

IN THE SUPREME COURT OF VICTORIA

COURT OF APPEAL

(CRIMINAL DIVISION)

BETWEEN:

HAI DUC NGUYEN

Applicant

–and–

THE DIRECTOR OF PUBLIC PROSECUTIONS

Respondent

APPLICANT'S WRITTEN CASE:

APPLICATION FOR LEAVE TO APPEAL AGAINST CONVICTION

Date of document:	24 November 2016
Filed on behalf of:	The Applicant
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PARTICULARS OF CONVICTION AND SENTENCE

1. The trial first commenced on 3 August 2015. The jury was discharged, and a second jury empanelled on 31 August. The second jury was discharged on 11 September, and the trial adjourned to 1 August 2016.
2. On 25 August 2016, the Applicant was found guilty by a jury in the County Court in a trial before Judge Douglas of one charge of Trafficking a Large Commercial Quantity of a Drug of Dependence (Charge 1) contrary to *s71A Drugs Poisons and Controlled Substances Act*; one charge of Trafficking a Commercial Quantity of a Controlled Substance (Charge 2) contrary to subsection 302.2(1) *Criminal Code (Cth)*; three charges of Trafficking a Drug of Dependence (Charges 3,4 & 5); Trafficking a Commercial Quantity of a Drug of Dependence (Charge 6) contrary to *s71AC Drugs*

Poisons and Controlled Substances Act; and one charge of Knowingly Deal With Proceeds of Crime (Charge 7) contrary to s194(3) *Crimes Act*.

3. On 19 October 2016 the Applicant was sentenced as follows¹:

Charge	Offence	Maximum	Sentence	Cumulation
1	Traffick Large Commercial Quantity Drug of Dependence - Heroin (4.813kg)	Level 1 (Life Imprisonment)	11 years imprisonment	Base Sentence
2	Traffick Commercial Quantity Controlled Substance – MDMC (4.475kg)	Life Imprisonment	11 years imprisonment	Nil
3	Traffick Drug of Dependence – Ephedrine (39.3g)	Level 4 (15 years)	4 years imprisonment	Nil
4	Traffick Drug of Dependence – Cocaine (34.8g)	Level 4 (15 years)	4 years imprisonment	Nil
5	Traffick Drug of Dependence – Methylamphetamine (29.5g)	Level 4 (15 years)	4 years imprisonment	Nil
6	Traffick Commercial Quantity Drug of Dependence –	Level 2 (25 years imprisonment)	4 years imprisonment	2 years

¹ *Director of Public Prosecutions v Duc Hai Nguyen [2016] VCC (19/10/16 & 2/11/16)*

	Heroin (524.8g)			
7	Knowingly Deal With Proceeds of Crime (\$169,900)	Level 4 (15 years)	12 months	Nil
Total effective sentence		16 years imprisonment		
Non-parole period		12 years imprisonment		
Pre-sentence detention		369 days		

On Charge 6, Mr. Nguyen was sentenced as a Serious Drug Offender.

On 19 October 2016, Her Honour ordered that the sentences imposed on Charges 1,3,4,5,6 & 7 and the non-parole period are to commence on 19 October 2019 (3 years from date of sentence); while the sentence on Charge 2 commenced immediately.

On 2 November 2016, the matter was recalled before Her Honour, and pursuant to s104A *Sentencing Act*, Her Honour corrected the sentence so that the non-parole period commenced on 19 October 2016.

Summary of relevant facts:

4. On 16 December 2013, investigators entered a storage unit at Kennards Storage in Maribyrnong and located 4.812kg of heroin, 39.3g of ephedrine, 34.8g of cocaine, 4.475.6kg of MDMC and 29.5g methylamphetamine packed inside various boxes and containers within the unit. Also located amongst the drugs were a large number of household and personal items, said to be related to the trafficking of drugs of dependence.
5. Located within a duffle bag inside the storage unit were a number of bags containing what was later determined to be alpha-Pyrrolidinopentiophenon (alpha-PVP). Alpha-PVP was not a scheduled drug at the time of the seizure, though was subsequently scheduled as a controlled substance. A single fingerprint identified as belonging to the Applicant was located on one of these bags.

6. Later analysis determined that the discs of heroin located within the storage unit contained, in addition to heroin, a quantity of alpha-PVP.
7. Located on a number of items seized from the storage unit were fingerprints identified as belonging to the Applicant. A single, partial fingerprint identified as the Applicant's was located on a bag containing a small quantity of methylamphetamine.
8. This discovery came about following investigations arising from the arrest of Quoc Nguyen, Thanh Chin Nguyen and others in the course of an investigation by Victoria Police. Following the arrest of Quoc Nguyen, a flat at 93/12 Holland Court, Flemington was searched – and a small quantity of heroin seized, along with a number of items relating to processing and packaging heroin. Further investigations revealed that following the arrest of these people, the Applicant attended 93/12 Holland Court, Flemington following the arrest of Quoc Nguyen and removed a number of items from the flat.
9. The Applicant travelled from Melbourne to Vietnam on 27 November, and returned on 4 February 2014. Quoc Nguyen was remanded following his arrest on 21 November 2013, and released on bail on 6 December. During this period, covert surveillance showed that no other person attended the Kennards storage unit.
10. On his return to Melbourne, the Applicant attended the storage unit on 4 February 2014, and placed a cardboard box inside. Investigators covertly entered the unit on 5 February and examined the box – locating a quantity of heroin (524.8g) and \$169,000 cash.
11. The Applicant was arrested the following day, and amongst items seized by Police were keys to the storage unit.
12. The Applicant gave evidence in the trial, to the effect that he had attended the Holland Court flat on 22 November 2014, packed a number of items into various bags and boxes, and had delivered them to his (then) partner's father. He further gave evidence that his (then) partner's father gave him a number of boxes and asked that they be placed in storage – which the Applicant did on 26 November. The Applicant could not say with precision what items he had packed, save that they appeared to be kitchen related items.

