IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

No. M82 of 2015

BETWEEN:

THE QUEEN (CTH)
Appellant

AND

VU LANG PHAM
Respondent

10

RESPONDENT'S SUBMISSIONS

Part I: Certification as to suitability for publication

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

Part II: Issues presented by the appeal

2. The issues in the appeal are:

   a) whether the reasons of Osborn and Kyrou JJA were infected by errors in the reasons of Maxwell P;

20

   b) whether *Hili & Jones v The Queen* (***Hili***)[1] requires consistency in sentencing *outcomes* (as contended by the appellant), as distinct from consistency in the application of *principle*; and

   c) whether, as contended in the Notice of Contention, the sentence imposed at first instance was heavy compared to sentences in jurisdictions other than merely Victoria.

Part III: Certification as to section 78B

3. Notice is not required to be given in compliance with s 78B.

Part IV: Contested facts

4. The respondent does not contest the accuracy of the facts set out in Part V of the Appellant's Submissions.

30

Part V: Applicable provisions

5. The appellant's statement as to s 307.2(1) of the *Criminal Code* 1995 (Cth) is accepted.

---

[1] [2010] HCA 45; (2010) 242 CLR 520.

Date of document: 13 July 2015
Filed on behalf of the Respondent
Victoria Legal Aid
Lawyers
Email: nirvana.adey@vla.vic.gov.au

DX address: DX 210646 Melbourne
Postal address: 350 Queen Street
Tel: 03 9269 0145
Fax: 03 9269 0604
Ref: NA/14X006196NA
Attention: Nirvana Adey

6. The appellant also refers, in footnote 1 of the Appellant's Submissions, to the marketable and commercial quantities of heroin. The relevant provisions establishing that are ss 301.10 and 301.11 of the *Criminal Code* 1995 (Cth) and s 5D and Schedule 4 of the *Criminal Code Regulations* 2002 (Cth). There have been no relevant changes to those provisions since the date of the offence.

7. Paragraph 20 of the Appellant's Submissions refers to s 5(2)(b) of the *Sentencing Act* 1991 (Vic). Both parties refer to s 16A of the *Crimes Act* 1914 (Cth). Those provisions are still in force, in that form, at the date of making these submissions.

8. The Respondent also refers to ss 68(1) and 79(1) of the *Judiciary Act* 1903 (Cth). Those provisions are still in force, in that form, at the date of making these submissions, and are set out in Annexure A to these submissions.

10

Part VI: The Respondent's Argument

The reasons of the Court of Appeal

9. Contrary to the assertions in the Appellant's Submissions, Osborn and Kyrou JJA did not:

   a) adopt the reasoning, analysis and conclusions of Maxwell P;[2] or

   b) impermissibly use statistical analysis of comparable cases to determine the objective seriousness of the offence;[3] or

   c) treat the sentences imposed in prior Victorian cases as an outer limit beyond which the sentence imposed was wrong.[4]

20

10. As will be seen, both Osborn and Kyrou JJA observed that the *statistical* analysis of Maxwell P was *useful*. However, Osborn JA, with whom Kyrou JA agreed, painstakingly set out the limited value of such statistics, and the use that could properly be made of them.

11. Further, their Honours made it very clear that their decisions were based upon their own, very different, reasoning. Neither Osborn JA nor Kyrou JA agreed with any of the reasoning of Maxwell P. By contrast, Kyrou JA expressly agreed with the reasoning of Osborn JA.

12. In addition, Osborn JA identified six matters which led his Honour to conclude that the sentence was manifestly excessive. Only the last of these related to sentences imposed in other cases. The six matters addressed eight of the factors listed in s 16A(2) of the *Crimes Act*.[5]

30

[2] As asserted by the appellant in paragraphs 16-19, 23, 25, 31 and 40 of the Appellant's Submissions.

[3] As asserted by the appellant in paragraph 19(b), 31-33, 35 and 40 of the Appellant's Submissions.

[4] As asserted by the appellant in paragraph 25 of the Appellant's Submissions.

[5] See paragraph 18 below.

Osborn JA

13. Osborn JA said that the statistical analysis performed by Maxwell P was "significantly more helpful than the more general data commonly presented to the Court. It demonstrates that the sentence imposed was on its face a heavy one if assessed against sentencing practice in Victoria."[6]

14. Osborn JA then detailed the proper approach to such statistics, and the limited use to which they may be put:[7]

    a) His Honour expressly noted the applicable principles re-stated in *Barbaro v The Queen (**Barbaro**)*.[8]

10

    b) His Honour said that the analysis of sentencing statistics by reference to weight may mask relevant differences, and there was a fundamental limitation in the usefulness of generalised statistics.[9]

    c) His Honour noted that it had been specifically held in *Wong v The Queen* (***Wong***)[10] that it was an error to view the weight of the drug as generally the chief factor in fixing the sentence.[11]

    d) His Honour said that references to sentences in comparable cases may provide a useful reference point, and cited the passage from *Hili* in which the Court set out the appropriate use to which past sentences could be put.[12]

