IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

No. M82 of 2015

BETWEEN:

THE QUEEN (Cth)

Appellant

and

VU LANG PHAM

Respondent

Appellant's submissions

Part I – Certification

1. These submissions are suitable for publication on the Internet.

Part II – Statement of Issues

2. The issues in this appeal are:

   (a) Whether federal offenders should be sentenced in accordance with "*current sentencing practices*" in the State (or Territory) in which they are convicted, to the exclusion of sentencing practices in other jurisdictions.

   (b) Whether it is permissible to determine the objective seriousness of a federal drug importation offence by reference to a statistical analysis of comparable cases which grades those cases by the weight of the drugs expressed as a percentage of the statutory threshold for a more serious offence.

3. Determination of the above issues will also assist in the resolution of important issues related to the scope of the decisions of this Court in *Hili & Jones v The Queen* [2010] HCA 45; (2010) 242 CLR 520 (***Hili***) and *Barbaro & Zirilli v The Queen* [2014] HCA 2; (2014) 88 ALJR 372 (***Barbaro***), namely:

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(a) whether *Hili* (and thus *Barbaro*) can properly be confined to the question of consistent application of sentencing principles (as contended by the respondent, at least at the special leave stage), or whether those decisions are also concerned with reasonable consistency of sentencing outcomes by reason of what was said in *Hili* at [57], in the context of [47]-[56];

(b) the use properly to be made of intermediate appeal court sentencing decisions nationwide in aid of determining at the appeal stage whether a given federal sentence is manifestly excessive (or inadequate); and

(c) how federal sentencing consistency is to be achieved by sentencing judges having regard to what has been done in comparable cases, including those from other jurisdictions.

Part III – Section 78B of the *Judiciary Act 1903*

4. No notice need be given in compliance with s 78B of the *Judiciary Act 1903* because no constitutional issue arises.

Part IV – Citation

5. Primary Court citation: *Director of Public Prosecutions v Vu Lang Pham* [2013] VCC 1739 (23 October 2013, Judge Tinney).

6. Intermediate Court citation: *Vu Lang Pham v The Queen* [2014] VSCA 204.

Part V – Statement of Facts

7. The respondent was recruited to bring drugs into Australia from Vietnam. On 15 March 2013 he arrived at Melbourne on a flight from Vietnam. He brought with him two clear plastic packages containing white powder, comprising the equivalent of about 577 grams of pure heroin. The circumstances of the offending were accurately summarised by Maxwell P: [2014] VSCA 204 at [12]-[15]. The respondent's personal circumstances, including his prior drug convictions, were accurately summarised by his Honour at [16]-[19] and [21]-[23].

8. On 23 October 2013, the respondent (now aged 40), pleaded guilty to one charge of importing a marketable quantity of a border controlled drug, heroin, contrary to s 307.2(1) of the *Criminal Code* (Cth).[1]

9. On the same day, 23 October 2013, following a plea hearing before Judge Tinney of the County Court of Victoria at Melbourne, the respondent was sentenced to 8 years and 6 months' imprisonment with a non-parole period of 6 years.

10. On 9 May 2014, an appeal to the Victorian Court of Appeal was heard by Maxwell P and Kyrou JA.[2] Judgment was reserved and the Court of Appeal indicated that it would enlarge the bench to three.

10 11. Osborn JA considered the appeal on the basis of the transcript of the hearing and the written cases filed by the parties which were each supported by a table of comparable sentences. The table of comparable cases provided by the respondent consisted of Victorian decisions only. The table of comparable cases provided by the appellant included both Victorian and interstate sentences.

12. On 5 September 2014, the Court of Appeal allowed the appeal against sentence and ordered that the sentence of imprisonment be set aside. The respondent was resentenced to 6 years' imprisonment with a non-parole period of 4 years.

Part VI – Summary of Argument

13. Maxwell P concluded that sentences imposed in New South Wales, Queensland and
20 Western Australia were substantially higher than sentences imposed in Victoria with respect to similar quantities of narcotics: [2014] VSCA 204 at [8], see also [38]-[40]. His Honour stated at [10] (see also [40]):

> *"What is relevant for present purposes is that the appellant pleaded guilty in the reasonable expectation that he would be sentenced in accordance with current sentencing practices in Victorian courts. The sentence imposed was well outside the range indicated by Victorian practice. His appeal must therefore be allowed and his sentence reduced."*

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[1] A marketable quantity of heroin is 2 g – cf the quantity imported of about 577 g pure. A commercial quantity of heroin, being the relevant quantity for the more serious commercial quantity importing offence, is 1.5 kg.

