

## **THE QUEEN v PHAM (M101/2014)**

Court appealed from: Supreme Court of Victoria (Court of Appeal)  
[2014] VSCA 204

Date of judgment: 5 September 2014

Date special leave granted: 15 May 2015

On a flight from Vietnam on 15 March 2013 the respondent became unwell and required medical attention. Two small packages of white powder were discovered in a toilet which he had been using. When subsequently questioned, he admitted that he had ingested heroin during the flight and that the packages of powder were his. On analysis, the powder was found to be a mixture of heroin and caffeine. The total pure weight of heroin detected was 577.1 grams. A marketable quantity of heroin is an amount between 2 grams and 1.5 kilograms. Thus, the amount comprised a little over one-third of the range of quantities covered by the offence of importing a marketable quantity of heroin. The maximum sentence applicable to the offence is 25 years' imprisonment.

On 23 October 2013 the applicant pleaded guilty in the County Court of Victoria to one charge of having imported a marketable quantity of heroin contrary to s 307.2(1) of the *Criminal Code* 1995 (Cth). He was sentenced by Judge Tinney to 8 years and 6 months' imprisonment with a non-parole period of 6 years. The respondent appealed to the Court of Appeal (Maxwell P, Osborn and Kyrou JJA) on the grounds that the sentence imposed, and the non-parole period fixed, were manifestly excessive.

Maxwell P undertook a statistical analysis of the results of 32 appeal court cases which had the following common features: a marketable quantity of drugs, a guilty plea, first conviction of the accused, and the fact that the accused was a courier. His Honour calculated the actual quantity of drugs imported as a percentage of the commercial quantity for each of the different drugs imported. His analysis was adopted by Osborn JA and Kyrou JA.

The Court concluded that when the respondent pleaded guilty, he was reasonably entitled to assume that he would be sentenced in accordance with current sentencing practices in Victorian courts. The comparative analysis showed that the sentence was outside the range reasonably open to the sentencing judge in the circumstances of the case, having regard to applicable sentencing practices for a case of this kind. The appeal was allowed and the respondent was re-sentenced to six years' imprisonment with a non-parole period of four years. The appellant appealed to this Court.

The grounds of appeal include:

- The Court of Appeal erred in law by determining that the respondent should be sentenced in accordance with current sentencing practices in Victorian courts, to the exclusion of sentencing practices in other jurisdictions

- The Court of Appeal adopted an impermissible statistical analysis of comparable cases to determine the objective seriousness of the offence.

The respondent has filed a notice of contention, the grounds of which include:

- Maxwell P erred in fact in failing to find that the impugned sentence was heavy compared to sentencing practices in jurisdictions other than Victoria