20

    e) His Honour noted that, if a sentence appears to be outside the range ordinarily imposed in generally similar circumstances, that fact invites very close scrutiny of the individual case. His Honour cited with approval an observation in another case to the effect that a general overview of the sentences imposed for offences of a similar character must inevitably play its part in provoking the instinctive reaction of the Court as to whether or not a particular sentence is manifestly excessive.[13]

    f) However, his Honour expressly said that the yardstick provided by other sentences could not be definitive of error, or, if error is found, definitive of the appropriate outcome.[14]

---

[6] At [63] of *Pham v R* [2014] VSCA 204 (the **Court of Appeal decision**).
[7] At [64], [66]-[75] of the Court of Appeal decision.
[8] [2014] HCA 2; (2014) 253 CLR 58.
[9] At [66]-[69] and [71] of the Court of Appeal decision.
[10] [2001] HCA 64; (2001) 207 CLR 584.
[11] At [70] of the Court of Appeal decision.
[12] At [72] of the Court of Appeal decision.
[13] At [73] of the Court of Appeal decision.
[14] At [73] and [74] of the Court of Appeal decision.

15. Osborn JA concluded that sentencing statistics may inform the context in which the appeal falls to be considered, but cannot be regarded as determinative of the outcome.[15]

16. Further, early in his Honour's analysis, his Honour properly identified the factors to which the Court must have regard pursuant to s 16A(1) and (2) of the *Crimes Act*. His Honour noted that the relative weight to be given to individual factors is not prescribed and must vary with the justice of the case.[16]

17. Finally, his Honour identified six matters which led his Honour to conclude that the sentence was manifestly excessive. The last of these was that the sentence
10 was "very heavy when compared with the class of broadly comparable cases identified by the President."[17]

18. Those six matters addressed eight of the factors listed in s 16A(2) of the *Crimes Act*.[18] Six of the other factors listed in s 16A(2) of the *Crimes Act* were not applicable.[19] The only applicable factor not referred to by Osborn JA was the deterrent effect on the offender. Given that both the original sentence and the substituted sentence involved lengthy periods of imprisonment, and in light of the offender's illness, it was unnecessary for his Honour to expressly refer to specific deterrence. Further, in view of the offender's remorse and prospects of rehabilitation, general deterrence was of far greater significance. His Honour
20 noted the need for general deterrence.[20]

Kyrou JA

19. Kyrou JA found that the sentence was manifestly excessive for the reasons set out by Osborn JA. His Honour said that, as Osborn JA had demonstrated, a balancing of the relevant sentencing considerations strongly indicated that the sentencing discretion had miscarried.[21]

20. Kyrou JA described the statistics as "helpful in identifying comparable cases and current sentencing practice and thus facilitating consistency in sentencing." His Honour noted the proper and limited use of such statistics.[22]

21. Kyrou JA said that the statistics established that the sentence imposed at first
30 instance (the **original sentence**) was out of line with current sentencing practice in Victoria. His Honour said that the disparity was "a factor, together with the

[15] At [75] of the Court of Appeal decision.
[16] At [65] of the Court of Appeal decision.
[17] At [77] of the Court of Appeal decision.
[18] These were the factors listed in s 16A(2)(a), (d), (f), (g), (h), (k), (m) and (n).
[19] These are the factors listed in s 16A(2)(b), (c), (e), (ea), (fa), and (p).
[20] At [77(a)], Osborn JA noted that the sentencing judge had correctly identified the offending as constituting a serious offence requiring punishment by imprisonment and a sentence which placed an emphasis on general deterrence.
[21] At [81] of the Court of Appeal decision.
[22] At [82] of the Court of Appeal decision.

other factors to which Osborn JA has referred," which enabled the Court to be satisfied that the sentence must have resulted from the misapplication of principle.[23]

Current sentencing practices – first alleged issue

22. The appellant says that the first issue raised in this appeal is 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.[24]

23. The respondent submits that it is already well established that the answer to that question is "no".[25]

10

Consistency

24. Although not raised by the grounds of appeal, a question that arises from the appellant's submissions is: what does *Hili* require of an intermediate appellate court in relation to consistency of sentences for federal offenders?

25. The appellant appears to be asserting that the decision in *Hili* requires a Court to follow the *outcome* of sentencing decisions in other States unless convinced they are plainly wrong.[26]

26. However, as developed below, it is submitted that *Hili* requires intermediate appellate courts to follow the decisions of other Australian appellate courts as to *the principles underlying* the sentencing task unless convinced the decision is plainly wrong.