[2] Leave to appeal was granted on 7 March 2014.

14. That conclusion was arrived by Maxwell P following a statistical analysis of the results of 32 intermediate appeal court cases involving a marketable quantity, guilty plea, first conviction,[3] "*courier*" importations: [2014] VSCA 204 at [7]-[8] and [29]-[40]. His Honour calculated the actual quantity imported as a percentage of the commercial quantity for each of the different drugs imported (noting that his Honour did not distinguish between drugs and precursors).

15. Attachment A to Maxwell P's judgment (appearing after [44]) is a table ranking the cases according to the percentage of the commercial quantity for the given drug in each case. Attachment B is a graph depicting what was said to be the correlation between the head sentence imposed (in months) and the quantity imported as a percentage of the commercial quantity.

16. The President's reasoning was an important and indispensable part of the conclusion reached by each of Osborn JA and Kyrou JA. It is, as a practical matter, inseverable from the conclusion reached as to manifest excess. The taint of that reasoning is impossible to separate out from the result.

17. The list of reasons given by Osborn JA and adopted by Kyrou JA not only expressly adopted the President's reasoning, but as a practical matter relied heavily upon the outcome of that reasoning to reach the conclusion as to manifest excess. In particular:-

    (a) even with all the matters identified by Osborn JA, the original sentence of the respondent was within that imposed in sufficiently like cases in other jurisdictions;

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[3] Maxwell P's finding at [20] of no prior relevant convictions was not properly available for the respondent given his prior drug offences, the relevance of which was conceded at the sentence hearing. The respondent's criminal history, including drug-related convictions, disentitled him from receiving the benefit of a first offender discount: *Veen v The Queen [No.2]* (1988) 164 CLR 465 at 477.6. The Court of Appeal's conclusion that the respondent could properly be regarded for the purpose of sentencing comparison as having "*no relevant prior convictions*" was therefore incorrect. Accordingly, Maxwell P's conclusion that his Honour had created a table of comparable sentences "*in which the only variable factor affecting offence seriousness is the quantity imported*" (at [3]) was also incorrect (even assuming that all other variable factors have been considered and properly excluded: cf *Wong v The Queen* [2001] HCA 64; (2001) 207 CLR 584 at 608 [66]).

(b) at [63], Osborn JA adopted the President's analysis to conclude that "*the sentence imposed was on its face a heavy one if assessed against sentencing practice in Victoria*";

(c) at [73], Osborn JA concluded that the analysis undertaken by the President demonstrated that the sentence appeared to be outside the range, and in context this could only have been a reference to the range identifiable from Victorian sentence cases, a point reinforced by the next subparagraph; and

(d) at [77](f), Osborn JA confirmed that "*the sentence imposed was very heavy when compared with the class of broadly comparable cases identified by the President*" – in context, that could only be a reference to the comparison with other Victorian cases;

18. Kyrou JA:

(a) at [81] adopted Osborn JA's reasoning;

(b) at [82], adopted the President's statistical analysis; and

(c) at [83], concluded that the statistics establish that the impugned sentence was "*out of line with current sentencing practice in Victoria*".

19. The erroneous conclusion and analysis of Maxwell P was indispensably adopted by Osborn JA and by Kyrou JA. The Court of Appeal therefore made two errors which are sought to be captured by the grounds upon which special leave to appeal was granted, namely:

(a) erroneously 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;

(b) impermissibly using statistical analysis of comparable cases to determine the objective seriousness of the offence.

First Error: 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

20. Section 5(2)(b) of the *Sentencing Act 1991* (Vic), requires Victorian courts to have regard to "*current sentencing practices*" in that State. That phrase was part of the reasoning of the Court of Appeal per Maxwell P at [10] and per Kyrou JA at [81] (reproduced in these submissions above at [13] and [18(c)] respectively). Their Honours (and Osborn JA in adopting the reasoning of Maxwell P) therefore had regard to a State legislative requirement to have regard to Victorian sentencing practices, and applied that to the review of a federal sentence, necessarily and in context to the exclusion of sentencing practices elsewhere. This approach was contrary to the conclusion of this Court in *Johnson v The Queen* [2004] HCA 15; (2004) 78 ALJR 616 at 622 [15] that "*except to the extent stated in ss 16A and 16B of the* [*Crimes*] *Act* [*1914*]*, general common law and not peculiarly local or state statutory principles of sentencing are applicable*"; see also *Hili* at 528 [25].

