

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 SENTENCE

Date of document:	24 November 2016
Filed on behalf of:	The Applicant
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ISSUE ON APPEAL

1. The issues to be argued on appeal are that the sentence imposed on Charge 1 offends the principle of parity with the co-accused; that the Learned Sentencing Judge took into account an unproved prior conviction; and that the total effective sentence of 16 years imprisonment with a minimum non-parole period of 12 years was in all the circumstances manifestly excessive.

PARTICULARS OF SENTENCE

2. 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.
3. 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*.

4. 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 – Heroin (524.8g)	Level 2 (25 years imprisonment)	4 years imprisonment	2 years
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.

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

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:

5. 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 dependence².
6. 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 heroin³. 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 flat⁴.
7. The Applicant travelled from Melbourne to Vietnam on 27 November, and returned on 4 February 2014⁵. 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.
8. Amongst the items seized by Police on 21 November 2013 was a hydraulic press. Analysis by a tool-mark examiner revealed that the majority of the discs of heroin located at the Kennards storage unit were made using this press; and that they were packed in vacuum sealed bags that were sealed by a machine observed by Police in the flat on 21 November.

² *Director of Public Prosecutions v Duc Hai Nguyen* at [29]

³ *ibid.* at [27]

⁴ *ibid.* at [25]

⁵ *ibid.* at [28]

9. 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 cash⁶.
10. The Applicant was arrested the following day, and amongst items seized by Police were keys to the storage unit.
11. The Prosecution contended that the Applicant removed the 4.813kg of heroin from the Holland Court flat, along with other items, and placed them in the storage unit prior to his departure for Vietnam.
12. Quoc Nguyen was convicted following trial of trafficking the 4.813kg of heroin located at Kennards (the same heroin forming the basis of Charge 1 against the Applicant), on the basis that he possessed and prepared the drugs for sale prior to his arrest.
13. On 26 November 2015, Quoc Nguyen was sentenced as follows⁷:
Charge 1: Traffick Large Commercial Quantity Heroin (4.813kg) – 12 years imprisonment
Charge 2: Traffick Heroin (~11g) – 12 months imprisonment
Total Effective Sentence: 12 years imprisonment
Non-Parole Period: 8 years
14. Leave to appeal against both the conviction and sentence was refused on 20 October 2016⁸.

GROUND OF APPEAL AND SUBMISSIONS

Ground 1:

15. It is submitted that the sentence imposed on Charge 1 is disproportionate to the sentence imposed on Charge 1 in respect of Quoc Nguyen.
16. Quoc Nguyen was sentenced on the present matter with a prior conviction for trafficking heroin in 2001. This sentence related to the trafficking of 1.398kg of heroin (under the present statutory regime, this would constitute a Large Commercial Quantity). He was sentenced to 7 years imprisonment with a non-parole period of 5 years.

⁶ *ibid.*

⁷ *Director of Public Prosecutions v Quoc Huy Nguyen* [2015] VCC (26 November 2016)

⁸ *Nguyen v The Queen* [2016] VSCA 253 (20 October 2016)

17. In the 2015 reasons for sentence, Her Honour specifically noted his status as a Serious Drug Offender, and the application of section 6D *Sentencing Act* – and consequential weighting of the sentence so as to address community protection.
18. Further, Her Honour sentenced Quoc Nguyen on the basis that his involvement in trafficking heroin was ‘on a commercial basis, for gain’ and that [his] motive was purely profit⁹; and that it was appropriate to sentence on the basis of trafficking not less than 4kg of heroin¹⁰.
19. The Applicant was sentenced in 2016 with a prior conviction from the Melbourne Magistrates Court in 2001 for trafficking heroin, for which he received an Intensive Corrections Order.
20. The Applicant was not sentenced on Charge 1 as a Serious Drug Offender (he was sentenced as such on Charge 6 however).
21. Her Honour found the Applicant’s involvement in the offending to be a business venture, the motive being profit¹¹; and that, save for the removal and storage of the drugs, there is no evidence of involvement in trafficking¹².
22. Her Honour also found that the Applicant’s role in the trafficking organisation was in the middle level of the hierarchy¹³.
23. Her Honour referred to parity with Quoc Nguyen in the course of sentencing remarks, stating that in light of Quoc Nguyen’s prior conviction, the Applicant was to be sentenced to a lesser term of imprisonment, as less weight was given to specific deterrence.¹⁴
24. The personal circumstances of the Applicant and Quoc Nguyen are remarkably similar – such that there is no appreciable difference in the mitigating factors, save for their prior convictions.
25. It is submitted that due to the different roles found to have been played by the Applicant and Quoc Nguyen, and the significant prior conviction of Quoc Nguyen – that there should have been a more significant difference in the sentences imposed on the Applicant and Quoc Nguyen for their respective Charge 1. The sentence imposed on the Applicant exhibits an unjustified sentencing disparity¹⁵ with that of the co-accused.