20

Differences inevitable

27. The fact that most federal offenders are sentenced by State courts inevitably leads to some differences in the sentencing of federal offenders according to where they are sentenced.[27]

28. The differences may arise due to differences in the State or Territory laws picked up by s 68 of the *Judiciary Act* or by the *Crimes Act* itself.[28]

---

[23] At [83] of the Court of Appeal decision.

[24] Paragraph 2(a) of the Appellant's Submissions.

[25] *Hili,* supra n1, per French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ at [18], [53]-[54] and [57]. See also *Leeth v The Commonwealth* (1992) 174 CLR 455 (***Leeth***) per Mason CJ, Dawson and McHugh JJ at page 471 and Brennan J at 476.

[26] See paragraph 22-24 of the Appellant's Submissions.

[27] See *Putland v The Queen* [2004] HCA 8; (2004) 218 CLR 174 (***Putland***) per Gleeson CJ at [4]-[5], [18] and [22]-[25], Gummow and Heydon JJ at [59]-[60], and Kirby J at [82]-[83], and *Leeth*, supra n25, per Mason CJ, Dawson and McHugh JJ at page 467 and 470-471, Brennan J at 475-6, Deane and Toohey JJ at 490, and Gaudron J at 499-500.

[28] See *Putland,* ibid, per Gleeson CJ at [4] and [25], Gummow and Heydon JJ at [59]-[60], and *Leeth,* supra n25, per Mason CJ, Dawson and McHugh JJ at page 467. See also *Hili,* supra n1, at [27] and [52].

29. In addition, differences may result from the State or Territory laws that apply by virtue of s 79 of the *Judiciary Act*.[29]

30. Differences may also arise due to local factors, such as the prevalence of a particular crime in that State.[30]

31. However, the State courts should consistently apply relevant *principles* to the sentencing of federal offenders. It is submitted that this is what *Hili* demands.

Hili

32. It is acknowledged that there are three matters that arguably support the appellant's contention.

10 33. Firstly, in *Hili*, the plurality (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ) said at [57]:

> *In dealing with appeals against sentences passed on federal offenders, whether the appeal is brought by the offender or by the prosecution, the need for consistency of decision throughout Australia is self-evident. ... [I]n considering the sufficiency of sentences passed on federal offenders at first instance, intermediate appellate courts should not depart from what is decided by other Australian intermediate appellate courts, unless convinced that the decision is plainly wrong.*

34. Secondly, the plurality later[31] referred to the outcomes in two comparable cases

20 which, even allowing for the different circumstances of each case, were much more severe than the sentence imposed against Hili and Jones. The plurality said this permitted the Court of Appeal to conclude that there must have been some misapplication of principle by the sentencing judge.

35. Thirdly, in a separate judgment, Heydon J agreed with the plurality's answers and orders, but adopted different reasoning in relation to the "norm" question in one respect.[32] Heydon J expressly distinguished between legal principles and aspects of sentencing *other* than legal principles, such as factual reasoning, or the exercise of a discretionary judgment. His Honour said that the obligation of intermediate appellate courts to not depart from what is decided by other Australian intermediate

30 appellate courts unless convinced that the decision is plainly wrong was limited to legal principles.[33] The appellant could argue that, by providing these separate reasons, Heydon J interpreted the plurality's reasons as supporting the appellant's contention.

---

[29] The appellant does not address whether s 5(2)(b) of the *Sentencing Act* 1991 (Vic) could apply pursuant to s 79 of the *Judiciary Act*, and appears to assume that it could not.
[30] Cf Kirby J in *Putland*, supra n27, at [82]-[83], and *Leeth*, supra n25, per Mason CJ, Dawson and McHugh JJ at page 467 and 470-1 and Brennan J at 475-6.
[31] Supra n1 at [67].
[32] Supra n1 at [70].
[33] See supra n1 at [71], [73]-[74], [76]-[78].

36. There are four matters that support the respondent's contention.

37. Firstly, paragraph 57 of the plurality judgment followed a detailed analysis of what was meant by "consistency".

38. The plurality stated that consistency meant consistency in the application of the relevant legal principles, and did not mean numerical or mathematical equivalence.[34]

39. Contrary to the appellant's submissions, the Court did not hold that "[a]chieving 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
10 application of Part 1B of the *Crimes Act*".[35] The Court pointed out that it was not enough to have regard to what has been done in other cases; it was necessary to also have regard to *why* it was done.[36]

40. The plurality emphasised that:[37]

   a) what is sought is the treatment of like cases alike;

   b) consistency of that kind is not capable of mathematical expression; and

   c) consistency of that kind is not capable of expression in tabular form.

41. Secondly, s 16A(1) of the *Crimes Act* requires that the sentence must be of a "severity appropriate in all the circumstances of the offence".

