SUPREME COURT OF QUEENSLAND

CITATION:	*R v Ocampo Alvarez* [2018] QCA 162
PARTIES:	**R** **v** **OCAMPO ALVAREZ, Juan Pablo** (applicant)
FILE NO/S:	CA No 129 of 2016 SC No 409 of 2014
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	Supreme Court at Brisbane – Sentence: 19 April 2016 (Mullins J)
DELIVERED ON:	10 July 2018
DELIVERED AT:	Brisbane
HEARING DATE:	12 February 2018
JUDGES:	Holmes CJ and Gotterson and McMurdo JJA
ORDERS:	**1. Leave to appeal against sentence is refused.** **2. Leave to adduce further evidence is refused.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – SENTENCE MANIFESTLY EXCESSIVE – where the applicant pleaded guilty to one count of conspiring with co-offenders to import a commercial quantity of a border-controlled drug and to a further count of conspiring with the same co-offenders during the same period to traffic in the drug – where the applicant faced a maximum penalty of life imprisonment – where the applicant's mitigating circumstances were given appropriate weight – whether the sentence imposed was manifestly excessive CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – PARITY BETWEEN CO-OFFENDERS – where the applicant pleaded guilty to one count of conspiring with co-offenders to import a commercial quantity of a border-controlled drug and to a further count of conspiring with the same co-offenders during the same period to traffic in the drug – where the applicant complained of a lack of parity with the sentences of his co-offenders – whether the primary judge erred in sentencing CRIMINAL LAW – APPEAL AND NEW TRIAL –

APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – JUDGE ACTED ON WRONG PRINCIPLE – where the applicant pleaded guilty to one count of conspiring with co-offenders to import a commercial quantity of a border-controlled drug and to a further count of conspiring with the same co-offenders during the same period to traffic in the drug – where the applicant contends that the primary judge's findings on contested questions of fact were wrong – where the applicant contends that the primary judge had not taken mitigating factors into account or had not given them sufficient weight – where the applicant contends that the primary judge had failed to identify the Act under which he was to be sentenced – whether these grounds of appeal were made out

CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – POWERS OF APPELLATE COURT – POWER TO ADMIT NEW EVIDENCE – where the applicant pleaded guilty to one count of conspiring with co-offenders to import a commercial quantity of a border-controlled drug and to a further count of conspiring with the same co-offenders during the same period to traffic in the drug – where the applicant sought leave to adduce new evidence – whether leave to adduce new evidence should be granted

Crimes Act 1914 (Cth), s 16A, s 16E, s 16F, s 16G
Criminal Code (Qld), s 31(1)(d)
Evidence Act 1995 (Cth), s 141(1)
Evidence Act 1977 (Qld), s 21A, s 132C
Judiciary Act 1903 (Cth), s 79
Penalties and Sentences Act 1992 (Qld), s 159A

Director of Public Prosecutions (Cth) v El Karhani (1990) 21 NSWLR 370, cited
House v The King (1936) 55 CLR 499; [1936] HCA 40, applied
Ma v The Queen [2010] NSWCCA 320, cited
R v De Groot van Embden (2003) 140 A Crim R 403; [2003] NSWCCA 156, cited
R v Elfar and Golding [2018] 1 Qd R 608; [2017] QCA 170, considered
R v El Hani [2004] NSWCCA 162, cited
R v Handlen & Paddison (2010) 207 A Crim R 50; [2010] QCA 371, cited
R v Jackson (2003) 138 A Crim R 148; [2003] QCA 31, cited
R v Maniadis [1997] 1 Qd R 593; [1996] QCA 242, applied
R v Meggett (1999) 107 A Crim R 257; [1999] NSWSC 606, considered
R v Schelvis; *R v Hildebrand* [2016] QCA 294, applied
R v Silva [2010] QCA 79, cited
R v Taiapa (2008) 186 A Crim R 252; [2008] QCA 204, considered
R v Ung (2000) 173 ALR 287; [2000] NSWCCA 195, cited

R v Vo (2000) 118 A Crim R 320; [2000] NSWCCA 440, considered
Teng v The Queen (2009) 22 VR 706; [2009] VSCA 148, cited
Thompson v The Queen [2007] NSWCCA 83, considered
Tiknius v The Queen (2011) 221 A Crim R 365; [2011] NSWCCA 215, cited
Velez v The Queen [2015] NSWCCA 177, cited
Wang v The Queen [2010] NSWCCA 319, cited

COUNSEL: The applicant appeared on his own behalf
G R Rice QC, and A J Guilfoyle, for the respondent

SOLICITORS: The applicant appeared on his own behalf
Director of Public Prosecutions (Commonwealth) for the respondent

[1] **HOLMES CJ:** The applicant pleaded guilty to one count of conspiring with co-offenders named Turner, Rendon Alvarez and Ruiz to import a commercial quantity of a border-controlled drug, cocaine, between 1 January 2009 and 27 May 2011 and to a further count of conspiring with the same co-offenders during the same period to traffic in the drug. After a sentence hearing in which certain issues of fact were contested, he was sentenced on each count to concurrent sentences of 22 years, with a non-parole period fixed at 14 years and eight months. A declaration was made under s 159A of the *Penalties and Sentences Act* 1992 that he had already served 1,788 days under the sentence. Rendon Alvarez and Ruiz were sentenced at the same time; Turner had absconded while on bail.

The applications in this Court

[2] The applicant, who is unrepresented, now seeks leave to appeal against his sentence. He stated only one proposed ground in his application for leave to appeal: that the sentence was manifestly excessive. However, in written and oral submissions he advanced a great many arguments. It became apparent that the complaint of manifest excess in the sentence, and a further complaint of a lack of parity with the sentences of his co-offenders, were largely founded on a contention that the sentencing judge's findings on contested questions of fact were wrong. The applicant also contended that mitigating factors were either not taken into account or not given sufficient weight and that her Honour had failed correctly to identify the Act under which he was to be sentenced. In conjunction with his application for leave to appeal against sentence, the applicant sought leave to adduce evidence in support of his contentions. To the extent possible, that application was dealt with on the hearing of the application for leave to appeal against sentence, but there was not time to resolve all of the issues raised. Those left unresolved are dealt with in this judgment.

The sentencing judge's findings

[3] The sentencing judge found that in 2008 Turner had recruited a Colombian national named Jaramillo to help him import cocaine from South America. He had contacted two Melbourne syndicates as prospective buyers. The plan as it developed was that he would import hydraulic oil for his business, in which cocaine would be suspended. Rendon Alvarez, who had some expertise, was to carry out the chemical

process necessary to retrieve the cocaine from the hydraulic oil, with assistance from Ruiz. A preliminary shipment of oil which did not contain cocaine was sent by way of a test run in August 2010. The real importation took place in May 2011, when a shipment of 600 drums of hydraulic oil which included 17 drums with a suspension of cocaine arrived in Melbourne from Panama, having been transported there from Colombia. The weight of the cocaine was calculated as at least 71.6 kilograms. The applicant and the three co-offenders named in the indictment were arrested before it could be collected. Jaramillo had already left Australia for Colombia, and, it appears, was arrested and dealt with there.