21. Contrary to Maxwell P's conclusion reproduced above at [13], there cannot be any reasonable expectation on the part of a federal offender to receive a sentence that is arrived at as a result of examining only the yardstick pattern of sentencing in the State or Territory jurisdiction in which the offence and sentencing takes place, when the results in other jurisdictions are provided. Any such expectation cannot reasonably be held because this approach is contrary to the objective and requirement of reasonable national consistency explained by this Court in *Hili* at 535 [47] and 537-8 [56-7].

22. The Court of Appeal did not make any finding that the decisions of the other intermediate appeal courts in the comparable prior cases placed before it were in any way incorrect, let alone plainly wrong, as to the sentences imposed. It follows that there was no proper basis for disregarding the "*yardstick*" effect of inter-State appellate decisions in aid of determining whether the original sentence in this case was manifestly excessive as asserted by the respondent.

23. By intervening and overturning a sentence by a process infected by a finding that it does not accord only with sentencing practices in Victoria as to the severity of the sentence imposed, the Court of Appeal has, with respect, misinterpreted or otherwise failed to comply with *Hili*. Achieving federal sentencing consistency by having regard to what has been done in other comparable cases is second only to the paramount concern with the consistent application of Part 1B of the Crimes Act 1914 (Cth): *Hili* at 536 [53] in the context of 535-6 [46]-[52].

24. Consistency in federal sentencing is to be achieved through the work of intermediate appeal courts: *Hili* at 537 [56]. The need for consistency of decisions throughout Australia requires intermediate appeal courts to follow the decisions of like courts in other jurisdictions as to sufficiency (and therefore also excess) of sentences unless convinced the decision is plainly wrong: *Hili* at 538 [57].

25. In *Hili* at 537 [54], the reasoning of Simpson J in *DPP (Cth) v De La Rosa* (2010) 243 FLR 28 at 98 [303]-[305] was approved, being to the effect that a history of sentencing in prior matters for the same or similar offences can establish a past range in the sense of recording historic outcomes, but does not establish the correctness of the range revealed or dictate outer limits. That reasoning has even greater force and effect when, as here, the range relied upon artificially excludes sentences from consideration merely because they were imposed in a different jurisdiction, without any suggestion they are wrong. The Court of Appeal was using the table and graph created by Maxwell P to treat the sentences imposed in prior Victorian cases as an outer limit beyond which the sentence imposed was wrong.

26. If this decision is left untouched two possible results are likely. Either other intermediate appeal courts will feel bound to follow this approach of intra-jurisdictional consistency instead of national consistency. Alternatively, other intermediate appeal courts will decline to follow this decision, but it will still apply in Victoria and be binding on the Trial Division of the Victorian Supreme Court, on the Victorian County Court and on the Victorian Magistrates Court.

27. Either or both outcomes are possible according to the view taken by different intermediate appeal courts. Either outcome is antithetical to the objective of national consistency in federal sentencing mandated by this Court in *Hili*. Either way, the result will be inconsistent federal offence sentencing practices between jurisdictions, sanctioned by an intermediate appeal court.

28. These inconsistencies will likely become entrenched, instead of being minimised over time by the work of intermediate appeal courts developing national guidance for sentencing courts as contemplated by *Hili* at [56]-[57].

29. Inconsistent outcomes between jurisdictions entrenched by the application of the Court of Appeal's reasoning will inevitably not be confined to drug offences, but rather will apply to sentencing for all federal offences where unjustifiable disparities exist or emerge. It will tend to discourage intermediate appeal courts from addressing or seeking to explain such disparities when they arise by a national consistency approach, rather than requiring that issue to be addressed. The role of intermediate appeal courts in achieving national consistency will be undermined.

30. There is an important public interest in ensuring the maintenance and development of federal sentencing practices that are "*systematically fair, and that involves, amongst other things, reasonable consistency*": *Wong v The Queen* [2001] HCA 64; (2001) 207 CLR 584 (***Wong***) at 591 [6], endorsed in *Hili* at 535 [47]: see also *R v Ruha, Ruha and Harris; Ex parte Director of Public Prosecutions (Cth)* [2010] QCA 10; [2011] 2 Qd R 456 at 471 [49]. The decision of the Court of Appeal promotes inconsistency in the sentencing of federal offenders by requiring sentencing courts in Victoria to have regard to comparative cases emerging only from that jurisdiction to the exclusion of non-Victorian intermediate appeal court decisions.

Second Error: impermissible statistical analysis of comparable cases to determine the objective seriousness of the offence

31. The Court of Appeal (per Maxwell P, adopted by Osborn and Kyrou JJA) narrowed the weight-based comparison to cases involving "*couriers*", guilty pleas and absence of prior relevant convictions. As Maxwell P indicated at [3], the use of these three "*recurrent features*" means that "*a large number of sentencing decisions can be assembled — for the purposes of comparison — in which* ***the only variable factor*** *affecting offence seriousness is the quantity imported*" (emphasis added). That approach deliberately enhanced rather than diminished drug weight as the dominant means of determining objective seriousness.

