IN THE HIGH COURT OF AUSTRALIA

SYDNEY OFFICE OF THE REGISTRY **No. S 271 of 2015**

B E T W E E N:

PHILIP NGUYEN

Appellant

and

THE QUEEN

Respondent

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RESPONDENT'S ANNOTATED SUBMISSIONS

Part I: Publication

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

Part II: Concise statement of issues

1. Whether taking into account a hypothetical state of mind contrary to the basis on which the offence was founded was an extraneous consideration in assessing the seriousness of the offence.

20 2. Whether, in structuring the sentences for the manslaughter offence, taking into account the offence on the Form 1, and the wounding with intent to inflict grievous bodily harm offence, some measure of accumulation on the sentence imposed for the wounding was warranted to reflect the seriousness of the intentional taking of a life.

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Part III: Section 78B of the Judiciary Act

It is certified that this appeal does not raise any constitutional question. The respondent has considered whether any notice should be given in compliance with s78B of the *Judiciary Act 1903 (Cth).* No such notice is required.

Part IV: Statement of contested material facts

4. 1 The respondent does not contest the appellant's outline of the material facts. This matter proceeded by way of Agreed Facts which were accepted by the sentencing judge (ROS [8] AB 45.50)

PART V: Applicable Legislative provisions

The appellant's list of legislative provisions is accepted.

PART VI: Statement of Argument

De Simoni

6. 1 The plea to manslaughter was based on the partial defence of excessive self-defence under s 421 of the *Crimes Act.* The elements of murder were admitted (AWS [28]). The appellant shot Constable Crews with the intent to inflict grievous bodily harm. Criminal responsibility was reduced to manslaughter because the appellant believed it was necessary to shoot at Constable Crews in order to defend himself (AWS [46]). This was incorporated into an agreed statement of facts (ROS [8] AB 45.50) and the sentencing judge accepted that the partial defence was based on the appellant's mistaken belief that Constable Crews was there to rob him and posed a threat to his safety (ROS [34] AB 52.40).

6. 2 The appellant accepts that this was the basis of the plea but submits there was no error in finding that the offence would have been more serious if the

appellant had known the men were police officers because knowledge that Constable Crews was a police officer was not an element of murder. Taking such knowledge into account in assessing the seriousness of the manslaughter offence is said not to constitute a ***De Simoni*** error because it did not involve taking into account a circumstance which would have constituted an element of a more serious offence (AWS [41]). The appellant points out that there is a distinction between circumstances which constitute an element of another offence and circumstances which make a particular offence more serious (AWS [40]). On this analysis, the appellant's knowledge that Constable Crews was a police officer was just a circumstance which might have made the offence more serious but not an element of the offence of murder.

6. 3 There is no issue that knowledge was not an element of murder. The elements of murder were admitted. The appellant fired at Constable Crews with intent to inflict grievous bodily harm. The issue is whether firing the gun with knowledge that he was a police officer negated the partial defence which reduced the murder to manslaughter.

6. 4 The appellant contends that it does not because his belief that Constable Crews was there to rob him was not an element of that partial defence (AWS [41]). The "only relevant belief" was the belief that his conduct was necessary to defend himself (AWS [44]). Knowledge that the person was a police officer was not a necessary element of that belief. In this way the appellant seeks to separate the belief that it was necessary to defend himself from his belief that Constable Crews was a robber. The partial defence is said to require one but not the other and there was no error in making the comparison because the appellant's knowledge that Constable Crews was a police officer was not part of the belief that it was necessary to defend himself.

6. 5 That separation of the two beliefs was not available in the circumstances of this case. The appellant's belief that it was necessary to defend himself was not distinct from his belief that the men were robbers who posed a threat of

harm. It was integral to his belief that it was necessary to defend himself which founded the partial defence.

6. 6 The sentencing judge correctly drew no such distinction. Her Honour characterised the belief as a belief in the necessity to defend himself against the men he thought were there to rob him. Her Honour noted that the partial defence was based "on his mistaken belief that the officer was someone who was intent on robbing him" (ROS [34] AB 52.40) and found that the appellant had "armed himself because he believed he was going to be robbed or physically harmed, and in the process fired the pistol at an unarmed man" ROS [41] AB 55.26).

6. 7 The appellant also appears not to accept any such distinction for the appellant acknowledges that the appellant's belief that he needed to defend himself was "inextricably linked" to his belief that the men were not police (AWS [33]) as his belief that Constable Crews was not a police officer "founded his claim for excessive self-defence" (AWS [41], [49]).

