SUPREME COURT OF QUEENSLAND

CITATION:	*R v Le* [2019] QCA 200
PARTIES:	**R** **v** **LE, Tan Da** (applicant)
FILE NO/S:	CA No 168 of 2018 SC No 154 of 2016
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	Supreme Court at Brisbane – Date of Sentence: 1 June 2018 (Lyons SJA)
DELIVERED ON:	27 September 2019
DELIVERED AT:	Brisbane
HEARING DATE:	31 July 2019
JUDGES:	Gotterson JA and Henry and Bradley JJ
ORDER:	**Application for leave to appeal against sentence refused.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – SENTENCE MANIFESTLY EXCESSIVE OR INADEQUATE – where the applicant was found guilty after trial of conspiring to import and traffic a commercial quantity of methamphetamine – where the quantity of drug involved was not able to be ascertained but the applicant was sentenced on the basis it was a "significant quantity" – where the applicant relies upon the imprecision of quantity to contend the sentence was manifestly excessive compared with sentences in other cases – whether the lack of specificity regarding quantity makes this case less serious than those in which there is specific evidence as to quantity – whether the sentences imposed were within range for this field of sentencing *Director of Public Prosecutions (Cth) v Brown* (2017) 268 A Crim R 309; [2017] VSCA 162, considered *Hili v The Queen* (2010) 242 CLR 520; [2010] HCA 45, applied *Papadimitriou v The Queen* (2011) 214 A Crim R 50; [2011] WASCA 140, considered *R v Olbrich* (1999) 199 CLR 270; [1999] HCA 54, applied *R v Scott* [2017] SASCFC 96, considered *R v Yuan* (2015) 252 A Crim R 422; [2015] NSWCCA 198, considered *Savvas v The Queen* (1995) 183 CLR 1; [1995] HCA 29, applied

Wong v The Queen (2001) 207 CLR 584; [2001] HCA 64, applied

COUNSEL: B J Power for the applicant
L Crowley QC, with S Harburg, for the respondent

SOLICITORS: McMillan Criminal Law for the applicant
Director of Public Prosecutions (Commonwealth) for the respondent

[1] **GOTTERSON JA:** I agree with the order proposed by Henry J and with the reasons given by his Honour.

[2] **HENRY J:** The applicant seeks leave to appeal sentences imposed upon him following his conviction after a 17-day jury trial for three Commonwealth drug offences.

[3] The offences and the concurrent head sentences imposed in respect of each were as follows:

Count 1	Conspiring to import a commercial quantity of a border-controlled drug	20 years imprisonment
Count 2	Conspiring to traffic a commercial quantity of a controlled drug	10 years imprisonment
Count 3	Dealing in the proceeds of crime worth $100,000 or more	8 years imprisonment

A single non-parole period was fixed at 14 years.

[4] The applicant's sole proposed ground of appeal is that the sentence is manifestly excessive.

Background

[5] The applicant was the owner operator of a Brisbane shipping company. He entered into a criminal conspiracy with his brothers, Khoa Le and Minh Le in Vietnam and An Le in the United States of America, and two other Vietnamese men, Quang Tuyen Ha and Xuan Kim Ta. They conspired to import a commercial quantity of methamphetamine into Australia by using the applicant's company, LCI Australia Pty Ltd, to receive consignments of second-hand machinery that contained the drug hidden within it. They also conspired to traffic in the drug after its importation.

[6] Evidence led at trial in proof of the existence and nature of the conspiracies included circumstantial evidence of actual acts of importation and trafficking. Much of the evidence consisted of recordings of intercepted conversations.

Importations completed pursuant to importation conspiracy

[7] Two consignments of machinery containing methamphetamine were imported pursuant to the importation conspiracy. The first involved a consignment of machinery sent by a US-based company of the applicant and his brother An Le. It was shipped from Toronto, Canada and arrived at the Port of Brisbane on about 1 July 2011. Within that consignment was hidden a bulk weight of six kilograms of methamphetamine.

[8] The second importation involved a consignment of machinery shipped from Ho Chi Minh, Vietnam. It was sent by an entity known as Lucky Co., a Vietnam-based business of the applicant's family, particularly associated with his brother Khoa Le. That consignment of methamphetamine, which arrived at the Port of Brisbane on or about 25 September 2012, was hidden in a road compaction roller. The consignment contained packages of methamphetamine. The purity of the drug is not known for it was not seized. It is known there were 177 packages. The Crown urged the inference they would have been 500 grams each, giving rise to a gross weight total of 88.5 kilograms.