42. The plurality noted that provision, and its effect. Their Honours also noted the fact
20 that "norms" will mislead if they suggest that, for example, the same proportionate relationship should exist between the time to be served in prison and the length of the head sentence.[38]

43. The requirement in s 16A applies both to sentencing judges at first instance and also to appellate courts which, having found error, may re-sentence the offender. The requirement cannot be met if a court must follow the actual sentences imposed by courts in other jurisdictions unless satisfied the outcome was plainly wrong. This would usurp the sentencing discretion of a court to weigh up the multitude of factors and perform an instinctive synthesis.

44. Thirdly, the plurality noted that past sentences are no more than historical statements
30 of what has happened in the past. They provide guidance to sentencing judges, and to appellate courts, and stand as a yardstick against which to examine a proposed sentence.[39]

---

[34] See supra n1 at [18] and [48]-[49].
[35] Paragraph 23 of the Appellant's Submissions.
[36] Supra n1 at [18]. See also [48]-[57].
[37] Supra n1 at [48]-[49].
[38] See supra n1 at [24]-[25], [38]-[42].
[39] Supra n1 at [54].

45. Fourthly, this interpretation is consistent with other High Court authority.[40]

46. In particular, in *Lacey v Attorney General (Qld)*,[41] French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ noted that the plurality in *Hili* had pointed out that consistency in sentencing refers to "consistency in the application of the relevant legal principles, not some numerical or mathematical equivalence." Their Honours (in *Lacey*) said "Consistency in that sense is maintained by the decisions of intermediate courts of appeal."[42]

47. In *Barbaro,* the plurality similarly observed that the consistency that was sought was consistency in the application of principles, and noted that "what is important is the
10 unifying principles which those sentences both reveal and reflect."[43]

48. Accordingly, it is submitted that *Hili* does not require intermediate appellate courts to follow the *actual sentences* imposed or endorsed by other Australian intermediate appellate courts unless convinced that the decision is plainly wrong. It is submitted that *Hili* requires intermediate appellate courts to not depart from *the principles underlying* the decisions of other Australian appellate courts in imposing or endorsing particular sentences, unless convinced the principle is plainly wrong.

49. Finally, with respect, the appellant's submissions as to what *Hili* requires appear to be inconsistent with its submissions in relation to the second alleged error.[44]

Disregarding other jurisdiction – the first alleged error

20 50. The appellant asserts that the Court of Appeal had "no proper basis for disregarding the 'yardstick' effect" of the decisions of other intermediate appeal courts because it did not make any finding that the decisions were incorrect, "let alone plainly wrong, as to the sentences imposed."[45]

51. For the reasons set out earlier, the Court was not required to find that the sentences were plainly wrong.

52. In addition, the appellant's assertion must be seen in the context of the following matters.

53. Firstly, the comparison with the outcomes in other cases was only one of many factors relied upon by Osborn and Kyrou JJA.

30 54. Secondly, Osborn JA, with whom Kyrou JA agreed, properly noted the limited value of any such comparison.

---

[40] See *Lacey v Attorney General (Qld)* [2011] HCA 10; (2011) 242 CLR 573 per French CJ, Hayne, Crennan, Kiefel and Bell JJ at [54]-[55], *Barbaro,* supra n8, at [40]-[41] and *Wong,* supra n10, per Kirby J at [123].

[41] [2011] HCA 10; (2011) 242 CLR 573.

[42] Ibid, at [54]. See also [55].

[43] *Barbaro*, supra n8, at [40]-[41].

[44] See in particular paragraphs 38-40 of the Appellant's Submissions.

[45] Paragraph 22 of the Appellant's Submissions.

55. Thirdly, although Maxwell P considered that the sentences imposed in New South Wales, Queensland and Western Australia were substantially higher than those imposed in Victoria,[46] it is doubtful that that conclusion is borne out by the table and graph his Honour produced.

56. The only cases that appear to be significantly above the parallel lines on the graph are the six New South Wales cases of between 19-39% of the applicable commercial quantity.[47]

    a) Two of those were described by the appellant as not involving offenders who were characterized as couriers.[48]

10

    b) One of those, and another two of the six cases, were decided prior to 2008.[49] It had been submitted to the Court of Appeal that New South Wales decisions prior to 2010 were impermissibly influenced by a quantitative guideline judgment.[50] The Crown removed from the first table it provided to the Court of Appeal (the **Crown's first table**) cases in New South Wales decided prior to 2008 to avoid any impact of this issue.[51]

    c) There were another nine New South Wales decisions on the graph. Eight of them fell within or below the parallel lines.[52]

    d) Of the three Queensland cases on the graph, two were within the parallel lines, and one only slightly above it.[53]

20

    e) The only Western Australian case on the graph was only marginally above the parallel lines.[54]

---

[46] At [8] of the Court of Appeal decision.

[47] Which is the range within which the respondent fell, having had 38.4% of the commercial quantity.

[48] According to the Crown's first table, the offender in *Govindaraju v R* [2011] NSWCCA 255 was "more than a mere courier", and there had been no finding as to the role of the offender in *Mirza v R* [2007] NSWCCA 257. It is conceded, however, that the Court of Appeal in *Govindaraju* said the evidence did not justify the finding that the offender was more than a courier – see [59]-[61].