6. 8 The appellant also acknowledges that his belief that the men were there to rob him, that they were "fake police", was the basis of his belief that it was necessary to defend himself and if it were removed, that is, if he knew they were police, the defence would not be available: "If this was removed then he may not have had grounds for believed [sic] that he needed to act to protect himself" (AWS [45]).

6. 9 The appellant is correct that if the appellant's belief that they were not police were removed the partial defence would not be available. And if the partial defence were not available, as the appellant points out, the offence would be murder (AWS [46]).

6. 10 The same reasoning applies were the Crown to seek to have the appellant's knowledge that the men were police taken into account as aggravating the manslaughter offence. The appellant submits this would be permissible (AWS [41]) but as her Honour noted that would contravene the basis of the plea (ROS [46] AB 57.20). It was for that reason that her Honour did not find knowledge was essential in relation to the aggravating factor that the victim

was police officer under s 21A of the *Crimes (Sentencing Procedure) Act*, because her Honour recognised that the sentence "must" proceed on the basis that he did not know (ROS [52] AB 58.50).

6. 11 However, her Honour failed to apply that reasoning when assessing whether the offence was in the worst category. By comparing the seriousness of the manslaughter offence with the situation had the appellant known Constable Crews was a police officer her Honour effectively removed the basis of the partial defence, a finding her Honour had previously acknowledged must not be made in this case (ROS [52] AB 58.45). The state of mind on which the partial defence was based was the belief that the men were robbers against whom the appellant needed to defend himself. The state of mind that he knew they were police was not a mere circumstance in that context. It was an entirely different state of mind which negated the belief that they were robbers and thus removed the basis of the partial defence.

6. 12 The appellant is correct that it may not be helpful to characterise the lack of knowledge that the men were police as the absence of a factor (AWS [47]). The appellant had a particular state of mind constituted by a specified belief, namely that the men were not police, they were robbers.

6. 13 The appellant further submits that it is entirely hypothetical and irrelevant to posit that he knew the men were police because if he had known they were police he may not have chosen to discharge the gun at all as he would not have believed it was necessary to defend himself (AWS [45]). This is said to be the error made by the CCA but it is the very error made by the sentencing judge. Her Honour took into account the seriousness of the hypothetical offence he would have committed if he had fired knowing they were police in assessing the seriousness of the offence he committed without that state of mind.

6. 14 The postulation that the appellant knew that they were police also rendered the second aspect of the partial defence meaningless. The second aspect of the defence addresses the unreasonableness of the person's response "in the circumstances as he or she perceives them" (s 421(1)(b)). The

circumstances the appellant perceived were that he was under threat by a group of robbers. The sentencing judge's finding that it was unreasonable to shoot at those men without taking any steps to ascertain whether the men posed any danger "*or whether the claim by those men that they were police officers was legitimate*" (ROS [41]) would have no bearing if the appellant knew they were police.

6. 15 The circumstances were that the officers announced they were police a number of times ROS [15]). Three of them were in uniform. They did not have their weapons drawn. The appellant knew they claimed to be police but he did not believe them which was why he came out of the garage with his gun drawn (ROS [16]).

6. 16 The appellant then pointed the gun towards Constable Crews who was standing closest to him. Constable Crews was holding a folder of documents (ROS [13]). The police again identified themselves as police officers and directed the appellant to put down the gun (ROS [17]).

6. 17 If the appellant knew that Constable Crews was a police officer it meant he fired at an officer holding a folder of papers knowing he was a policeman and unarmed. That would unquestionably have been an aggravated form of murder. The introduction of that hypothetical state of mind provided no useful comparison in assessing the seriousness of the manslaughter offence the very essence of which was that he did not know.

6. 18 The appellant submits that the appellant's belief that the men were robbers was the reason the plea was accepted and a matter into which the sentencing judge could not inquire (AWS [38]).

6. 19 The appellant's belief in the need to defend himself was the basis of the plea, not the reason it was accepted. The reason the plea was accepted was that the Crown could not disprove the genuineness of that belief despite the fact that three of the men were in uniform and the officers repeatedly identified themselves as police. This was because of the unusual circumstance that the appellant had been the victim of an attempted robbery in that garage area two weeks earlier when two men wearing balaclavas and

armed with bats threatened him (ROS [30]). After this attempted robbery the appellant obtained the gun to protect himself in case he had any further problems. There was the further coincidence that the appellant was involved in a drug transaction for 8 ounces of cocaine at the time the police arrived (ROS [29]). He may have panicked when he heard the men approaching believing they were "fake police" there to rob him as in the previous incident (Agreed Facts [32]).