[4] The sentencing judge was required to determine four contested questions of fact in relation to the applicant's involvement in the conspiracies:

(a) whether he knew the size of the importation;

(b) what remuneration he was expecting to receive;

(c) whether he was the subject of threats and intimidation to secure and retain his involvement in the enterprise; and

(d) the proper characterisation of his role.

The applicant gave evidence as to those matters, and his counsel cross-examined Rendon Alvarez about the applicant's role and threats Jaramillo had allegedly made in respect of the applicant's wife.

[5] As to the applicant's role, the sentencing judge found that the applicant, who was a diesel fitter, met Turner in Colombia in 2008. Turner, who owned a business which did some work in the mining industry, had originally offered the applicant work as a diesel mechanic but the latter was unable to pass the English test which was a requirement of obtaining a work visa. He met Turner again in April 2009, and at the end of that month, he came to Australia at Turner's behest. He travelled on a student visa and studied English, Turner paying for his travel and his tuition fees. He joined Turner in Mackay in July 2009. While there was no detailed plan for importation in place when the applicant came to Australia, Turner had a general plan to import cocaine from South America in which the applicant was willing to assist. Between October and December 2009, the applicant had conversations with contacts in South America with a view to developing a method to import cocaine. During a visit to Colombia at the beginning of 2010 (during which he married), he contacted Rendon Alvarez, who agreed to go to Panama to find a source of cocaine. On the applicant's return to Australia in February 2010, he, Turner and Jaramillo discussed the proposed importation, including the plan for Rendon Alvarez to go to Panama to buy the cocaine.

[6] On 4 May 2010, the applicant informed Jaramillo that he had been told that "the guy" would send "20", of which they would be entitled to 30 per cent or "six". For the money they had sent, they would get another "six or seven"; this was distinct from the "20". (In the course of the conversation Jaramillo expressly referred to "twenty kg".) The sentencing judge found that this was a reference to 20 kilograms being sent to Turner, with another six kilograms being contributed by the South American contacts. In mid-May, the applicant accompanied Turner to Melbourne to meet potential buyers for the cocaine. During this month, the plan shifted from one which contemplated importation of the cocaine in machinery to one of concealing it in drums of hydraulic oil. At the end of May, one of the South American contacts

gave the applicant the name of one Zuluaga, a business man in Panama who could ship the hydraulic oil to Turner's company as if it were a genuine business transaction. Thereafter, negotiations began to import the cocaine in the drums of oil.

[7] On 3 June 2010, one of the South American connections suggested that the Australian conspirators give more money towards the cocaine, because an extremely good deal had been organised. The applicant, Turner and Jaramillo discussed buying 600 drums of oil. Jaramillo referred to the fact that if they paid for a kilogram they could keep all the proceeds, but if the South American parties paid, those at the Australian end would receive only 30 per cent of the proceeds.

[8] In an email sent on 5 September 2010 to Turner, the applicant explained that there were two separate "businesses", the first of which was already in progress. "The partners" would send "20 pieces of gold" with Turner and the others involved to receive 30 per cent ("for us is the 30% of product"), which her Honour inferred was a reference to commission on the cocaine to be sold on behalf of the South American parties. Turner had to pay for his own "pieces of gold", at a price of US$7,500 per piece of gold, made up of: US$4,500, being the price of each piece in Panama; US$1,000, the amount charged by the sender of the oil (Zuluaga); and US$2,000 charged per piece of gold by the police. The sentencing judge inferred that "piece of gold" was a code for kilogram, consistently with the May 2010 conversation between the applicant and Jaramillo. The email went on to explain that there would be two separate shippings of oil, the first containing only oil, not "gold", in order to pass police inspection, and the second "coming with all the gold". Others involved had invested US$30,000 "in gold". The email ended by observing that the applicant had told Turner "in our first met" [sic] he would help him to do "these businesses", and he was doing it.

[9] There was some delay; in an email sent to Turner in late December 2010, the applicant urged patience. He did not want "trouble with those guys" in Colombia because his family was there. He continued: one of the reasons that he had come to Australia was for "these business", which he had promised Turner, and which he swore he would do. The sentencing judge found these allusions to doing the "business" were references to the original arrangement made with Turner to help with the importation of the cocaine. They were consistent with a recorded conversation between the applicant, Rendon Alvarez and Ruiz on 12 August 2010 in which he told the other men that he had informed Turner when they met in Colombia that he could organise things for him and find people, and had subsequently done so.

[10] Between January and May 2011, the sentencing judge found, the applicant was in regular contact with the South American parties and Rendon Alvarez to gather information, solve problems and determine the shipment's timing. In a February conversation, one of the South American parties told the applicant that the deal was one of US$300,000 or US$400,000. In March 2011, the applicant told Rendon Alvarez that one of the South American principals proposed to send "40 more filters" in addition to what had been planned. Rendon Alvarez told him to tell him not to do so, because they did not have the capacity. The applicant then had a further conversation with the principal referring to the "60" originally planned. The sentencing judge was not prepared to infer that "60" was reference to 60 kilograms, as opposed to possibly referring to containers or other measurements. There were

various communications about payment of commission to Zuluaga. In May 2011, the applicant and Rendon Alvarez ordered the manufacture of the press mould needed to press the cocaine.

[11] The sentencing judge did not accept the applicant's version of events, which was that he had not been involved in any arrangements for the importation. He testified that he had come to Australia to study and to work as a diesel mechanic for Turner. He had become involved only in late August 2009 when he met Jaramillo, who threatened to have his family in Colombia killed if he did not assist with the importation by translating phone calls to be made to Jaramillo's associates in Colombia. Jaramillo repeatedly made threats to harm his wife, he claimed, so that he lived in constant fear, and when he returned to Colombia at the beginning of 2010 he received a visit from (un-named) people who reminded him to keep silent if he did not want anything to happen to his family.

[12] Her Honour rejected that evidence, and evidence from Rendon Alvarez that the applicant was involved only because of Jaramillo's alleged threats, in light of the applicant's emails and explanations as to his willingness to help Turner to import the cocaine. Her Honour found that while the applicant might have been concerned about consequences to his family or to him if he withdrew from the importation, that was a result of his choosing to help Turner and to deal with criminals in Colombia. The intercepted conversations did not suggest any threat of violence from Jaramillo. There was a conversation between the latter and Turner in October 2010, in which Jaramillo said that if the applicant's wife was going to be a problem, "just kill her, that's it". This was said, her Honour found, in the context of joking (the transcript records laughter) and was not a serious threat.