13. On 26 August 2015, following argument, the Learned Trial Judge ruled that the Prosecution were permitted to lead evidence that the bag on which the Applicant's fingerprint was located, contained a substance that was used as a 'filler' that was used to dilute the heroin subject to charges on the indictment.
14. Evidence was given by Ms. Amy Malone, Forensic Scientist, that items 2/1, 2/4, 2/5, and 2/6 contained 'filler substance'²; and that the 'drug mix table'³ showed that the discs of heroin also contained 'filler substances'. Further evidence was elicited that a fingerprint belonging to the Applicant was located on item 2/1 which was identified as containing '224 grams fillers'⁴; and a table showing the location of all fingerprints belonging to the Applicant was tendered as an exhibit⁵.
15. This ruling was not challenged following the discharge of the jury on 31 August 2015; and the Learned Trial Judge advised that it would not be re-litigated at the re-commencement of the trial on 3 August 2016.

GROUND OF APPEAL

16. The sole ground of appeal is that a miscarriage of justice resulted from the admission, over objection, of evidence relating to 'filler substance' being located and seized from the Kennards storage unit.

ARGUMENTS IN SUPPORT OF GROUNDS

Ground 1: A miscarriage of justice resulted from the admission of evidence relating to 'filler substances' seized from the Kennards storage unit.

17. It is submitted that the evidence in respect of the presence of 'filler substance' within the storage unit should have been excluded under sections 55 and 137 *Evidence Act* on the basis that a) it was not relevant to any fact in issue at the trial; and b) that the probative value of the evidence is outweighed by the danger of unfair prejudice to the Accused.

² Transcript 11/08/16: p526, line 29 – p527, line 5

³ Exhibit P11

⁴ Transcript 11/08/16: p539, line 5 – line 24

⁵ Exhibit P12

18. The Prosecution case was that the Applicant possessed the various drugs of dependence, for the purpose of (later) sale, and did so between 22 November 2014 (in the case of the heroin subject to Charge 1) and 4 February 2015. The Prosecution did not assert any involvement of the Applicant prior to his removal of items from the Holland Court flat on 21 November⁶.
19. As the Applicant was not said to have been involved in the preparation, pressing or packaging of the heroin, it is submitted that the admission of the evidence of the presence of filler substance, and a fingerprint of the Applicant found on a bag containing the filler substance – in combination with other (unchallenged) evidence that the heroin was mixed with other substances gave rise to the danger of unfair prejudice.
20. It is submitted that the danger of unfair prejudice arises from the risk that the jury would impermissibly reason that the presence of the fingerprint suggests involvement with the preparation, pressing and/or packaging of the heroin at a time earlier than that alleged on the indictment – contrary to the Prosecution case. Further, as the hydraulic press used to press the discs of heroin was seized by Police prior to the Applicant having placed the boxes containing the discs in the storage unit (and being said to have been in possession of the heroin), it could not be the case that he was involved in the creation of the discs.
21. As stated during the course of pre-trial argument⁷, the issues in dispute were knowledge of the drugs amongst the items in the storage unit, and the intention to traffick in them. It was not disputed that the Applicant had packed up a number of items from the Holland Court flat and deposited them inside the storage unit on 26 November 2014.
22. There being no dispute as to the Applicant having handled a large number of the items found by Police within the storage unit, it is submitted that there is a danger that the jury could use the evidence of the fingerprint on the bag containing alpha-PVP to reason that the was involved in the preparation pressing and/or packaging of the heroin.
23. It is submitted that the evidence relating to the bags containing ‘filler substance’ and the evidence in relation to the Applicant’s fingerprint being located on item 2/1 was not relevant – as it could not rationally affect the assessment of the probability of the

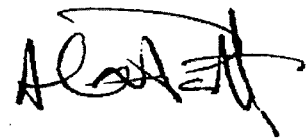
⁶ Summary of Prosecution Opening dated 27 July 2016

⁷ Transcript 10/8/15: p507, line 30 – 508, line 17

existence of a fact in issue in the proceeding, namely whether the Applicant possessed the heroin (and other drugs) for the purpose of sale from 22 November 2013 until 5 February 2014.

24. Further, it is submitted that the evidence in relation to the presence of 'filler substance' within the storage unit; and the evidence that the heroin seized from the storage contained 'filler substance' had no probative value to a fact in issue (whether the Applicant possessed the drugs between 22 November 2013 and 5 February 2014 for the purpose of sale); and accordingly the probative value was outweighed by the danger of unfair prejudice against the Applicant.
25. It is submitted that a substantial miscarriage of justice has been occasioned by 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'. Accordingly, the convictions should be set aside

Dated: 24 November 2016



A.J. Patton
Counsel for the Applicant