6. 20 The sentencing judge's comment that the manslaughter offence would have been in the worst category if the appellant fired knowing Constable Crews was a police officer (ROS [57]) was inconsistent with her Honour's acknowledgement at other stages of her reasons that the plea was accepted on the basis that it was "reasonably possible that the [appellant] did not know Constable Crews was a police officer" (ROS [46]) and that it had to be accepted that the manslaughter was based on the possibility that the appellant believed the men were robbers and posed a danger to him: "*As I see it, accepting as I **must** that the offender might actually have believed that the police officers were robbers*" (ROS [52])*(emphasis added)*. Her Honour accepted that the basis of the manslaughter was that the appellant "was unaware that Constable Crews was a police officer" and had a genuine but misplaced belief that he needed to defend himself against a perceived threat of harm (ROS [57]). It was somewhat antithetical to posit that the appellant knew the men were police when it was acknowledged that that contradicted the belief on which the partial defence depended.

6. 21 This is not to say that her Honour was wrong in her assessment that it would have been more serious had the appellant known that Constable Crews was a police officer but the problem with that analysis was that her Honour was not assessing the relative seriousness of this manslaughter offence in the range of possible manslaughter offences but comparing its seriousness in relation to what would have been a more serious offence.

6. 22 The appellant submits that this was not an error because the ***De Simoni*** principle, "by analogy or otherwise", does not prohibit a sentencing judge from having regard to the absence of a factor which, if present, would have

rendered an offender liable to a more serious offence. The ***De Simoni*** principle is said to apply only to the presence of circumstances of aggravation not the absence of circumstances of aggravation and, being "ameliorative", does not apply to mitigating circumstances (AWS [37]).

6. 23 As the appellant points out, the distinction between absence of factors and presence of factors is not helpful in the present case. It is misleading to characterise the appellant's belief that the men were robbers as an absence of a belief that they were police. The comparison that was made by the sentencing judge was between one positive belief or state of mind (that they robbers who posed a threat) as against another positive belief or state of mind (that they were police).

6. 24 This was not strictly a contravention of the ***De Simoni*** principle as the sentencing judge did not impose a sentence in reliance on a circumstance of aggravation which had not been charged that rendered the appellant liable to a greater punishment. However, the introduction of a hypothetical consideration which, if it existed, would have constituted a more serious offence was an extraneous consideration analogous to a breach of the ***De Simoni*** principle

6. 25 Contrary to the appellant's submission, the use of the ***De Simoni*** principle is not confined to having regard to uncharged circumstances of aggravation. The principle has been relied upon in relation to the absence of a factor which, if it existed, would have been a mitigating circumstance: ***Elias v The Queen*** (2013) 248 CLR 483.

6. 26 ***Elias*** concerned the *Liang* principle which held that it was relevant and proper to take into account on sentence that a lesser offence was available and could have been charged (***Elias*** at [13]). The error in taking into account the availability of a lesser offence was held to be that it indicates that the court sentences on its assessment of the offending conduct and not for the offence charged (***Elias*** at [26]). That error was demonstrated by reference to the ***De Simoni*** principle: "*If it is right for the judge to take into account the circumstance that the offender might have been convicted of a*

less serious offence, it is difficult to see why as a matter of principle the judge should not take into account facts disclosing a circumstance of aggravation that could have been, but was not, charged" (***Elias*** at [26]). The ***De Simoni*** principle was thus used by analogy to demonstrate the error of having regard to an absent mitigating consideration.

6. 27 As this Court held in ***Elias***, "*Consideration of different offences for which an offender might have been convicted is merely a distraction.*" (***Elias*** at [36]). This was similar to the reasoning applied by the CCA in the present case where the reference to the appellant's knowledge that the men were police was characterised as an "extraneous or irrelevant consideration" (CCA [52] AB 106.40).

6. 28 Contrary to the appellant's submission, this did not impair the ability to do individualised justice by limiting consideration of the relevant circumstances (AWS [43]). The hypothetical state of knowledge that the men were police was not a relevant circumstance. It was a non-existent circumstance which had been expressly negated by the plea to the offence in question. Nor did this introduce excessive subtlety and refinement to the sentencing process (AWS [43]). This was the accepted basis of the partial defence which the sentencing judge had already recognised and applied elsewhere in her reasons.

6. 29 However, in relation to manifest inadequacy, the CCA stated that "*the fact that the Respondent did not know or believe that the persons in the garage were police officers is not relevant to an assessment of the objective gravity of the manslaughter offence*" (CCA [95] AB 113.25).