[49] *R v Paliwala* [2005] NSWCCA 221; (2007) 153 A Crim R 451, *R v Mirzaee* [2004] NSWCCA 315 and *Mirza*, ibid.

[50] See [36] of the Court of Appeal decision.

[51] See paragraph 1 of the "Further Submissions on behalf of the Respondent" (filed by the Crown) dated 16 May 2014.

[52] Only *R v Huynh* [2008] NSWCCA 16; (2008) 180 A Crim R 517 was above it. It involved 0.7% of the commercial quantity.

[53] *R v Tran* [2007] QCA 221; (2007) 172 A Crim R 436 was the only case above the lines, involving 98.2% of the commercial quantity.

[54] *Taylor v The Queen* [2007] WASCA 146; (2007) 172 A Crim R 430, involving 18.2% of the commercial quantity.

Asserted consequence

57. The appellant asserts that other courts will feel bound to follow the Court of Appeal decision if it is not quashed.[55] With respect, other courts will be bound by the decision in *Hili*. The individual reasoning of one member of a Court of Appeal will not affect that.

Statistical analysis – the second alleged issue

58. The appellant says that the second issue raised in this appeal is whether it is permissible to determine the objective seriousness of a federal 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.[56]

59. If by this the appellant means that the issue is whether it is permissible for objective seriousness to be determined solely by reference to comparable cases, or solely by the weight of the drug, the respondent submits that it is already well established that the answer to those questions is "no".[57]

The second alleged error

60. The second alleged error is that the Court of Appeal treated the weight of the drug as the "dominant means of determining objective seriousness" and that the "use of statistical analysis became a guiding force for the outcome of the appeal."[58]

Attribution of the reasons of Maxwell P to the entire Court

61. The appellant's submissions on this alleged error incorrectly attribute the reasons of Maxwell P to the Court of Appeal as a whole.

62. As noted above,[59] Osborn and Kyrou JJA observed that the statistical analysis of Maxwell P was useful. However, their Honours did not adopt the reasoning of Maxwell P, and expressly noted the limited and proper use of statistics. Osborn JA expressly noted the statement in *Wong* that it was an error to view the weight of the drug as generally the chief factor in fixing the sentence. Further, the comparison with other cases was the last of six reasons for the conclusion of Osborn JA that the sentence was manifestly excessive. Finally, the six reasons of Osborn JA addressed eight of the relevant factors listed in s 16A(2) of the *Crimes Act*.

[55] Paragraph 26 of the Appellant's Submissions.

[56] Paragraph 2(b) of the Appellant's Submissions.

[57] The limited value of comparable cases has recently been reiterated in *Hili*, supra n1, at [53]-[54]. Further, it is well established that it is false to say that the gravity of the offence can usually be assessed by reference to the weight of narcotic involved – see *Wong*, supra n10, in particular at [72]-[73].

[58] Paragraphs 31 and 33 of the Appellant's Submissions. See also paragraphs 32, 35-37 and 40.

[59] See under the heading "The reasons of the Court of Appeal".

Focus on drug weight

63. The appellant submits that the Court of "narrowed the weight-based comparison to cases involving "*couriers*", guilty pleas and absence of prior relevant conviction" and that "approach deliberately enhanced rather than diminished drug weight as the dominant means of determining objective seriousness."[60]

64. With respect, this is mistaken.

65. Maxwell P incorporated into the table three factors which are frequently found in drug cases: a role of courier, a guilty plea, and an absence of prior relevant convictions. His Honour then added a calculation related to the weight of the drug. By doing so, his Honour clearly appreciated the relevance of *each* of those four factors to the proper disposition, and was not focusing on weight to the exclusion of every other factor.

66. Furthermore, his Honour expressly acknowledged that the table omitted factors personal to the individual offender.[61] Personal factors are infinitely variable, and are not easily compared.

67. With respect, the table created by his Honour was more informative than the Crown's tables. The Crown's first table contained only nine cases, seven of which were from New South Wales, and in each of which quite high sentences had been imposed - ranging from 7 years and 8 months (92 months) to 9 years (108 months). The amended table later provided by the Crown (the **Crown's second table**) included only three additional cases, in which head sentences below that range were imposed.[62]

Utility of classification as courier - Olbrich

68. The appellant next refers to *The Queen v Olbrich* (***Olbrich***).[63] The appellant asserts that "Classifying cases by reference to "couriers" as part of a statistical analysis based on drug weight tends to advance the proscribed obscuring of what was done by this respondent and by the prior offenders."[64]

69. The majority in *Olbrich* was concerned to refute the proposition that it was *necessary* to characterize an offender's role, and made the further point that it was not always useful or possible to do so. The majority also noted that the characterization must not obscure the assessment of what the offender did. However, the majority acknowledged that the distinction between "couriers" and "principals" may prove a useful shorthand description of different kinds of participation in a single enterprise when more than one person connected with the importation of those drugs is