Supplies and sales completed pursuant trafficking conspiracy

[9] Three instances of supply and sale of methamphetamine occurred pursuant to the trafficking conspiracy.

[10] The first instance of trafficking involved the six kilograms imported in the first consignment. The drugs were extracted and stored at Brisbane and then offered for supply and sale through third party brokers to a Melbourne group in late July 2011. The offer and negotiations was handled by Quang Ha from Vietnam. Under his direction An Le travelled from the USA to Brisbane in early August 2011 to facilitate the handover of the drugs. The Melbourne buyers travelled to Brisbane and met with An Le, receiving a sample of the drugs. That deal did not go ahead. Ha subsequently arranged for the drugs to instead be supplied to a Sydney-based group represented by Thanh Long Le, who travelled from Sydney to the Gold Coast to receive the drugs. The applicant assisted An Le to weigh and transport the drugs from Brisbane to the Gold Coast prior to their eventual supply by An Le to Thanh Long Le on 15 August 2011.

[11] The second instance of trafficking involved most of the methamphetamine hidden in the road roller. After the machinery had been cleared by Customs and delivered to LCI, the applicant arranged to warehouse it. Quang Tuyen Ha and Xuan Kim Ta arrived in Sydney from Vietnam soon thereafter in order to liaise with buyers in Sydney, oversee the drug handover and facilitate the receipt and remittance of sale proceeds. Around this time An Le arrived in Brisbane from the USA to assist with the extraction and supply process. The applicant and his brother An Le, under instructions from Quang Ha and with the assistance and guidance of Minh Le in Vietnam, accessed the roller drum and extracted the 177 concealed packages of methamphetamine. The evidence showed there was supposed to have been 178 rather than 177 packages. The applicant and his brother restored the drugs in the roller and prepared it ready for transportation to Sydney.

[12] The applicant arranged for Pham Lam, a delivery driver, to take the roller to an address in Sydney. The applicant also arranged for his brother and his employee, Si Cong Nguyen, to travel at the same time, shadowing the delivery truck. Delivery was made successfully on 18 October 2011 after which An Le, Quang Ha and Xuan Ta remained in Sydney to tend to the collection and remittance of the drugs sale proceeds.

[13] The third instance of trafficking involved the supply and sale to Thanh Vu Do of three packages of methamphetamine from the second consignment that had not been included in the above transportation. Thanh Vu Do flew to Brisbane and met with the applicant to arrange the handover and receipt of the drugs.

Dealing with proceeds of crime to the value of $100,000 or more

[14] The applicant dealt with a total of at least $219,700 of proceeds from drugs sold pursuant to the trafficking conspiracy in count 2. That money was passed on to the applicant after An Le, Quang Ha and Xuan Ta left the country. The applicant retained custody of the money until such time as he could arrange for it to be remitted back to Vietnam in amounts less than $10,000 at a time. He used a network of willing but unwitting associates to transfer the money back to Vietnam through an entity known as Ninh Son Homewares.

Appellant's role in the conspiracies

[15] The applicant had an active and important role in the conspiracies. Ha and Ta were at the top of the syndicate. An Le and the applicant occupied similar level, senior positions. Khoa and Minh were in more junior positions.

[16] The applicant met with his co-conspirators and participated in numerous coded telephone conversations with them throughout the periods of the two conspiracies in order to assist in monitoring, reporting, discussing and arranging the successful importations and trafficking of the drugs.

[17] His role was pivotal, in importing the drugs and then moving them on within Australia; effectively managing the coalescence of the end stages of the importations and the early stages of the trafficking. As the ostensibly legitimate importer of machinery, he made arrangements for the receipt and processing of the illicit incoming shipments, including Customs clearances. Further, he warehoused the machinery, checked, extracted and verified the amounts of drugs they contained, and arranged and facilitated the transportation and delivery of those drugs to the buyers.

Antecedents

[18] The applicant was 43 years old at the time of the offending and 49 years old at the time of sentence. His single previous conviction in the Magistrates Court in 2005 was for possession of articles in which copyrights subsisted. It was not said to be of relevance on sentence.

[19] The applicant was arrested on 22 December 2012, spending two days in presentence custody before being granted bail on 24 December 2012. His trial did not commence until 8 May 2018, over five years and four months later. That is an unusually long time between arrest and trial, not attributable to him, during which he was not alleged to have committed any other offences.

