasonable doubt when she said that the applicant's 'involvement was a business venture, the motive being profit...Your involvement was part of an organised criminal enterprise, including Quoc Huy Nguyen and very likely, other people. The quantities were enormous and the stakes were therefore high. The estimated value of the drugs was substantial."[24]

d. Whilst it is true that Quoc's role was different to the applicant's in that he was involved in the preparation of the heroin into discs, the applicant's role in regard to charge 1 was significant in that he transferred the 4.312kg's of heroin in order to keep them out of the reach of police and in order for the drugs to be sold later for vast amounts of profit. It is this transfer that (if undetected) would have led to the misery and death her Honour referred to when sentencing the offenders. Therefore, the applicant may have been lower in the hierarchy, however, his involvement means that in terms of sentencing he is not significantly different to Quoc.

This is acknowledged by her Honour when she said, 'I am satisfied beyond reasonable doubt that you were in a position of enormous trust, as you had in your possession a large quantity of drugs which were valuable.

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[21] See paragraphs 12 & 62 in *DPP v Quoc Huy Nguyen* [2015] VCC, 26 November 2015 and paragraph 33 of *DPP (Cth) & DPP (Vic) v Duc Hai Nguyen* [2016] VCC 1553, 19 October 2016.
[22] *DPP v Quoc Huy Nguyen* [2015] VCC, 26 November 2015 at [62]
[23] *DPP v Quoc Huy Nguyen* [2015] VCC, 26 November 2015 at [13].and *DPP (Cth) & DPP (Vic) v Duc Hai Nguyen* [2016] VCC 1553, 19 October 2016 at [34] for similar remarks.
[24] *DPP (Cth) & DPP (Vic) v Duc Hai Nguyen* [2016] VCC 1553, 19 October 2016 at [40] & [41].

I infer that you are, therefore, not in the lower end of the organised criminal enterprise, but a man considered trustworthy.'[25]

4.5. The applicant concedes that in other respects there is no appreciable difference between Quoc and the applicant.[26]

4.6. Given the above it is submitted that ground 1 of the sentence appeal should fail.

5. **Ground 2 – The Learned Sentencing Judge erred in taking into account an unproved prior conviction in imposing sentence**

5.1 The applicant asserts that the applicant's prior conviction for 1999 but was erroneously taken into account in sentencing by the sentencing judge after it was agreed that it wouldn't be relied upon by the Crown.[27]

5.2 In response, her Honour refers to the applicants prior convictions in her sentencing remarks on 2 occasions. These are:

i. "You have a criminal history attached to the indictment. On 5 March 2001, you were convicted of trafficking in heroin, possession of heroin and possess money being proceeds of crime. You were sentenced to an aggregate sentence of 2 months imprisonment to be served by way of an Intensive Correction Order."[28]

ii. "I accept the submission made on your behalf by Mr. Patton that the prior conviction in relation to heroin are of some age, 1999 and 2001, and the dispositions imposed reflect the offending was at a low level for sentencing purposes. Nevertheless, these convictions are relevant."[29]

5.3 It is clear from the first paragraph that her Honour was well aware that only one set of convictions (occurring in 2001 and comprising of 3 charges) were to be taken into account in sentencing. Her Honour states the year, the offence and the disposition.

5.4 In regard to the second paragraph, the inclusion of the year 1999 was a minor error that did not reflect upon the sentence given her Honour clearly articulated in the earlier paragraph the offending she was in fact taking into account.

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[25] Ibid at [56].
[26] See the applicant's written case at paragraph 24.
[27] See the applicant's written case at paragraphs [26] – [29].
[28] *DPP (Cth) & DPP (Vic) v Duc Hai Nguyen* [2016] VCC 1553, 19 October 2016 at [19].
[29] *DPP (Cth) & DPP (Vic) v Duc Hai Nguyen* [2016] VCC 1553, 19 October 2016 at [52].