[60] Paragraph 31 of the Appellant's Submissions.
[61] At [9] of the Court of Appeal decision.
[62] The Crown's first table was filed by the Crown on 30 April 2014 for the Court of Appeal hearing. The Crown's second table was filed on 16 May 2014, with further submissions.
[63] [1999] HCA 54; (1999) 199 CLR 270.
[64] Paragraph 34 of the Appellant's Submissions.

prosecuted, and those persons are charged with different offences. The majority said that the adoption of the terms may permit different levels of culpability to be identified.[65]

70. In this case, multiple people had been charged, and it was known that the respondent was a courier, not a principal.[66] Further, the Crown submitted he was a courier.[67] In addition, the Crown's tables had a column for "Role". Of the nine cases on the Crown's first table, six offenders were said to be a "courier", two "more than a mere courier", and in one case it was said that there was "no finding made as to role".[68]

71. Accordingly, in this case, the classification of the respondent as a courier was a useful shorthand description. In order to properly apply the parity principle, a court dealing with another offender involved in the same criminal enterprise needed to know not only *what* were the sentences imposed on the other involved offenders, but *why*.

Grid or guideline sentencing

72. The appellant asserts that the Court of Appeal's decision, if allowed to stand, "will tend to encourage a form of grid or guideline sentencing of the kind disapproved of for federal offences by this Court in *Wong*."[69] The appellant asserts that the decision [paraphrasing] 'encouraged, if not required, 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'.[70]

73. These assertions can have no application to the reasons of Osborn and Kyrou JJA. Neither used the statistics to measure the objective seriousness of the offence, and both were keenly alive to the need for care in the use that could properly be made.

The orders sought by the appellant

74. Finally, the appellant seeks orders that the appeal to the Court be allowed, that the order of the Court of Appeal be set aside, and that there be an order that the appeal to the Court of Appeal be dismissed.

75. Even if the Court upholds the appellant's contentions as to error in the Court of Appeal, it would not be appropriate to order that the appeal to the Court of Appeal be dismissed. Such an order would deprive the respondent of his entitlement to an appeal according to law, having been granted leave to appeal against his sentence.

[65] *Olbrich*, supra n63, at [14] and [19]-[20].
[66] See the Court of Appeal decision, per Osborn JA at [49], [53(a)], [54].
[67] See the Court of Appeal decision, per Osborn JA at [53(a)].
[68] Of the ten cases on the Crown's second table, five offenders were said to be a "courier" and three "more than a mere courier". See n62, supra, for details of the Crown's tables.
[69] Paragraph 38 of the Appellant's Submissions.
[70] Paragraph 40 of the Appellant's Submissions.

Part VII: Notice of Contention

Compared to all jurisdictions, this was heavy

76. The appellant asserts that the original sentence was within that imposed in sufficiently like cases in other jurisdictions.[71] No reason is provided for this assertion.

77. At the respondent's request, the appellant kindly provided an extract from the appellant's database of cases (the **Crown's extract**). As requested, the Crown's extract contained the appellant's summary of all cases from every jurisdiction within Australia with each of the following attributes:

10

a) sentence imposed in the last 5 years;

b) for importing a border controlled drug;

c) in excess of the marketable quantity, but less than the commercial quantity;

d) being heroin, cocaine, methyl amphetamine or amphetamine;

e) involving only one type of drug;

f) against a person who pleaded guilty;

g) who was a courier.

(the **common attributes**)

78. The only qualifications to that description are that the appellant:

a) included two first instance decisions which were made outside that 5 year period because the appeal decisions were within that period *(De La Rosa* and *Johnson)*;

20

b) included two matters that referred to drugs other than those identified above, namely ketamine (*Langford*) and cannabis resin (*Hassan*);

c) did not include any matters that could breach suppression orders.

79. The respondent has created graphs from the Crown's extract, showing outcomes in terms of the head sentence and the non-parole period for all cases which involved an amount of drug in the range from 288g to 1154g. The lower limit of the range is half the amount of drug imported in this case. The upper limit is twice the amount of drug. Accordingly, the graphs capture all the cases which had the common attributes and which involved a weight of drugs in that broad range, from all jurisdictions. There were 85 cases in the Crown's extract that met those criteria (the **compared cases**), in addition to this case.

30

80. It is not suggested that the graphs demonstrate, without more, that the original sentence was manifestly excessive. The graphs say nothing about *why* sentences were fixed as they were. However, the graphs do show that the original sentence

[71] Paragraph 17(a) of the Appellant's Submissions.

was heavy compared to sentences imposed in the compared cases in *all* jurisdictions, not merely Victoria.