[13] The sentencing judge found that although the applicant described his role as primarily one of translator, that was to understate his involvement in discussing the arrangements with the South American parties over a lengthy period of time. He was Turner's subordinate, not a full partner, and his share of profit was to be received after Turner had been reimbursed for his outlays. He had persisted in pursuing the importation for an expected large reward. In an October 2010 conversation which took place in the applicant's absence (the discussion ended abruptly when he entered the room), Jaramillo and Turner agreed on a split of profits 40/30/30, with Turner receiving the largest share. (They speculated in the course of the discussion that Jaramillo and the applicant would receive something of the order of $2,000,000 each.) The sentencing judge noted that there was no recorded conversation showing that the applicant was aware of a 30 per cent profit split in his favour, but the arrangement was that he was to receive a share of the profits and it was evident that he was expecting a "significant reward". That was apparent from his communications with Turner and a particular conversation with his wife in February 2011, in which he assured her:

> "with what's coming, honey, we won't need to work any more…"

[14] The applicant had given evidence that he understood that there would be between seven and ten kilograms of cocaine extracted, but that was, her Honour found, not consistent with conversations to which he was a party, which referred to at least 20 kilograms being imported by Turner. While she was not satisfied that the applicant knew there were 71 kilograms of cocaine being imported, she was

satisfied that he anticipated at least 20 kilograms, so that he took the risk that the importation would involve such a significant amount.

[15] The fact that the applicant was to share in the profits and the energy he spent in negotiating with the South Americans showed that he was much more than a mere bridge between the parties; he was the interface between the Australian and South American parties. It was his intention to assist Turner in the importation of cocaine at least from the time of their meeting in Colombia in April 2009. The sentencing judge regarded the applicant as the most culpable of the three defendants because his role was the most significant, lasted the longest (about 20 months, from at least October 2009) and had the potential for the greatest remuneration. It was an aggravating feature that the defendants were involved not only in a conspiracy to import, but also a conspiracy to sell cocaine to purchasers who were on standby to buy it once extracted.

[16] The applicant was aged between 22 and 24 years over the period of the conspiracies, so that he was, the sentencing judge observed, "relatively youthful", and he was married without children. Various references portrayed him as a model prisoner, and her Honour noted that he had made the most of his opportunities to improve his qualifications and deepen his religious faith while in custody. He had the support of his wife and other members of his community. All of these factors indicated that he had good prospects of rehabilitation. His good conduct also pointed to some degree of contrition for his offending, although that was qualified to some extent by his evidence on the sentence hearing, which her Honour regarded as an attempt to minimise the true extent of his involvement in the conspiracy. Her Honour recorded that she had taken into account the applicant's plea of guilty, although it took place on the day on which the trial was due to commence. Albeit late, the plea facilitated the administration of justice, for which some benefit should be given. The applicant's serving of a long sentence in Australia would cause hardship to his wife and also to his mother and siblings, but that could be of little weight; general deterrence was the most important consideration.

Preliminary matters

[17] Electronic surveillance of the four co-offenders began in October 2009. The prosecution case relied heavily on a great number of intercepted conversations and emails, which were reduced to transcript form and many of which had to be translated from the original Spanish. The death of one of the translators involved in that process meant that a number of conversations had to be re-translated. The applicant made two complaints here of the prosecution's conduct in relation to transcripts. Firstly, he asserted at various points that the prosecution had failed to put all relevant evidence before the sentencing judge, because not all transcripts of conversations recorded over the 20 months or so during which they were being intercepted were put into evidence. But there is nothing sinister in that; they were disclosed, and had the defence sought to rely on them, they could have been tendered. (Some in fact were.) The applicant applied for leave to adduce as evidence some of the transcripts not previously tendered.

[18] Secondly, the applicant maintained that the transcripts of translated conversations which were put before the sentencing judge were inaccurate. He sought to adduce as new evidence a transcript of a conversation newly translated, on its face by an accredited interpreter, which had previously been translated by the prosecution's

interpreter, and submitted that the Court should order re-translation of all the intercepted material. The transcript of the re-translated conversation was said to cast a different light on the applicant's February 2011 discussion with his wife about the money that was coming. In fact, the alternative translation, while varying a little from the words used in the transcript before the sentencing judge,[1] had, nonetheless, precisely the same effect. It provided no evidence of any general deficiency in the translation process. More importantly, counsel for the applicant took no objection at the sentence hearing to the transcripts' being relied on as authoritative.

[19] The applicant attributed the failure to take that objection to negligence on his counsel's part, as he did other matters: a failure to tender translations of emails exchanged between him and his wife, a failure to have the substance in the 17 drums re-tested, and, remarkably, a failure to apply for him to be declared a "special witness", pursuant to s 21A of the *Evidence Act* 1977 (Qld), when he gave evidence on sentence. Counsel was given no notice of, and had no opportunity to respond to, these allegations, but it should be said that nothing in the material relied on suggested anything on his part other than an energetic and appropriate representation of his client.

[20] In any event, the last allegation of negligence is patently nonsense. The applicant claimed that the application for him to be treated as a special witness should have been made on the basis that he was

> "to give evidence about the commission of a serious criminal offence committed by a criminal organisation".[2]

In fact, the applicant was giving evidence purely to minimise his own involvement in the admitted commission of a serious criminal offence; such an application would have been risible. Counsel's supposed negligence in relation to the other matters could only be relevant if there were in fact some critical piece of evidence not put before the sentencing judge. Questions of whether there were any such pieces of evidence were, or will be, addressed in considering the applicant's application to adduce further evidence on a very large number of matters.

The challenge to findings of fact

[21] For the applicant to succeed on any appeal against sentence on the basis of an error in the judge's findings of fact, it would be necessary to demonstrate that the finding was not open to the sentencing judge; a difficult task, particularly where questions of credibility are involved. The sentencing judge made her assessment of the witnesses' credit with the advantage of seeing them give evidence; in the absence of objective evidence to suggest some mistake by her in that assessment or in her consequent findings, this Court would have no occasion to intervene. In this case, the applicant sought leave to adduce evidence on a wide range of issues in order (he argued) to demonstrate error in various respects. However, the Court will not receive new evidence (none of the material relied on by the applicant was in any sense "fresh" evidence) unless it demonstrates a miscarriage of justice.[3]

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1 Instead of the words, "we won't need to work any more" the new translation was, "we won't have to work".

2 Thus, it was claimed, falling within the definition of "special witness" in s 21A(1) of the *Evidence Act*.

3 *R v Maniadis* [1997] 1 Qd R 593.

[22] The applicant's submissions in relation to the sentencing judge's fact-finding were premised on an erroneous belief that Division 5 of Chapter 2 of the *Criminal Code* (Cth), dealing with proof of fault elements, applied and that by virtue of s 141(1) of the *Evidence Act* 1995 (Cth), the prosecution was required to prove beyond reasonable doubt all of its allegations against him on sentence. But the applicant's criminal responsibility was established by his plea of guilty, and the *Evidence Act* (Cth) applies only to proceedings in a Federal Court.[4] The process of fact-finding on sentence was governed by s 132C of the *Evidence Act* 1977 (Qld) (applicable by virtue of s 79 of the *Judiciary Act* 1903 (Cth)). Pursuant to subsections 132C(3) and (4), the sentencing judge was entitled to act on a satisfaction on the balance of probabilities that a given allegation was true, with the necessary degree of that satisfaction varying according to the significance of the consequences to the applicant. It was not necessary that her Honour be satisfied of any matter beyond reasonable doubt.