[20] The applicant was born in Vietnam, leaving there after high school to travel to Thailand as a refugee. He there met his wife in a refugee camp and she eventually sponsored him to come to Australia in 1999. They had three children but later divorced.

[21] The applicant had a history of employment in working in the repair and resale of machinery in electronic equipment. The applicant was a director of LCI Australia Pty Ltd, which imported and sold refurbished machinery. The evidence showed he had substantial debts and his legitimate business was floundering. By the time of sentence he no longer owned a business and worked for his son-in-law.

[22] There was no evidence of his retention of the proceeds of his offending, though he had obviously channelled significant proceeds to Vietnam.

The sentence below

[23] The sentence proceeding followed a trial. The applicant, to his credit, made various admissions at trial, shortening its length. Nonetheless, it was a lengthy trial, at which he was convicted on all counts.

[24] Various comparable decisions, cited later in these reasons, were referred to in sentencing submissions. Each demonstrated very significant terms of imprisonment are imposed for offending of this seriousness.

[25] The estimation of the amount actually imported was the subject of submissions by each counsel on sentence. The prosecution submitted the total gross weight was likely 95.5 kilograms and in any event many times greater than the commercial quantity threshold of 750 grams. Defence counsel acknowledged a significant amount of drug must have been imported. However, defence counsel disputed the total urged by the prosecution, noting such a large amount was unlikely to have been missed by customs and that the value of such an amount was disproportionate to the proceeds detected.[1] The learned sentencing judge observed in the course of submissions that, for the reasons identified by defence counsel, it was difficult to accept the total was as high as the prosecution contended for. Nonetheless her Honour reflected the debate did not matter greatly in that a significant quantity was obviously involved.[2]

[26] Her Honour's sentencing remarks were consistent with that thinking. Her Honour observed:

> "I accept that there was a significant quantity of drug imported. The amount cannot be accurately quantified. The Crown alleges in excess of 90 kilograms. The purity, however, cannot be confirmed. I accept that the jury, by their verdict, accepted that there was a significant quantity of drugs imported …"[3]

[27] Her Honour went on to observe of the first importation:

> "In this first importation which is alleged in July, it is alleged that there were some six kilograms involved. Once again, the amount cannot be exactly quantified, but I accept that there was a significant quantity involved."[4]

[28] Of the second consignment her Honour noted:

> "There were some 177 packages that were extracted and it was methamphetamine. It is not known what the quantity was in relation to that 177 packages. However, significant quantities were involved. As I have indicated already, it's not known what the purity was."[5]

[29] Later, still in her sentencing remarks, her Honour observed:

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1 AR Vol 2 p 606 LL32-45.
2 AR Vol 2 p 575 LL1-22.
3 AR Vol 2 p 609 LL15-18.
4 AR Vol 2 p 609 LL36-39.
5 AR Vol 2 p 610 LL14-17.

> "As I have already stated, the quantity and purity is not able to be determined. Whilst the Crown have alleged the total bulk amount was 94.5 kilograms, it is not able to be accurately determined, but I accept very, very large quantities have to have been imported. The substantive offence of importing a border-controlled drug in a commercial quantity means it has to be more than 750 grams. That was clearly the case. This was clearly many, many times greater."[6]

[30] The learned sentencing judge noted the pertinent aspects of the applicant's antecedents and his financial situation, observing:

> "Clearly, you were financially motivated for this offending. You clearly were suffering some financial hardship and were in debt at the time. However, you do not have any significant trappings of wealth. You are not living a lavish lifestyle, but you were clearly involved in sending large amounts of money to Vietnam, and that was to clear a debt that you had to your family."[7]

[31] While her Honour noted the applicant was unlikely to ever offend again, she emphasised the significant weight which needed to be attached to deterrence in a case of this kind, particularly having regard to the difficulty in detecting importation offences and the great social consequences that follow from such offending. Her Honour noted the essence of the criminality was an ongoing conspiracy between members of an organised criminal enterprise calculated at the importation and sale of large quantities of methamphetamine.

Consideration

[32] The applicant's complaint of manifest excess relies in part upon the imprecision surrounding the volume of drug imported. The point is emphasised that there was no actual evidence of the weight of each of the 177 packages and that references to the packages in the intercepted conversations may have been to packages weighing ounces or 100 grams, rather than the 500 grams argued by the prosecution.