81. The comparison is particularly compelling in relation to the non-parole period. In *none* of the 85 compared cases was a non-parole period set that was higher than the 6 year period set in the original sentence imposed on the respondent. In one other case, the same non-parole period was set, and in two cases a non-parole period of just under 5.5 years was set. In the remaining 82 cases (96%), a non-parole period of 5 years or less was set.

82. In relation to the head sentence, six of the 85 cases (7%) were higher than the head sentence in the original sentence imposed on the respondent. One head sentence was slightly lower at 8 years 3 months. In the remaining 78 cases (92%), a head sentence of 8 years or less was set.

83. The respondent submits that the compared cases, combined with the first five factors identified by Osborn JA, supports the orders made by the Court of Appeal.

84. Even if the Court upholds the appellant's contentions as to error, it is submitted that the Court should leave the decision of the Court of Appeal undisturbed. It is acknowledged that this Court is not a sentencing court. However, in this case, two of the Court of Appeal judges made limited use of the statistics and it formed only one of six reasons for their Honour's conclusion. In addition, the Crown's extract showed that the original sentence *was* heavy when compared to other cases in all jurisdictions.

The table and graph of Maxwell P

85. For the reasons set out earlier in these submissions,[72] the table created by Maxwell P indicated that the original sentence was heavy compared to sentences imposed in New South Wales, Queensland and Western Australia for importation offences, not only when compared to sentences imposed in Victoria.

<u>Part VIII: Time Estimate</u>

86. It is estimated that the respondent's oral argument will require about ninety minutes.

13 July 2015

Gail Archer
Francis Burt Chambers
Tel: 08 9220 0528
Email: garcher@francisburt.com.au

[72] See paragraphs 55-56 of these submissions.

IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

No. M82 of 2015

BETWEEN:

THE QUEEN (CTH)
Appellant

AND

VU LANG PHAM
Respondent

10

RESPONDENT'S SUBMISSIONS – ANNEXURE A

LEGISLATIVE PROVISIONS

No.	Description of document	Date	Page no.
1.	Section 68 *Judiciary Act* 1903 (Cth)	18 June 2015	1
2.	Section 79 *Judiciary Act* 1903 (Cth)	18 June 2015	5

20 Dated: 13 July 2015

Gail Archer
Francis Burt Chambers
Tel: 08 9220 0528
Email: garcher@francisburt.com.au

Date of document: 13 July 2015
Filed on behalf of the Respondent
Victoria Legal Aid
Lawyers
Email: nirvana.adey@vla.vic.gov.au

DX address: DX 210646 Melbourne
Postal address: 350 Queen Street
Tel: 03 9269 0144
Fax: 03 9269 0498
Ref: NA/14X006196NA
Attention: Nirvana Adey

Part X—Criminal jurisdiction

Division 1—Application of laws

68 Jurisdiction of State and Territory courts in criminal cases

(1) The laws of a State or Territory respecting the arrest and custody of offenders or persons charged with offences, and the procedure for:

  (a) their summary conviction; and
  (b) their examination and commitment for trial on indictment; and
  (c) their trial and conviction on indictment; and
  (d) the hearing and determination of appeals arising out of any such trial or conviction or out of any proceedings connected therewith;

and for holding accused persons to bail, shall, subject to this section, apply and be applied so far as they are applicable to persons who are charged with offences against the laws of the Commonwealth in respect of whom jurisdiction is conferred on the several courts of that State or Territory by this section.

(2) The several Courts of a State or Territory exercising jurisdiction with respect to:

  (a) the summary conviction; or
  (b) the examination and commitment for trial on indictment; or
  (c) the trial and conviction on indictment;

of offenders or persons charged with offences against the laws of the State or Territory, and with respect to the hearing and determination of appeals arising out of any such trial or conviction or out of any proceedings connected therewith, shall, subject to this section and to section 80 of the Constitution, have the like jurisdiction with respect to persons who are charged with offences against the laws of the Commonwealth.

(4) The several Courts of a State or Territory exercising the jurisdiction conferred upon them by this section shall, upon application being made in that behalf, have power to order, upon such terms as they think fit, that any information laid before them in respect of an offence against the laws of the Commonwealth shall be amended so as to remove any defect either in form or substance contained in that information.

(5) Subject to subsection (5A):

- (a) the jurisdiction conferred on a court of a State or Territory by subsection (2) in relation to the summary conviction of persons charged with offences against the laws of the Commonwealth; and
- (b) the jurisdiction conferred on a court of a State or Territory by virtue of subsection (7) in relation to the conviction and sentencing of persons charged with offences against the laws of the Commonwealth in accordance with a provision of the law of that State or Territory of the kind referred to in subsection (7);

is conferred notwithstanding any limits as to locality of the jurisdiction of that court under the law of that State or Territory.