The applicant's submissions re the finding as to his knowledge of the quantity of the drugs

[23] The applicant's first contention was that the sentencing judge should have found that he believed the product imported to be, not cocaine, but a precursor substance from which cocaine could be manufactured, in an amount of seven to ten kilograms. That had been his evidence, not accepted by the sentencing judge. Rendon Alvarez had also given evidence that he understood that the importation contained coca leaf, from which between eight and twelve kilograms of cocaine could be obtained. The applicant submitted that references by him in a conversation with Jaramillo in April 2010 to "a guy" having "the raw material" and other references in a conversation with him in May 2010 to the material coming in liquid form, not as powder, and requiring to be "cooked" by Rendon Alvarez showed that he understood it to be a precursor.

[24] The applicant argued also that the sentencing judge could not have concluded that the substance imported was in fact cocaine. He asserted, incorrectly, that the Crown had admitted that the substance was a precursor; he appears to have misunderstood the prosecutor's characterisation of Rendon Alvarez' contention to that effect. The Crown case was always that the substance imported was cocaine which was to be extracted and transformed to saleable powder form. There had been a breach of procedural fairness, the applicant said, because an order her Honour (supposedly) made for the retesting of the material had not been complied with. In fact, the question as to whether the substance imported should be further tested was raised on the third day of the sentence hearing, when counsel for Rendon Alvarez said that he had instructions to seek an expert report and was in discussion with the prosecution about the possibility of taking some of the drums to a university for expert examination. Her Honour made no order concerning the proposal; she simply established that none of the accused wanted to give evidence until the results of the expert evidence were known and adjourned the sentence hearing for a review a fortnight later. The hearing itself did not resume for another three months. In the interim, the defence had decided not to pursue the re-testing.

[25] The applicant sought to tender a report, apparently prepared by an expert from the University of Queensland. It seems to have been written on the basis of information

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4 Section 4, *Evidence Act* 1995 (Cth).

about the analyses performed by forensic analysts retained for the prosecution, and reviews their conclusions. The expert's view was that they had

> "correctly demonstrated that all 17 drums contained cocaine, and have provided satisfactory evidence to establish the % of cocaine in each drum".

The forensic analysts had also correctly determined the gross amount of cocaine in the drums as about 71 kilograms, of which it could be expected that 80 per cent to 90 per cent would be recovered. The expert explained the process required to precipitate cocaine salts from a water-based solution into an organic solvent form and reconvert them into salt form, and confirmed that chemicals which the police had seized were those necessary for the process. Since the report did nothing to assist the applicant's case, instead reinforcing the Crown's position that the substance imported was indeed cocaine, it was not admitted as new evidence.

[26] The finding that he was expecting at least 20 kilograms of cocaine was, the applicant contended, based on speculation. His references to the number 20, such as in his email advice to Turner about 20 pieces of gold, related not to kilograms, but to the drums of oil in which the substance was to be sent. He sought to tender various items of evidence in this regard, none of which ought to be admitted.

[27] The first was an earlier translation (by the now-deceased interpreter) of the applicant's 4 May 2010 conversation with Jaramillo; he asserted that the translation relied on by the Crown should have been excluded as "hearsay". In the earlier translation, only one reference by Jaramillo to "twenty kg" appeared, as opposed to two such references in the translation which went into evidence; the significance of this was that the prosecutor had put to the applicant in cross-examination that Jaramillo had twice asked him whether the "guy of the twenty kg" was putting in money. (The applicant's explanation in response to the prosecutor was that the conversation was quick, in his view there was only a single reference to "twenty", and he had believed it referred to containers, not kilograms.) But there is no reason to suppose that the first translator was more accurate, as opposed to simply missing the second reference after some over-talking (recorded in the transcript which went into evidence). Had there been any contest about it, the second translator could have been called to give direct expert evidence of his translation, but the transcript on which the prosecution relied was admitted without objection. And whether or not Jaramillo referred more than once to 20 kilograms in his conversation with the applicant was of minimal relevance; the point that the prosecutor made in cross-examination was that the applicant had said nothing in the course of his conversation with Jaramillo to suggest he did not understand the reference, whether it occurred once or twice.

[28] The second was the transcript of another conversation, in November 2009, translated by the original interpreter, between the applicant and a man he called "Pirulin" about a plan to buy "merchandise" in Bolivia, to be delivered to someone named "Martin" in Argentina and sent from there. There is reference to delivery "in a can" which would be "fixed", with a plan to buy "another 20". This was relied on by the applicant as showing that he was contemplating 20 drums. However, the conversation was at the very outset of the applicant's involvement in contacting potential South American sources of cocaine. There is no reason to suppose it sheds

any light on the importation plan which was ultimately adopted, or the applicant's understanding of it.

[29] The third was a transcript of a conversation on 12 March 2011 with one of the South American principals, in which the discussion seems to focus on the poor state in which the containers in the first (test run) shipment arrived. The South American said that he would deal with the person concerned, pointing out that he would be losing "500,000 or 600,000" (presumably in the real importation). The applicant asserted, for reasons which are not clear, that this was the prospective profit on between five and six kilograms. If it was, that might have reflected the individual's contribution and expected return, but it does not assist in establishing the proportions of the importation.

[30] Nothing in the content of any of the transcripts demonstrates any miscarriage of justice so as to warrant their admission on this application.

[31] The applicant also pointed to a transcript of a telephone intercept conversation between him and Zuluaga of 6 March 2011, tendered in evidence by his counsel, in which he asked Zuluaga how many "units" they were talking about and the latter responded that it was "more or less 20 drums", each to have "about 300 units". Later in the same conversation, Zuluaga said that "the cost of the 5 would be 150" because they were "30 each". The applicant in evidence maintained that he understood this to be Zuluaga's commission, leading to his understanding that there were only five kilograms involved.

Conclusions

[32] The short answer to the applicant's arguments about the nature of the substance imported, and his knowledge of it, is that he pleaded guilty to conspiring to import and to traffic in cocaine. There is no evidence that he was under any misapprehension as to the fact that the drug named in the indictment was cocaine, or indeed any objective evidence that he believed the substance imported to be anything else. References in various intercepted conversations to it as "raw material" do not establish the contrary; the evidence (consistently with what was contained in the expert report of which the applicant unsuccessfully sought admission) was that the substance would require processing to render it into a saleable form. The sentencing judge was entitled to reject the evidence of both the applicant and Rendon Alvarez on the point. Nothing demonstrates that she was mistaken in doing so.