6. 30 This was unfortunately expressed and appears to be a slip brought about by the use of the double negative. One of those negatives needed to be removed for the passage to be consistent with the CCA's reasons as a whole. The passage should have read that "the fact that the respondent knew that the persons were police is not a relevant consideration" or "the fact that the respondent did not know that the persons were police is a relevant consideration". As the CCA noted just two paragraphs later, it was

accepted that the appellant did not know the men were police which was the basis of the plea (CCA [97]).

6. 31 It was apparent that the fact that the appellant did not know that the men were police was a relevant consideration. It was the very basis of the plea and the reason the CCA held that the hypothetical state of mind posited by the sentencing judge was extraneous.

Totality

6. 32 The respondent agrees with the appellant's statement of the principle that totality it is a discretionary determination and that sentencing judges are afforded considerable flexibility on questions of concurrency and accumulation (AWS [53]). The respondent also adopts the appellant's quotation from ***Pearce v The Queen*** (1998) CLR 610 that it is a matter of common sense not to be attended with excessive subtleties or refinements (AWS [55]). As the appellant notes (AWS [53]), these principles were accepted by the CCA (CCA [77] – [78], AB 110.47).

6. 33 However, there is a clear distinction with the situation in ***Pearce*** which concerned the question of double punishment for a single act and the present case which raises no such issue. The two offences in the present case were clearly distinct with quite different consequences.

6. 34 There was no element of double punishment in imposing a degree of separate punishment for the intentional taking of a life. This was a significant consequence not reflected in the wounding offence. The manslaughter offence also had to take into account the criminality of the offence on the Form 1 (CCA [82] AB 111.35, CCA [105] – [110] AB 115.10). This offence of possession of a prohibited firearm carried a maximum penalty of 14 years and a standard non-parole period of 3 years (CCA [6] AB 98.10).

6. 35 Despite much of the appellant's conduct being common to both offences, a measure of accumulation was required in recognition of the fact that these "*were distinct offences caused by different bullets causing very different consequences*" (CCA at [81]).

Determination of Appeal

6. 36 In addition to the error found in relation to totality (ground 3) and the ***De Simoni*** principle (ground 1), the CCA also upheld ground 4 and found that the sentence was manifestly inadequate (CCA [113] AB116.15). This was a separate error independent from the other two. Ground 4 having been established, the Court was required to undertake a fresh exercise of the sentencing discretion.

6. 37 Contrary to the appellant's submission, the CCA expressly took into account that the appellant did not know that the men were police officers (CCA [97] AB 113.37). On resentence, the CCA considered that the objective gravity of the manslaughter offence was greater than the sentencing judge had assessed but agreed with the sentencing judge that there were limited subjective circumstances in the appellant's favour (CCA [118] AB 116.40).

6. 38 The appellant was 55 at the time of the offences, he had previous convictions for fraud, theft and a serious drug supply offence. He continued to be involved in the supply of drugs and had recently taken the step of arming himself with a prohibited weapon (CCA [112] AB 115.50). He was taking crystal methamphetamine and heroin at the time of the offences but did not consider his drug use problematic (ROS [63] AB 62.20). The sentencing judge found that the appellant was resistant to submitting to supervision on parole, had little insight into his drug use and appeared determined to continue to involve himself in the drug milieu. Given those findings her Honour was unable to find that the prospects of rehabilitation were favourable (ROS [63] AB 62.28).

6. 39 In all the circumstances the CCA concluded that a "substantially different" sentence should be imposed (CCA [117] AB 116.37). Taking into account the discretionary factors, and allowing a discount of 10% for the plea of guilty, the Court imposed new sentences for the respective offences (CCA [128] (c) - (d)).

6. 40 There is no ground of appeal averring that the finding of manifest inadequacy was wrong, nor that the redetermined sentence was wrong. The

errors in relation to grounds 1, 3, or even 4, had no bearing on the independent assessment undertaken to determine the new sentence considered appropriate in all the circumstances. Error having been established, the new sentence was arrived at as a result of a fresh exercise of the sentencing discretion.

6. 41 The appellant seeks to set aside the orders made by the CCA, or alternatively, that the matter be remitted to the CCA (AB 125.15) but as there is no ground averring error in the new sentence imposed by the CCA, no basis has been identified to warrant overturning that order.

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PART VIII: Time Estimate

It is estimated that oral argument will take 1 hour.

Dated: 19 February 2016

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