32. For drug importation offences, even though the weight of drugs is given statutory significance for sentencing purposes by distinguishing between the maximum sentence that may be imposed, the selection of weight as the dominant factor to be taken into account is a departure from fundamental principle: *Wong* at 609 [67] and [70]. In this case, on appeal weight became not just the dominant determinant, but the effective sole determinant, for differentiating between the prior sentences imposed once the bare and general three recurrent similarities were used for comparative case selection.

33. In *Barbaro* 88 ALJR 372 at 372 [41], this Court made it clear that statistics as to prior sentences are but a part of the raw material that is required to be synthesised. Prior sentences cannot be more than a yardstick, yet the use of the statistical analysis in this case went beyond that limitation and became a guiding force for the outcome of the appeal.

34. In *The Queen v Olbrich* [1999] HCA 54; (1999) 199 CLR 270 at 279 [19], this Court made it clear that characterising a drug importation offender as a courier (or principal) must not obscure the assessment of what the offender (and thus prior offenders) did. Classifying cases by reference to "*couriers*" as part of a selection process for statistical analysis based on drug weight tends to advance the proscribed obscuring of what was done by this respondent and by the prior offenders. Differences in what the offender has done will often better explain differences in outcome than mathematically derived graphs and tables.

35. In *Adams v The Queen* [2008] HCA 15; (2008) 234 CLR 143, the proposition that a sentencing court should attempt a harm analysis of different kinds of drugs was rejected by this Court upon the basis that the differences in the seriousness of offending as between different types and quantities of drugs was addressed by the legislative scale of sentences based on quantity. This Court was doing no more than pointing out that the maximum penalties set by the legislature were governed by drug type and quantity, which precluded any assessment of relative harmfulness. That conclusion did not in any way replace the reasoning in *Wong*, and affords no support for the approach taken by the Court of Appeal: cf Maxwell P at [29]-[30].

10 36. The effect of the above authorities, especially *Wong*, is that even if a degree of mathematics applied to past sentencing outcomes in relation to the statutory threshold for a given drug offence is able to be used in aid of the synthesis of the range of material available to help a sentencing court to arrive at an appropriate sentence, it cannot be the sole or even dominant way of measuring objective seriousness.

37. For a given offence, a sentencing court can legitimately note that the quantity involved was close to the threshold for that offence, or that it was some multiple of that threshold, or that it was close to the top of the legislated range for that offence in the sense of being close to the next threshold. That fact can properly be taken into
20 account as but one of a number of measures of objective seriousness for the case at hand. It can even be used to give a sentencing court a sense as to how close the offending came to be at the next level of offending to assist in the overall assessment of objective seriousness. However it is an altogether different thing to compare that relative position against a table or graph of other offences that have been committed to arrive at a definitive measure of objective seriousness. Such an approach, although seductive in its simplicity, is a step too far.

38. If this approach is permitted to continue by allowing this decision to stand, it will tend to encourage a form of grid or guideline sentencing of the kind disapproved of for federal offences by this Court in *Wong*. It will also tend to give comparative sentences a quality of correctness as to the range disclosed and the establishing of outer limits disapproved of by this Court in *Hili* and *Barbaro*. It will encourage mathematical consistency, rather than the consistent application of principle.

39. This approach is also "*inconsistent with the requirement to consider the range of matters detailed in s 16A of the Crimes Act [1914]*": *Putland v The Queen* [2004] HCA 8; (2004) 218 CLR 174 at 194 [55].

10 40. By encouraging, if not requiring, the use of tables and graphs calculated by reference to the threshold for a more serious uncharged offence as the dominant means of determining objective seriousness of federal drug importation offences, the Court of Appeal decision will also encourage mathematical consistency, rather than the consistent application of principle and an approach to consistency of outcome of the kind required by this Court in *Wong*, *Hilli* and *Barbaro*.

Part VII – Applicable Provisions

41. The applicable statutory provision is s 307.2(1) of the *Criminal Code* (Cth). That provision is still in force, in the same form, at the date of these submissions.

Part VIII – Orders Sought

20 42. The following orders are sought:

(a) appeal allowed;

(b) set aside the order of the Court of Appeal of the Supreme Court of Victoria made on 5 September 2014 and, in its place, order that the appeal to that Court be dismissed.

Part IX – Time Estimate

43. The appellant's oral arguments are estimated to take about two hours (allowing for the respondent's notice of contention).

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