ZIRILLI v THE QUEEN (M1/2013)

Court appealed from:	Court of Appeal of the Supreme Court of Victoria [2012] VSCA 288
Date of judgment:	30 November 2012
Date special leave referred:	16 August 2013

On 28 June 2007, 4.4 tonnes of ecstasy tablets, containing more than 1.4 tonnes of pure MDMA, were imported into Melbourne, concealed in a shipment of tinned tomatoes. The wholesale price of the shipment was estimated to be approximately $122 million. The applicant (together with others, including the applicant in matter M3/2013, *Barbaro v The Queen*) was involved in the conspiracy to import the tablets, his role being to transport them 'with a view towards sale by another, with ultimately a view to distribution'. The applicant (Zirilli) pleaded guilty to one count of conspiracy to traffic in a commercial quantity of MDMA, one count of trafficking in a commercial quantity of MDMA, and one count of aiding and abetting an attempt to possess a commercial quantity of cocaine. In agreeing to plead guilty, Zirilli (and Barbaro) had each entered into an agreement with the Crown that the prosecution would make a particular submission to the court on the sentencing range. However, the sentencing judge made it clear at the outset and during the course of the hearing that she did not want to receive submissions as to range from anyone. Had the Crown been allowed to do so, the prosecutor would have submitted, in Zirilli's case, a sentencing range of 21 to 25 years' imprisonment with a non-parole period of 16 to 19 years. Zirilli was sentenced to 26 years imprisonment, with a non-parole period of 18 years.

In his appeal to the Court of Appeal (Maxwell P, Harper JA, and T Forrest AJA) Zirilli contended that the sentencing judge's refusal to entertain a submission from the Crown on sentencing range constituted a breach of natural justice or a failure to take into account a relevant consideration. The Court found that the sentencing judge (King J) committed no error of law. The function of a Crown submission on range was to assist the sentencing judge. No authority suggested that a judge who declined such assistance should nevertheless be compelled to receive it, still less that the decision whether or not to entertain such a submission rested on considerations of procedural fairness. The Court considered that no sentencing judge is under an obligation to receive assistance on range if that is not desired.

In this matter (and in *Barbaro*), the Director of Public Prosecutions for Victoria has filed a summons seeking leave to intervene or leave to appear as *amicus curiae*.

The questions of law said to justify the grant of special leave include:

- Does a submission as to sentencing range – in the form of a submission that sets out the numerical parameters beyond which a sentence would be in error – amount to a submission of law?
- Does a judge's refusal to hear from a prosecutor a submission as to range amount to (i) a breach of procedural fairness and/or (ii) a failure on the judge's part to hear and consider a relevant consideration?

- Are the answers to those questions affected by the fact that the putting of such a range by the Crown was part of a plea agreement with the applicant?