[33] It is not submitted the learned sentencing judge, who did not accept the quantity argued for by the prosecution, erred by concluding that "significant", "very, very large quantities" were imported. Rather the imprecision regarding quantity is relied upon in contending the sentence is inconsistently high in comparison to sentences in other cases. That reliance is of limited utility for four reasons.

[34] Firstly, as the High Court concluded in *Wong v The Queen*,[8] the weight of the drug is relevant but not of chief importance in fixing sentence.

[35] Secondly, this was a conspiracy case. The actual importations were relied on only to evidence the conspiracies.

[36] Thirdly, as the High Court held in *Hili v The Queen*,[9] the expectation of consistency in sentencing is consistency in the application of relevant legal principles, not

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6 AR Vol 2 p 613 LL6-11.
7 AR Vol 2 p 616 LL15-19.
8 (2001) 207 CLR 584.
9 (2010) 242 CLR 520.

numerical or mathematical equivalence. In this field of sentencing those principles include that:

- primacy must be given to general deterrence;[10] and
- in sentencing for conspiracy the seriousness of an offender's role in and actions in carrying out the conspiracy are relevant[11] but not determinative in assessing the actual criminality being assessed, which is the agreement to participate in an organised criminal activity.[12]

Her Honour's sentencing remarks do not suggest any misapplication of such principles.

[37] Fourthly, the conspiracies, which continued for longer than a year, contemplated sophisticated criminal activity on a significant commercial scale. It may readily be inferred the conspiracies were cynically calculated at the importation and distribution of methamphetamine in bulk amounts. That inference is so compelling it is hardly to the point that the actual amounts of the obviously significant quantities in contemplation were not known.

[38] The applicant relies upon four decisions to attempt to demonstrate the sentence was manifestly excessive. None do so.

[39] Those decisions, all of which were placed before the learned sentencing judge, are *Papadimitriou v The Queen*,[13] *R v Yuan*,[14] *Director of Public Prosecutions (Cth) v Brown*[15] and *R v Scott*.[16] The applicant evidently places weight upon those cases because in each of them there was specific evidence as to the actual quantity of the kilograms of drug involved, whereas here there was not. However, it does not follow that the less specific nature of the evidence on that aspect here makes this case less serious than those relied on. That is not merely because it is so obvious that bulk amounts were under contemplation here. It is also because of the other indicia of the offending, such as the extent of the conspiracies, which were prolonged and calculated at importation as well as trafficking, and the applicant's pivotally important role in the point of coalescence of those missions.

[40] Turning to the cases, in *Papadimitriou* a 41 year old appellant, without relevant criminal history, was convicted after trial of one count of conspiracy to traffic in a commercial quantity of a controlled drug. He was sentenced to 17 years imprisonment with a 10 and a half year non-parole period. His uncle put him in contact with another offender for the purpose of providing practical support to enable 44 kilograms of MDMA, which had been imported into Australia, to be converted into Ecstasy tablets. Papadimitriou arranged for a granny flat to be procured and renovated to enable Ecstasy tablets to be produced there. He also arranged for the hire of a vehicle and driver to come from Melbourne to Perth in order to transport a pill press, chemicals and binding agents to be used in the production of potentially 350,000 tablets. The Western Australian Court of Appeal dismissed the appeal against sentence.

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10 *Wong v The Queen* (2001) 207 CLR 584.
11 *Savvas v The Queen* (1995) 183 CLR 1; also see *R v Olbrich* (1999) 199 CLR 270, 279.
12 *Tyler v The Queen* (2007) 173 A Crim R 458, 471-472.
13 [2011] WASCA 140.
14 [2015] NSWCCA 198.
15 (2017) 268 A Crim R 309.
16 [2017] SASCFC 96.

[41] The charged conduct in *Papadimitriou* only involved a conspiracy to traffic. It did not include a conspiracy to import. The present applicant's substantive roles in both forms of conspiracy marks his offending as more serious than that of Papadimitriou's.

[42] In *Yuan* the Crown appealed a sentence of 10 years with a non-parole period of six years for the offence of importing a commercial quantity of methamphetamine. Yuan was 29 years old without previous convictions and was convicted after a trial. He was a furniture importer who arranged for the receipt and storage of an imported container of five sofas in which were hidden 69 packages of methamphetamine totalling 68.845 kilograms. He hired a storage facility to store the container after it cleared customs. He assisted with and directed the unloading of the contents of the container, separating out the sofas for collection by others. The New South Wales Court of Criminal Appeal concluded the first instance sentence was manifestly inadequate, substituting a sentence of 15 years imprisonment with a non-parole period of 10 years.