[33] As to the actual amount involved, there was plainly evidence on which the sentencing judge was entitled to rely to reach the conclusion that the applicant had discussed the quantity of 20 kilograms of cocaine and to reject his claim that any reference to "20" was to the number of drums in which cocaine was to be sent. The proposition that the expression "20 pieces of gold" (in the 5 September 2010 email the applicant sent to Turner) referred to drums defies belief in the context of the details given of the price constituents of each "piece of gold", the explanation that "only oil" could be sent in the first shipment while the second shipment would come "with all the gold", and the references to "the gold" as something which had been the subject of investment. Her Honour's interpretation was also, as she noted, consistent with the 4 May 2010 conversation between Jaramillo and the applicant, in which the latter informed Jaramillo that "that guy" would send "20", which Jaramillo went on to explicitly refer to as 20 kilograms.

[34] The applicant's discussion with Zuluaga in the month before the shipment actually arrived about 20 drums with "units" seems likely, in contrast, to be related to the approximate number of drums which contained cocaine in the shipment, but it had no bearing on the discussion of numbers of "pieces of gold" in the applicant's September 2010 email. The significance of Zuluaga's references to "5" costing "30" is unclear, but it is worth noting evidence that three weeks earlier Turner had telephoned the applicant from Panama to tell him that Zuluaga was considering including product of his own - "say 5" - with the shipment. Whether or not that is the explanation for Zuluaga's allusions to "5", nothing in the conversation suggested that Zuluaga was talking about his commission or that the applicant understood him to be doing so. And as the prosecutor put to the applicant in cross-examination, it was improbable that Zuluaga's commission would have increased from $1,000 per kilogram in September 2010 to $30,000 per kilogram in March 2011. The sentencing judge was entitled to reject the applicant's evidence in this regard.

The applicant's submissions re the finding as to his expectation of reward

[35] There was no evidence, the applicant submitted, that he was aware of any promise of money from Turner or Jaramillo, and the fact that Turner's and Jaramillo's conversation about a profit share in October 2010 ceased on his arrival in the room showed that they did not intend to include him. The conversation with his wife as to not having to work in the future was followed by a laugh, which should have indicated to her Honour that it was not serious.

[36] His activities in qualifying and working as a diesel fitter, the applicant contended, disproved the allegation that he sought reward from the importation. In this regard, he sought to tender new evidence: transcripts of conversations with Jaramillo in March 2010 in which he talked about opportunities for work as a diesel fitter, and transcripts of two telephone conversations in March 2011, one with a South American principal in which he spoke of his large income, and another in which he recounted that conversation to Rendon Alvarez.

Conclusions

[37] It was open to the sentencing judge to conclude from the applicant's conversation with his wife about no longer needing to work with "what [was] coming" that the applicant expected to receive a substantial reward for his efforts. Indeed the statement was not susceptible of any other rational interpretation; there was no other anticipated windfall identified which might have relieved the applicant and his wife of any need to work. The sentencing judge might also have drawn the inference from the applicant's statement, "for us is the 30%", in his email of 5 September 2010, that he saw himself as sharing in the proceeds of the importation. There was little logic in the applicant's proposition (which was also put to the sentencing judge) that Turner and Jaramillo must not have intended to include him in the profit-sharing because they ceased their conversation on the matter when he entered the room. It made no sense for them to discuss his share of the proceeds and his anticipated payoff of around $2,000,000 in his absence if they had no intention that he would receive it.

[38] So far as the proposed new evidence is concerned, the applicant's preparedness to work as a diesel fitter pending the importation, said to be shown by conversations

with Jaramillo, did nothing to disprove his expectation of a reward. The obvious inference is that it was both financially necessary and a prudent step to explain and justify his continued presence in Australia. The conversation with the South American principal, of which the applicant sought to produce a transcript, occurred while he, the applicant, was expressing frustration at the costs being run up waiting for the importation. He asserted that he could earn $12,000 per day; the implication was that he did not need to continue with the conspiracy. In recounting the conversation to Rendon Alvarez, who asked what the South American had said when the applicant "got tough on him", the applicant responded,

> "I told him that I did not need that job because I was working 15 days for $12,000 and I told him that he had to stick to his word…"

The conversation does nothing but emphasize the applicant's willingness to put pressure on those he was dealing with, by suggesting that he could walk away from the importation, in a manner well beyond anything that might have been expected of a mere translator. Neither they nor earlier conversations with Jaramillo do anything to advance his case that he was not anticipating any share of the profits of the importation. They should not now be received as evidence.

The applicant's submissions re the finding as to his role and motivation

[39] The applicant submitted that her Honour should have accepted his evidence about his intentions in coming to Australia and his acting as a mere translator, compelled to take that role by reason of Jaramillo's threat. It was illogical, he argued, for Turner to have recruited him to assist, because he was young and inexperienced, and Turner already had the assistance of Jaramillo. There were references in the transcripts which indicated that Jaramillo and Turner had been planning the importation since early 2009. The transcript of the conversation with Rendon Alvarez and Ruiz on 12 August 2010 about his dealings with Turner did not contain any reference to importation of cocaine and parts of it were unintelligible, so the sentencing judge should not have relied on it.

[40] The sentencing judge should have found that he had at all stages acted under "non-exculpatory duress" (that is to say, pressures such as to mitigate his culpability without amounting to a defence) in the form of fears of harm to his family and to himself. Relying on a passage from *R v Taiapa*,[5] a decision which deals with where the burden of proof lies in relation to the defence of compulsion under s 31(1)(d) of the *Criminal Code* 1899 (Qld), the applicant contended that the burden was on the Crown to exclude any reasonable possibility that he acted under duress. However, he contended, her Honour had failed to appreciate that duress was not being put as a defence, but as a mitigating factor. The fact that she had not mentioned the case of *Tiknius v The Queen*,[6] which considered non-exculpatory duress as a mitigating factor, and which had been raised with her by defence counsel, showed that she had not considered that factor. Alternatively, her Honour had failed to give the effect of duress on the applicant sufficient weight.

[41] The sentencing judge had during the course of argument referred to the applicant as having "throw[n] his lot in with criminals". That showed, it was said, that her Honour had impermissibly speculated that he had a prior tendency to deal with

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5 (2008) 186 A Crim R 252 at [30].

6 [2011] NSWCCA 215.

criminals, as to which there was no evidence. Her Honour had also observed during submissions that it did not seem that the applicant's introduction to the importation plan was the result of any threat. While she suspected that once involved he would have been aware that withdrawal would put him at risk, that did not carry much weight, because the recorded conversations and his actions indicated that he was a willing participant. Her Honour's statement indicated error, it was contended, because it amounted to: speculation, there being no evidence that the applicant had ever suggested he would be at risk by withdrawing himself from the plan; racial stereotyping (against anyone arriving in Australia from Colombia); and a failure to consider the true state of affairs in Colombia. The applicant sought to tender transcripts of telephone conversations with his wife in March 2010, in which they discussed concerns about the lawlessness of her neighbourhood and the numbers of recent killings, and other material concerning conditions in Colombia, arguing that the sentencing judge should have taken the violent nature of Colombian society into account in assessing the duress argument.