Ground 2:

⁹ *Director of Public Prosecutions v Quoc Huy Nguyen* [2015] VCC at [19]

¹⁰ *ibid.* at [54]

¹¹ *Director of Public Prosecutions v Duc Hai Nguyen* [2016] VCC at [40]

¹² *ibid.* at [45]

¹³ *ibid.* at [56]

¹⁴ *ibid.* at [67]

¹⁵ *DPP (Cth) v KMD* [2015] VSCA 255 [107]

26. A Criminal History of the Applicant was filed with the Court and served on the Applicant's solicitors prior to the plea¹⁶.
27. At the plea hearing, the Court was advised that the convictions recorded on 1 September and 10 November 1999 were not admitted by the Accused. The Prosecution did not seek to prove the convictions, and informed the Learned Sentencing Judge that they did not rely upon them as prior convictions.
28. In the sentencing remarks, the Learned Sentencing Judge made reference to both the 1999 (not admitted) and 2001 (admitted) prior convictions, noting that both were relevant.¹⁷
29. It is submitted that although the Learned Sentencing Judge did not place great weight on the 1999 prior convictions¹⁸, it was a matter erroneously taken into consideration in determining the Applicant's prospects for rehabilitation, as well as a matter that went to aggravation of the charges for which the Applicant was sentenced, as well as the 'cautiously optimistic' view as to his prospects for rehabilitation¹⁹.

Ground 3:

30. It is submitted that:
 - a. The total effective sentence of imprisonment of 16 years imprisonment is manifestly excessive in consideration of the following matters:
 - i. The individual sentences imposed on all charges are excessive, and in the case of Charges 3,4 and 5, disproportionate to the other individual sentences imposed.
 - ii. The Applicant was sentenced with limited prior convictions;
 - iii. That the Applicant suffered lengthy delays in the prosecution of the matter;
 - iv. The Applicant has good prospects for rehabilitation.
 - b. The non-parole period of 12 years imprisonment is manifestly excessive in consideration of the following matters:
 - i. The individual sentences imposed on all charges are excessive, and in the case of Charges 3,4 and 5, disproportionate to the other individual sentences imposed.
 - ii. The Applicant was sentenced with limited prior convictions;
 - iii. That the Applicant suffered lengthy delays in the prosecution of the matter;

¹⁶ Criminal Record of Duc Hai Nguyen, Date of Birth 1 June 1970

¹⁷ *Director of Public Prosecutions v Duc Hai Nguyen* at [52]

¹⁸ *ibid.*

iv. The Applicant has good prospects for rehabilitation.

