IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

No. S271 of 2015

BETWEEN:



**PHILIP NGUYEN**
Appellant

and

**THE QUEEN**
Respondent



**APPELLANT'S REPLY**

**PART I: Certification**

1. This submission is in a form suitable for publication on the internet.

**PART II: Reply**

*Seriousness of manslaughter*

2. The respondent concedes that the appellant's state of mind, namely his belief that the men were "fake police" and were there to rob him, was a relevant consideration for the purposes of sentence (Respondent's Submissions "RS" at [6.30]-[6.31]). The Court of Criminal Appeal ("CCA") held that the sentencing judge erred by having regard to the absence of a factor (here, that he did not know the men were police) which, if it existed, would render the appellant guilty of a more serious offence (*R v Nguyen* (2013) 234 A Crim R 324 at [52] **AB 106**). The CCA's finding that the sentence imposed for manslaughter was manifestly inadequate was (at least in part) based on its conclusion that it was not relevant to the seriousness of the offence that the appellant did not know or believe the men were police officers (CCA at [91], [95] **AB112-113**). The passage at CCA [95] **AB 113** accurately reflects the findings made by the CCA in relation to ground 1 (cf. RS at [6.30]). The passage at CCA [97] **AB 113** merely states that the basis of the plea to manslaughter did not preclude a finding that the offence is aggravated by virtue of s21A(2)(a) of the *Crimes (Sentencing Procedure) Act 1999* (NSW) because the appellant ought to have known that the men were police officers (cf. RS at [6.30]).

3. The sentencing judge found that the if the appellant had known the men were police officers, that would have rendered the manslaughter and wounding offences more serious (*R v Nguyen* [2013] NSWSC 197 ("ROS" at [57] **AB 60**). This is the passage the CCA found disclosed error (CCA at [52]-[54] **AB 106-107**). However, in this passage the sentencing judge was simply comparing the circumstances of the appellant's offences with the circumstances of a more serious example of the offences of manslaughter and wounding. This was a conventional and permissible approach to assessing the seriousness of an offence and whether the offence was in the worst category of manslaughter offences (see AS at [48]). The comparator offence for the purposes of that exercise is not bound or limited by the

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circumstances of the offence under consideration (cf. RS at [6.11], [6.13], [6.17] and [6.20]-[6.21]).

4. The CCA treated the appellant's belief that the deceased was "fake" police as an absence of a factor (CCA at [45]-[52] **AB 105-106**). However, as the respondent accepts, it is not helpful to characterize the appellant's lack of knowledge that the deceased was a police officer as an absence of a factor (RS at [6.12] and [6.23]; see AS at [47]).

10 5. The appellant agrees that it is difficult to separate the appellant's belief that his conduct was necessary to defend himself and his belief the deceased was a man who was there to rob him because the first belief was based on the latter (see RS at [6.5-[6.7], see AS at [44]). However, if the principle in *The Queen v De Simoni* (1981) 147 CLR 383 applies by analogy to prohibit a sentencing judge from having regard to a factor which, if existed, would have rendered the offender guilty of a more serious offence, such an analysis must be undertaken in the appellant's case (and was undertaken by the CCA at [47], [52]-[54], [95] **AB 105-107, 113**).

6. The appellant's plea of guilty to the manslaughter offence was on the basis that he
20 believed his conduct was necessary to protect himself (s421 of the *Crimes Act 1900* (NSW)) and this belief was, in turn, based on the belief that the men were "fake police" and were there to rob him (CCA at [15] **AB 101**; see RS at [6.4]-[6.7]). In these circumstances it is not correct to say that had he believed that the deceased was a police officer he would have been guilty of murder not manslaughter because it is unknown what the appellant would have done if he had a different state of mind (cf. RS at [6.3] and [6.8]-[6.9]).

7. The principle in *Elias v The Queen* (2013) 248 CLR 483 does not support the reasoning of the CCA at [45]-[54] **AB 106-107** (cf. RS at [6.25]-[6.27]). The *De*
30 *Simoni* principle was not relied upon in *Elias v The Queen* in relation to the absence of a factor which, if it existed, would have been a mitigating circumstance (cf. RS at [6.25]). The principle under consideration in *Elias* (that is, the principle in *Liang v The Queen*) did not relate to the limits of a sentencing judge's findings of fact nor did it prohibit a sentencing judge from having regard to the conduct (and/or state of mind) of the offender.

8. In *Elias v The Queen* it was held that there was no common law sentencing principle that required the sentencing judge to take into account the lesser maximum penalty for an offence for which the offender could have been but was
40 not charged (at [37]). The issue in *Elias* was whether a sentencing judge could have regard to an offence for which the offender had not been convicted (at [26]). The same issue arose in *De Simoni* albeit in a very different way. The fundamental principle, so described by Gibbs CJ in *De Simoni*, is that the offender is to be sentenced for the offence for which he or she has been convicted and the sentence imposed should take into account all the circumstances of the offence (at 389). This was affirmed by the Court in *Elias* (at [27]). Consideration of different offences for which the offender might have been convicted is "*merely a distraction*" (*Elias* at [36], quoted at RS at [6.27]). Here, the CCA used the principle in *De Simoni* in a different way to this Court in *Elias v The Queen*, that is, by analogy, to constrain
50 the facts to be taken into account on sentence because the absence of a factor was

said to render the appellant guilty of a more serious offence (CCA at [47]-[54] **AB105-107**).

*Totality*

9. For the reasons at AS [51]-[60] the sentencing judge was not obliged to impose partially cumulative sentences for manslaughter and wounding in the circumstances of the appellant's case (cf. RS at [6.33]-[6.35], CCA at [81]-[84] **AB 111**).

10. The different consequences of the single act of the appellant could be contemplated by the sentence imposed for manslaughter (cf. RS at [6.34], CCA at [81] **AB 111; see AS at [59]**). The taking of a life was a matter additional to the wounding offence and reflected in the sentence imposed for the manslaughter offence (cf. RS at [2], [6.34]; see AS at [59]). Additional punishment in the form of the imposition of partially accumulated sentences was not required in such circumstances (cf. RS at [2], [6.34]).

*Determination of the appeal*

11. The appellant does allege error on the part of the CCA in finding that the sentence imposed for the manslaughter offence was manifestly inadequate (Notice of Appeal Ground 2.1(d) **AB 124**; cf. RS at [6.40]).

12. It was necessary for the respondent to establish the error in the court below (*CMB v Attorney General* at (2015) 89 ALJR 407 at [33] and [54]). The CCA upheld 3 grounds of the Crown appeal – error in relation to the assessment of the seriousness of the manslaughter offence (ground 1), error in relation to the application of the principle of totality (ground 3) and error in relation to the imposition of manifestly inadequate sentences (ground 4) (CCA at [52]-[54], [81]-[84], [113] **AB106-107, 111, 116**). The appellant alleges error in respect of each of those conclusions (Notice of Appeal **AB 124**).[1] The appellant need not establish that the re-determined sentence is erroneous if the appellant can establish that the CCA erred in upholding all or any of grounds 1, 3 and 4. (cf. RS at [6.40]-[6.41]).

Dated: 3 March 2016

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[1] The finding that the wounding offence was manifestly inadequate is not the subject of a ground of appeal in this Court.