[42] The sentencing judge was not, the applicant contended, entitled to characterize as a joke the conversation between Turner and Jaramillo in which the latter advocated killing his wife if she proved a problem. Rendon Alvarez claimed to have heard an implied threat made by Jaramillo to the life of the applicant's wife if the applicant did not follow instructions, and he had given evidence that he, the applicant, was merely a translator, and that decisions were made by Jaramillo and Turner. The trial judge should not have rejected this evidence, which the applicant claimed was uncontested (by which he meant that the prosecutor, who had already cross-examined Rendon Alvarez, had not sought to ask further questions when the sentencing judge asked whether there was anything arising out of the applicant's counsel's cross-examination). Her Honour, in making findings on contrition, referred to the fact that she had not accepted Rendon Alvarez' evidence, which she described as given "for the purpose of benefiting" the applicant. The applicant submitted that her Honour had thus impermissibly speculated as to why Rendon Alvarez had given the evidence.

Conclusions

[43] *Taiapa* is of no use to the applicant in the context of a plea of guilty to a Commonwealth offence. It was necessary for him to satisfy the sentencing judge that duress, as a mitigating circumstance on which he wished to rely, was established on the balance of probabilities. The sentencing judge was under no misapprehension that the applicant sought to rely in that way on the allegation of threats made to him, but she simply did not accept his evidence, or that of Rendon Alvarez, about it. There was, accordingly, no occasion for her to consider *Tiknius*. Her Honour's allusion to the applicant's having thrown his lot in with criminals was not speculation about something he had done previously; it related to his role in conspiring with those arranging the movement of the cocaine from Colombia. Her observation that the applicant might have been concerned about the consequences should he withdraw was in fact founded in evidence, such as, for example, the statement in his email to Turner in December 2010, that he did not want "trouble with those guys" because his family was in Colombia; but that was something which the applicant had brought on himself. It need hardly be said that there was no element of racial stereotyping in her Honour's conclusions.

[44] The sentencing judge's finding that the applicant had become involved in the importation willingly, not because of any threat from Jaramillo, was not only open but obvious on the evidence. In that regard, the conversation between the applicant and the co-offenders Rendon Alvarez and Ruiz on 12 August 2010, on which the sentencing judge relied in part in making her finding, bears examination. In it, the applicant explained his relationship with Turner, whom, he said, he met at Medellin in Colombia. He had discussed his interest in going to Australia to work as a diesel mechanic with Turner but his results on an English test were not sufficient for him to qualify for a visa. Turner advised him to wait another year but he expressed his eagerness to earn more in Australia, after which Turner said (according to what he told his co-offenders),

> "I am thinking if you can help me in organising a few things that I want to bring"

to which, according to the transcript, the applicant said that he had asked him "like what?" The portion of the transcript which immediately follows records unintelligible parts; but it then records the applicant informing his co-offenders that he had told Turner that he could organise things for him and that he could find people, but if he were to do so he wanted to come to Australia immediately. He did come to Australia, to study English, and

> "started organising everything, communicating with the fucking bad guys and then I went back in January and met Mache [Rendon Alvarez] there and I went with him to meet with other people in Pereyra to organise other things".

[45] This explanation plainly had nothing to do with aspirations to work as a Queensland diesel fitter, as is further demonstrated by the role that the applicant actually did play in making contacts and organising the shipping of the cocaine to Australia. Nor were the applicant's references, in emails to Turner providing details of the importation, to having promised to "do the business" capable of being read as referable to an undertaking to work as a diesel fitter. The sentencing judge was, without any question, entitled to find that the applicant had agreed to take part in the importation before he came to Australia. And as her Honour observed, there is nothing in the transcripts of the applicant's conversations with Jaramillo which suggests any apprehension on the applicant's part. Nor is the tenor of his conversations with the South American contacts consistent with someone merely conveying the instructions of another. Her Honour was also entitled to reject Rendon Alvarez as a credible witness and to regard his evidence – which was most certainly the subject of contest by the prosecution – as given for the benefit of the applicant.

[46] The sentencing judge having found that the applicant was not operating under the force of any threat by Jaramillo, it was unnecessary for her Honour, and indeed she was not asked, to consider conditions in Colombia. There is no occasion for this court to admit the evidence which the applicant sought to adduce on that topic, including transcripts of his conversations with his wife.

Parity

[47] The applicant complained of the lack of parity between his sentence and the sentences given to Rendon Alvarez and Ruiz. Neither Rendon Alvarez nor Ruiz

had any previous convictions and the sentencing judge regarded the rehabilitation prospects of both as good. Her Honour found that Rendon Alvarez' involvement in the conspiracies began in February 2010. He was funded to travel to Panama, and reported on pursuing sources of cocaine there. He was party to many conversations with the other conspirators about the plan to import and traffic cocaine, offering advice and assistance at every opportunity; his involvement was persistent. He was paid expenses and expected to receive $120,000 for his role in extracting the cocaine. He was sentenced to 18 years imprisonment with a non-parole period of 10 years; in fixing that period, her Honour took into account that his plea of guilty was made earlier than the other defendants' and he had suffered a serious back injury when assaulted in prison.

[48] Ruiz was, her Honour found, involved over a period of around nine months from August 2010. He attempted to find investors. His role was subsidiary to that of Rendon Alvarez, whom he was to assist, for reward, in extracting the cocaine. The prosecutor had submitted that his payment was to be US$2,000 per kilogram, but the trial judge was not satisfied of that and instead found merely that he was motivated by profit. Ruiz obtained equipment for use in extracting the cocaine and sent it to the applicant, and with Rendon Alvarez tested the chemicals that Turner bought to use in the extraction process. He was sentenced to 14 years imprisonment with a non-parole period of nine years.

[49] The applicant argued that he was young and inexperienced, not in a position to make decisions in the conspiracies, and not anticipating any financial benefit from his actions, whereas both Rendon Alvarez and Ruiz were active participants expecting reward. More particularly, he said, the prosecutor had misled the sentencing judge by omitting evidence as to the length and level of Rendon Alvarez' involvement in the conspiracies. In this regard he sought to rely once again on new evidence in the form of transcripts of conversations not before the sentencing judge, said to demonstrate that Rendon Alvarez had really been involved as early as January 2009 and that he had acted in a managerial role.

[50] The transcripts said to demonstrate Rendon Alvarez' early involvement comprised: a discussion between Turner and Jaramillo in February 2010 in which, after mentioning Rendon Alvarez's role, Turner said that if the importation happened in June it would be "one and half years"; a conversation in mid-January 2011 between Jaramillo and Rendon Alvarez in which Jaramillo, apparently referring to Turner, said that he had been waiting "for two years now", and Rendon Alvarez said that he agreed; and a conversation at the end of January 2011 between the same parties in which Jaramillo complained "we have been talking over two years now" to which Rendon Alvarez responded "yes, yes that is the truth, that's why I decided to come". The transcripts went no further than showing that Turner and Jaramillo had been involved together for a lengthy period, consistently with what her Honour found. They proved nothing as to Rendon Alvarez's length of involvement.