Matters relied upon in mitigation

31. The following matters were raised in mitigation on the plea:

The Applicant's background

32. The court was addressed on the personal circumstances of the Applicant.
33. The Applicant fled Vietnam around the age of 9 due to his family being persecuted following the Vietnam War. After spending time in a Malaysian refugee camp, the Applicant's family was granted asylum in Australia in 1981.
34. The Applicant is the youngest of 9 siblings, all of whom reside in Australia. Both his parents are deceased.
35. The Applicant was married in 2015, and his wife, Huong Huynh, has recently been granted Permanent Residency in Australia. The Applicant and his wife have a daughter, Heidi, aged 3 (DOB 12 April 2013), and a second daughter due in April 2017.
36. The Applicant left formal education before completing Year 12; and has not completed any further formal education. The Applicant was employed in unskilled work in the clothing, ceramic and woodwork industries since the early 1990s. Since the early 2000s, the Applicant has been employed as a tour guide in Vietnam, travelling from Australia a number of times each year to work in seasonal blocks.
37. The Applicant has not been in paid employment since his arrest on these matters.
38. The Applicant does not suffer any relevant physical or mental health complaints; nor does he suffer any substance abuse issues.
39. Evidence of participation and completion of a number of courses while on remand were tendered on the plea²⁰.
40. Testimonial references from a number of friends and family members were tendered on the plea²¹.

The Applicant's relevant criminal history at the time of the offence

41. The Applicant had one relevant criminal conviction at the time of the offending, dating back to 2001.
42. It was submitted (and accepted by the Learned Sentencing Judge) that the prior conviction in 2001 was low level offending, as evidenced by the sentence imposed

¹⁹ *ibid.* at [64]

²⁰ Exhibit DN3

²¹ Exhibit DN2

offending could not be considered for the purpose of aggravating the offences for which the Applicant stood to be sentenced.

The Delay in Prosecution of the Matter

43. The trial commenced on 3 August 2015. Following legal argument, a jury was empanelled on 19 August 2015. On application by the Applicant, this jury was discharged following prejudicial evidence being given by a Prosecution witness. On 31 August a second jury was empanelled, and discharged on 11 September, following disclosure of additional evidence by the Prosecution.
44. The trial was adjourned to 1 August 2016, and following the discharge of 2 juries (not attributable to the parties), concluded on 25 August 2016.
45. It is submitted that the discharge of juries in August and September 2015 were not the fault of the applicant; and that the consequent delay of 12 months is a matter that must be moderate any sentence imposed.

The Applicant's time in custody since arrest

46. It was submitted that the Applicant had been a model prisoner since his remand; as evidenced by his participation in education programs.

Prospects of Rehabilitation

47. The Learned Sentencing Judge considered the Applicant's prospects of rehabilitation as good.²²
48. It is submitted that the sentence imposed does not adequately reflect the Applicant's prospects for rehabilitation; and further that the length of sentence serves to undermine his prospects.

Submissions as to sentence

49. Counsel for the Applicant submitted that the seriousness of the offending warranted an immediate term of imprisonment.

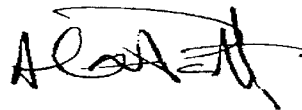
Why is the sentence manifestly excessive?

50. It is submitted that in all the circumstances, the sentence imposed on the Applicant was manifestly excessive.

²² *Director of Public Prosecutions v Duc Hai Nguyen* at [60 & 64]

51. It is submitted that the ground of manifest excess is made out when one considers the following matters:
- a. The individual sentences imposed on all charges are excessive, and in the case of Charges 3,4 and 5, disproportionate to the other individual sentences imposed.
 - b. The Applicant's role was limited to the period alleged on the indictment; and was limited to the removal and storage of the drugs.
 - c. At the time of the offence that Applicant only one relevant prior conviction;
 - d. The Applicant was otherwise a man of good character and repute; and
 - e. The Applicant has good prospects for rehabilitation.
52. The sentences imposed on Charges 3,4 & 5 of 4 years are excessive and do not appropriately reflect the offending in each charge, when assessed against the findings as to the Applicant's role in the offending. It is further submitted that these sentences are excessive when viewed against the sentences imposed in respect of Charges 1,2 and 6.
53. It is submitted that although categorised as being in the middle-range of the 'hierarchy'²³ – the Applicant's offending was found to be limited to the removal of items from the Holland Court flat, and ultimately storing them in the Kennards storage unit.
54. It is further submitted that the total effective sentence imposed (and the non-parole period) do not adequately reflect the good prospects of rehabilitation identified above.
55. In consideration of all matter raised, it is submitted that the sentence imposed in these circumstances was manifestly excessive.

Dated: 24 November 2016



A.J. Patton
Counsel for the Applicant

²³ op. cit. at [56]