[43] While Yuan was described as having been entrusted with a pivotal role in the single charge of importation, the present applicant's role in the charged conspiracies was more significant and the offending was more prolonged.

[44] In *Brown* the appellant was convicted of two counts of importing a commercial quantity of methamphetamine – on the first occasion 3.4 kilograms and, on the second, 44.7 kilograms. The drugs were hidden in engines, imported in containers. Brown was 31 years old and without previous convictions. He went to trial, unsuccessfully claiming that he had acted under duress. In respect of the first importation, Brown provided some minor assistance to another offender in the dismantling of the engines and removal of the packages of methamphetamine. He then took possession of the drugs and stored them before later handing the drugs over to another person. In respect of the second importation, Brown once again assisted another offender in dismantling the engines and took possession of the packages preparatory to their on-supply, which did not occur because of the intervention of Federal Police. He received an effective head sentence of 12 years imprisonment with a non-parole period of seven years. The Victorian Court of Appeal concluded the sentences were manifestly inadequate and substituted an effective head sentence of 20 years imprisonment with a non-parole period of 15 years. *Brown* therefore involves a head sentence equivalent to that imposed upon the present applicant and a non-parole period one year longer than the present applicant's non-parole period.

[45] Like Brown the present applicant was involved in the initial removal and movement of the methamphetamine after its arrival, however, unlike Brown, he was also pivotally involved in arrangements for the actual importation of methamphetamine into Australia. The level and extent of criminality engaged in by the present applicant was higher than Brown's, yet he received an identical head sentence and a slightly more lenient non-parole period.

[46] In *Scott* the appellant pleaded guilty to importing a commercial quantity of methamphetamine, importing a marketable quantity of the border-controlled precursor pseudoephedrine, trafficking in a large commercial quantity of a controlled drug cannabis and possessing prescribed equipment. He received an effective head sentence of 19 years and three months imprisonment with a non-parole period of 10 years eight months imprisonment. He was the sole director of a

company which sold stone pavers and imported tiles from Indonesia. He was caught on his return to Australia, after he travelled from Indonesia, with 1,394 tablets of pseudoephedrine. He was placed under surveillance. Investigators detected the presence of 60 packages of methamphetamine, each weighing a kilogram, contained within crates of tiles and pavers in a shipping container imported from Indonesia by him. The drugs were substituted with an inert substance and the packaging and container restored to its original state for continued surveillance. The container was delivered to the appellant's business where he unloaded the substituted substances and stashed them in separate places. One stash, weighing eight kilograms, was the appellant's share of the shipment. Police intervened. In a further search of another storage container of the appellant's they found 20 bags of cannabis weighing a total of nine kilograms, along with various hydroponic equipment. The appellant was 45 years old with two convictions for minor drug matters. The appeal against sentence was dismissed by the South Australian Court of Criminal Appeal, with the 10 year non-parole period being described as "merciful".

[47] Material differences as between that matter and the present include that the present applicant fell to be punished not for acts of importation but for his significant role in two prolonged conspiracies and that Scott pleaded guilty. The applicant's decision to go to trial removed any prospect of a "merciful" non-parole period.

[48] The above cases do not suggest the present sentence was so excessive as to bespeak error. To the contrary, they tend to confirm that the sentences imposed were within the range of sentence which should result from a proper and consistent application of legal principles to this field of sentencing.

[49] The only unusual aspect of this matter, which might potentially have set it apart from other broadly similar cases, was the regrettably long time it took to progress this matter from arrest to trial. The learned sentencing judge expressly indicated she took into account that the delay was not the applicant's fault and that the applicant had been of good behaviour in the interim. It should be borne in mind the applicant was in fact guilty but nonetheless chose to go to trial. There is no suggestion here that he could not have been sentenced without material delay had he been prepared to admit his guilt. His good behaviour during the long delay may have been a more compelling consideration in mitigation if this were a case where the applicant had pleaded guilty and the delay in entering that plea was not his fault. In any event, the sentence imposed, including the non-parole period (a period more generous than in *Brown*), does not suggest her Honour gave insufficient weight to the applicant's good behaviour while awaiting disposition of the case.

[50] The applicant has no prospect of demonstrating error. I would refuse leave to appeal the sentence.

Order

[51] I would order:

Application for leave to appeal sentence refused.

[52] **BRADLEY J:** I agree with the reasons for judgment of Henry J and the order proposed by his Honour.