(5A) A court of a State on which jurisdiction in relation to the summary conviction of persons charged with offences against the laws of the Commonwealth is conferred by subsection (2) may, where it is satisfied that it is appropriate to do so, having regard to all the circumstances, including the public interest, decline to exercise that jurisdiction in relation to an offence against a law of the Commonwealth committed in another State.

(5B) In subsection (5A), ***State*** includes Territory.

(5C) The jurisdiction conferred on a court of a State or Territory by subsection (2) in relation to:

- (a) the examination and commitment for trial on indictment; and
- (b) the trial and conviction on indictment;

of persons charged with offences against the laws of the Commonwealth, being offences committed elsewhere than in a

ComLaw Authoritative Act C2015C00264

State or Territory (including offences in, over or under any area of the seas that is not part of a State or Territory), is conferred notwithstanding any limits as to locality of the jurisdiction of that court under the law of that State or Territory.

(6) Where a person who has committed, or is suspected of having committed, an offence against a law of the Commonwealth, whether in a State or Territory or elsewhere, is found within an area of waters in respect of which sovereignty is vested in the Crown in right of the Commonwealth, he or she may be arrested in respect of the offence in accordance with the provisions of the law of any State or Territory that would be applicable to the arrest of the offender in that State or Territory in respect of such an offence committed in that State or Territory, and may be brought in custody into any State or Territory and there dealt with in like manner as if he or she had been arrested in that State or Territory.

(7) The procedure referred to in subsection (1) and the jurisdiction referred to in subsection (2) shall be deemed to include procedure and jurisdiction in accordance with provisions of a law of a State or Territory under which a person who, in proceedings before a court of summary jurisdiction, pleads guilty to a charge for which he or she could be prosecuted on indictment may be committed to a court having jurisdiction to try offences on indictment to be sentenced or otherwise dealt with without being tried in that court, and the reference in subsections (1) and (2) to ***any such trial or conviction*** shall be read as including any conviction or sentencing in accordance with any such provisions.

(8) Except as otherwise specifically provided by an Act passed after the commencement of this subsection, a person may be dealt with in accordance with provisions of the kind referred to in subsection (7) notwithstanding that, apart from this section, the offence would be required to be prosecuted on indictment, or would be required to be prosecuted either summarily or on indictment.

(9) Where a law of a State or Territory of the kind referred to in subsection (7) refers to indictable offences, that reference shall, for

the purposes of the application of the provisions of the law in accordance with that subsection, be read as including a reference to an offence against a law of the Commonwealth that may be prosecuted on indictment.

(10) Where, in accordance with a procedure of the kind referred to in subsection (7), a person is to be sentenced by a court having jurisdiction to try offences on indictment, that person shall, for the purpose of ascertaining the sentence that may be imposed, be deemed to have been prosecuted and convicted on indictment in that court.

(11) Nothing in this section excludes or limits any power of arrest conferred by, or any jurisdiction vested or conferred by, any other law, including an Act passed before the commencement of this subsection.

68A Committals jurisdiction if both Federal Court of Australia and State or Territory court have jurisdiction in relation to indictable offence

(1) This section applies if both:

(a) the Federal Court of Australia; and

(b) a court of a State or Territory (the ***superior State or Territory court***);

have jurisdiction to try a person on indictment for an indictable offence against a law of the Commonwealth (the ***indictable offence***).

Working out which court the person should be committed to

(2) If a court of the State or Territory (the ***State or Territory committals court***) has, under subsection 68(2), jurisdiction with respect to the examination and commitment for trial on indictment of a person who is charged with the indictable offence, the court may, in exercising that jurisdiction:

(a) commit the person for trial on indictment for the offence before either:

Division 2—Application of laws

79 State or Territory laws to govern where applicable

(1) The laws of each State or Territory, including the laws relating to procedure, evidence, and the competency of witnesses, shall, except as otherwise provided by the Constitution or the laws of the Commonwealth, be binding on all Courts exercising federal jurisdiction in that State or Territory in all cases to which they are applicable.

(2) A provision of this Act does not prevent a law of a State or Territory covered by subsection (3) from binding a court under this section in connection with a suit relating to the recovery of an amount paid in connection with a tax that a law of a State or Territory invalidly purported to impose.

(3) This subsection covers a law of a State or Territory that would be applicable to the suit if it did not involve federal jurisdiction, including, for example, a law doing any of the following:
- (a) limiting the period for bringing the suit to recover the amount;
- (b) requiring prior notice to be given to the person against whom the suit is brought;
- (c) barring the suit on the grounds that the person bringing the suit has charged someone else for the amount.

(4) For the purposes of subsection (2), some examples of an amount paid in connection with a tax are as follows:
- (a) an amount paid as the tax;
- (b) an amount of penalty for failure to pay the tax on time;
- (c) an amount of penalty for failure to pay enough of the tax;
- (d) an amount that is paid to a taxpayer by a customer of the taxpayer and is directly referable to the taxpayer's liability to the tax in connection with the taxpayer's dealings with the customer.