[51] The remaining transcripts (of 14 conversations) were said to show that Rendon Alvarez was the main decision-maker and regarded himself as high in the line of the leadership, giving instructions to the applicant and to Turner, whereas the prosecutor had said that his role was limited to the extraction of the cocaine. What the transcripts in fact reveal is Rendon Alvarez asking Jaramillo that he be informed of Turner's decisions direct so as to avoid "confusion in the line of leadership" and an objection to the applicant's talking about things outside his authority. They do

not contain any instance of Rendon Alvarez giving instructions to Turner, but there are conversations in which the applicant consults him about what he proposes to say to the South American parties. Nothing in the material is inconsistent with the sentencing judge's finding that Rendon Alvarez gave advice and assistance at every opportunity; which was also the Crown case. Those transcripts should not now be admitted as new evidence.

[52] The applicant's arguments amounted to saying that his role was not as significant as that of Rendon Alvarez and Ruiz and that his motivation (allegedly acting under threat, not for reward) was different; a contention which is at odds with the facts which her Honour found. He did not point to any basis for concluding that there was a lack of parity between the sentences on the findings actually made by the sentencing judge, and no such imbalance is apparent.

Alleged sentencing errors

[53] The applicant submitted that the learned sentencing judge erred in referring to the *Penalties and Sentences Act* when she should have been applying the *Crimes Act* (Cth), and in stating that the applicant would serve the balance of his sentence in the community subject to the conditions of a parole order, when in fact he was likely to be deported. He submitted also that her Honour had not taken into account matters to which she was required to have regard under s 16A of the *Crimes Act* (Cth). She had erred by regarding the benefit of his guilty plea as negated by the fact that he gave evidence and by failing to give him a discount for co-operation with the authorities, in the form of participation in an Australian Crime Commission hearing and an interview with Australian Federal Police officers. The sentencing judge was, it was asserted, aware of the latter and had not mentioned it in her sentencing remarks, showing that she had overlooked it. The judge had not taken into account his prior good character, the fact that his conduct was induced by threats or the prospect of his deportation at the end of his sentence. Insufficient weight had been given to other factors identified in s 16A: his youth, his exemplary conduct in custody, his prospects of rehabilitation and the effect of his sentence on his dependants.

Conclusions

[54] There is no reason at all to suppose that the learned sentencing judge failed to appreciate that she was sentencing under the *Crimes Act* (Cth) and the form which the sentence took – imprisonment with the fixing of a non-parole period – was consistent with that legislation, not the *Penalties and Sentences Act*. Section 16E of the *Crimes Act*, however, applied State law which had the effect that a sentence could be reduced by the period already spent in custody, or was to commence on the day on which the person was taken into custody. In conformity with that provision, her Honour applied s 159A of the *Penalties and Sentences Act* to declare that the applicant's pre-sentence custody period was time already served under the sentence. He would, no doubt, have been most aggrieved had she not done so. Section 16F of the *Crimes Act* required that her Honour explain, regardless of the reality of the proposition, that the applicant would have to serve a period of service in the community once the non-parole period expired, and could have his paroled revoked, if he failed to fulfil its conditions. There was no error in the form of the sentence which the learned sentencing judge imposed.

[55] In *R v Schelvis*; *R v Hildebrand*,[7] Fraser JA summarised some of the considerations relevant in sentencing for drug importation:

> "Section 16A(1) of the *Crimes Act* 1914 (Cth) required the sentencing judge to 'impose a sentence or make an order that is of a severity appropriate in all the circumstances of the offence'. Section 16A(2) sets out a range of considerations required to be taken into account, in addition to any other matters. The difficulty of detecting offences of this kind and the great social consequences which may follow from the commission of such offences suggest that deterrence is to be given chief weight and that stern punishment is warranted in almost every case. The prior good character of those who participate in offences of this kind has reduced significance, because organisers of the importation of drugs use such personal factors to their advantage in an attempt to avoid suspicion; undue weight cannot be given to the subjective circumstances of offenders such as to result in a sentence that is disproportionate to the objective seriousness of the criminality, and for 'foreign offenders, the fact of their separation from their homeland and family is of very little relevance.'"[8] (Citations omitted.)

[56] The sentencing judge in this case did not fail to consider any relevant matter put before her. Her Honour specifically took into account the applicant's plea of guilty; it was the element of contrition which she regarded as qualified by the evidence he had given. No evidence was put before her Honour about the Australian Crime Commission hearing, but since any examination would have been compulsory, the applicant could hardly have claimed to have "cooperated" in respect of it. The applicant's counsel expressly disavowed any reliance on the interview with the Australian Federal Police for any purpose at sentence, and indeed the applicant had actually sought its exclusion from the trial, with the result that the Crown agreed not to lead it. There was no evidence, therefore, that its content was of any assistance to anyone, and the application for its exclusion, on the ground that it was involuntary, hardly suggested an eagerness to co-operate.

[57] The sentencing judge noted the applicant's lack of prior convictions and his work history in Colombia; other than that there does not seem to have been any particular evidence of good character. Her Honour did not, of course, accept that the applicant acted under any form of threat, so there was nothing to take into account on that score. No submission was made to her Honour as to the prospect of the applicant's deportation or any relevance it might have to his sentence. Complaint as to the remaining matters concerned the weight given them. The attribution of weight was a matter within the sentencing judge's discretion, and it is clear from her reasons that she approached it consistently with the way in which Fraser JA describes the exercise in *Schelvis*. No *House v The King*[9] error arises merely because the applicant perceives that "insufficient weight" has been given to particular factors. Nothing in the reasons suggests any mistake on the part of the sentencing judge as to the existence or nature of any mitigating circumstance; so unless the sentence itself is so disproportionate as to indicate insufficient weight given to mitigating factors

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7 [2016] QCA 294.
8 At [61].
9 (1936) 55 CLR 499.

generally, there is nothing appellable. That, of course, leads to the question of whether the sentence was manifestly excessive.

Manifest excess

[58] The applicant faced a maximum penalty of life imprisonment. The sentencing judge referred to decisions in *R v Jackson*,[10] *Teng v The Queen*,[11] *R v Meggett*,[12] *R v Vo*,[13] *Silva v R*[14] and *R v Handlen & Paddison*[15] as of assistance in determining the starting point for the applicant's sentence before reduction for mitigating factors. The applicant provided the Court with a schedule of 37 sentencing decisions in Commonwealth drug matters which, he said, contained a number of cases in which lower sentences had been imposed in comparable matters, or sentences similar to that imposed on him had been imposed for much more serious offending. He placed particular reliance on *Velez v The Queen*[16] and *Thompson v The Queen*,[17] both of which, he said, were more serious cases involving more drugs and offenders with significant criminal histories but in which lower sentences were imposed. He also adverted to *Tiknius v The Queen*,[18] in which the applicant's sentence was reduced in circumstances where a finding that he had acted under non-exculpatory duress was made.