5.5 Given the above it is submitted that ground 2 of the sentence appeal should fail.

6. Ground 3 – The sentence imposed is manifestly excessive

6.1 The applicant asserts that the sentence imposed is manifestly excessive. In particular the applicant takes issue with the individual sentences, the total effective sentence of 16 years and the non- parole period of 12 years.

6.2 In regard to the claim that the individual sentences are excessive, with particular emphasis on charge 3, 4 and 5 as being disproportionate, it should be noted that not only are the sentences (4 years for each charge) modest given the type of and quantity of the drugs, but that charge 3, 4 and 5 did not attract any cumulation to the sentence imposed.

6.3 The individual charges, the total effective sentence and the non-parole period not only reflect the full weight given to the mitigating factors relied upon on the plea, but it also reflects other sentencing considerations required to be taken into account such as the objective nature and gravity of the offending; just punishment, denunciation, specific deterrence and most importantly general deterrence.

6.4 To establish manifest excess as a ground of appeal the appellant must demonstrate that the sentence was not reasonably open to the sentencing judge.

6.5 *"The ground of manifest excess will only succeed if it can be shown that the sentence was 'wholly outside the range of sentencing options available' to the sentencing judge. That is, it must be shown that it was not reasonably open to the sentencing judge to come to the sentencing conclusion which he or she did, if proper weight had been given to all the relevant circumstances of the offending and of the offender. It reflects the oft-repeated policy that sentencing is for judges and magistrates at first instance. Sentencing is not the task of appellate courts, except where clear error is shown."*[30]

[30] *Clarkson v The Queen* (2011) 32 VR 361.

6.6 The nature and gravity of the offending is significant. This is clear from her Honours references to the large quantity of drugs detected and sought to be sold for a vast amount of profit.

6.7 Her Honour detailed the quantities as follows:[31]

Charge 1	4.812kg's of heroin mix. 4.8 times a large commercial quantity which is 1 kg.
Charge 2	4.475kg's pure MDMC. 5.9 times a commercial quantity which is 750g's
Charge 3	39.3g's pure ephedrine. 1.96 times the trafficable quantity which is 20g's
Charge 4	34.8g's of cocaine 11.6 times the trafficable quantity which is 3 g's
Charge 5	29.5g's of methylamphetamine mix 9.8 times the trafficable quantity which is 3 g's.
Charge 6	524.8 g's of heroin mixture 1.04 times the commercial quantity which is 500 g's

6.8 The applicant was sentenced as a Serious Drug Offender on charge 6 and he knowingly dealt with proceeds of crime having in his possession $169,900 (charge7).

6.9 The large quantity of drugs and the types of drugs formed the basis for her Honours remarks regarding the misery and death that this type of offending inflicts upon those who are drug addicted.

6.10 Her Honour took into account mitigating factors articulated on the plea such as the applicant's character references,[32] his stable relationship with his partner,[33] his background,[34]the 12 months delay,[35]his anxiety due to being separated from his

[31] *DPP (Cth) & DPP (Vic) v Duc Hai Nguyen* [2016] VCC 1553, 19 October 2016 at [7] – [14]
[32] *DPP (Cth) & DPP (Vic) v Duc Hai Nguyen* [2016] VCC 1553, 19 October 2016 at [46]
[33] Ibid at [47]
[34] Ibid at [49] – [51]
[35] Ibid at [53]

wife and child,[36] his good prospects of rehabilitation[37] and parity (citing state and commonwealth legislation for each).[38] However, other considerations were also required to be taken into consideration in sentencing such as the objective nature and gravity of the offending; just punishment, denunciation, specific and most importantly general deterrence.[39]

6.11 The applicant has not demonstrated that the total effective sentence, the non-parole period or the individual sentences are outside the range of sentencing options available.

6.12 Given the above it is submitted that ground 3 of the sentence appeal should fail.

DATED: 10 March 2017

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Susan M K Borg
Counsel for the Respondent

[36] Ibid at [59] & [60]
[37] Ibid at [61]
[38] Ibid at [64]
[39] Ibid at [33] – [39]