Conclusions

[59] Many of the cases in the applicant's schedule concerned offending of much smaller proportions than that involved in the conspiracies in this case. Others concerned defendants who had played relatively minor roles; some, for example, were mere couriers or played confined parts in the retrieval of drugs once imported. Other sentences had been reduced for real assistance given to authorities, or because at the time, s 16G of the *Crimes Act* (repealed in 2003) applied to require, where a sentence was to be served in a State where no remission was available, that the length of the sentence be adjusted accordingly. (A discount by a third to reflect the s 16G consideration has been described as a "legitimate starting point": *Director of Public Prosecutions (Cth) v El Karhani.*[19]) The sentences in that group, once one isolates those where the offending was broadly comparable in seriousness to the applicant's, and identifies the discount made in each case, do not suggest that the applicant's sentence was excessive.[20] They include *R v Meggett*[21] and *R v Vo*,[22] both referred to by the sentencing judge.

[60] In *Meggett*, the 25 year old defendant had sailed a yacht carrying a load of 171 kilograms of pure cocaine from Panama to Australia. His role was described as "above that of

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10 [2003] QCA 31.
11 (2009) 22 VR 706.
12 (1999) 107 A Crim R 257.
13 (2000) 118 A Crim R 320.
14 [2010] QCA 79.
15 [2010] QCA 371.
16 [2015] NSWCCA 177.
17 [2007] NSWCCA 83.
18 [2011] NSWCCA 215.
19 (1990) 21 NSWLR 370 at 385.
20 Others in this group are *Wang v The Queen* [2010] NSWCCA 319; *Ma v The Queen* [2010] NSWCCA 320; *R v Ung* (2000) 173 ALR 287; *R v De Groot van Embden* (2003) 140 A Crim R 403; *R v El Hani* [2004] NSWCCA 162.
21 (1999) 107 A Crim R 257.
22 (2000) 118 A Crim R 320.

a mere courier" but "short of a mid-level executive organiser", because there were others who arranged the acquisition of the cocaine, its delivery to him and its ultimate distribution. He was, however, an indispensable part of the operation. Wood CJ observed that the sentencing range for offenders occupying levels of significant responsibility in relation to large shipments of heroin was severe, with life sentences or sentences in excess of 25 years being imposed. That was the starting point, but s 16G required adjustment to the head sentence, and assistance past and future given by the defendant called for a further discount of 50 per cent. The end result was that he was sentenced to imprisonment for ten years with a non-parole period of six years.

[61] In *Vo*, the applicant was convicted by a jury of having been knowingly concerned in the importation of 78 kilograms of heroin (54 kilograms pure) concealed in boxes of cans of pineapple which arrived from Hong Kong in a shipping container. The applicant had sent some money overseas to the consignor, retained a customs agent to clear the goods through customs and had leased premises where they could be received. The sentencing judge described her as, although not at the top of the organisation involved in the importation, a key participant and more than a mere conduit. Allowing for the absence of remissions in New South Wales, as s 16G required, she was sentenced to 22 years imprisonment with a non-parole period of 14 years, a sentence upheld by the Court of Criminal Appeal. Assuming a one-third discount, the result suggests a starting point of around 33 years.

[62] Also in this category is *Thompson v The Queen*, relied on by the applicant. That case concerned an applicant who pleaded guilty to being knowingly concerned in the importation of some 383 kilograms of pure cocaine. He was responsible for receiving the drugs near New Zealand and transferring them to a yacht which he sailed to Sydney. He was unsuccessful in an appeal against a sentence of imprisonment for 20 years and six months with a non-parole period of 13 years. He had previously gone to trial on the charge, succeeded on an appeal against conviction and then pleaded guilty on the date set for his retrial. The unrepresented applicant in that case complained of a lack of parity (because his co-offenders, unlike him, were able to make arrangements for transfer to their home countries) and of error in the judge's findings (although made on the basis of an agreed statement of facts) as to his state of knowledge of the importation. Apart from an observation that it was curious that the applicant was given a significant discount (15 per cent) for his guilty plea, despite his previously having gone to trial, the considerations in sentencing are not discussed.

[63] However, *Thompson* was the subject of review in a decision of this court, *R v Elfar and Golding*[23] and the point is there made that when Thompson was sentenced after his original trial, the starting point was 36 years with a one-third reduction to recognise the effect of s 16G of the *Crimes Act*, so that he was then sentenced to 24 years imprisonment. The reduction for his plea of guilty on the day of the retrial led to the lowering of the sentence to 20 years. That case, then, falls within the category of cases which, because of the effect of a discount, do not assist the applicant. It involved offending which might be regarded as more serious, but also attracted a much higher starting point for sentence.

[64] Nor were the other cases on which the applicant particularly relied of assistance to him. It is unnecessary to explore the facts on which the applicant in *Tiknius* was

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23 [2018] QCA 170.

sentenced, because the significant finding was that he had acted under the influence of non-exculpatory duress, which the New South Wales Court of Criminal Appeal characterised as relevant to the objective gravity of his offending.[24] No finding of that kind having been made in this case, *Tiknius* does not assist. In *Velez*, an applicant described as a "conduit", passing on information between two ethnic groups in an importation of between four and six kilograms of cocaine, and proposed importations respectively of 40 kilograms and 500 kilograms of the same drug, was re-sentenced on appeal to imprisonment consisting of a non-parole period of ten years and a balance of seven years, a reduction of his original sentence by a matter of months. The case does not contain much detail of his actual activities, because it was decided on a parity ground; while his criminality had been assessed at first instance as being the same as that of his two co-offenders, no adjustment of his sentence had been made for the facts that unlike them he had no criminal record, was an older man and suffered from a depressive condition. In the absence of greater detail of his involvement, it is not possible to ascertain whether his offending was or was not comparable with that of this applicant.

[65] The prosecutor's submission on the applicant's sentence was that the starting point lay between 25 and 30 years, before reduction to allow for mitigating factors. The cases on the schedules provided by the prosecutor at sentence and by the applicant in this Court do not suggest that that was inaccurate. This case involved conspiracies both to import and traffic, and involved the successful landing, after the applicant's involvement in lengthy negotiations and making of arrangements, of a very large amount of cocaine. Deterrence necessarily weighed strongly in the sentencing process. The applicant's mitigating circumstances, which had nothing of the extraordinary about them, were given appropriate weight. The sentence imposed was severe, but it was not outside a proper exercise of discretion.

Orders

[66] The applicant has not demonstrated any specific error by the learned judge in sentencing. Nor has he shown that the sentence imposed on him was manifestly excessive. I would refuse the application for leave to appeal against sentence and the application for leave to adduce further evidence.

[67] **GOTTERSON JA:** I agree with the orders proposed by Holmes CJ and with the reasons given by her Honour.

[68] **McMURDO JA:** I agree with the Chief Justice.

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24 [2011] NSWCCA 215 at [42].