SUPREME COURT OF QUEENSLAND

CITATION:	*R v Ngo; R v Truong* [2010] QCA 151
PARTIES:	**R** **v** **NGO, Hi** (applicant) **R** **v** **TRUONG, Thanh Hieu** (applicant)
FILE NO/S:	CA No 226 of 2009 CA No 231 of 2009 SC No 645 of 2009
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	18 June 2010
DELIVERED AT:	Brisbane
HEARING DATE:	4 June 2010
JUDGES:	Holmes and Muir JJA and Mullins J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**In each appeal:** **1. The application for leave to appeal be allowed;** **2. The appeal be allowed;** **3. The sentence imposed by the sentencing judge be set aside, but to the extent only that a non-parole period fixed at 24 months be substituted.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – SENTENCE MANIFESTLY EXCESSIVE OR INADEQUATE – applicants convicted after guilty pleas of conspiring with their co-accused with the intention of dishonestly causing a loss to the Commonwealth – applicants sentenced to four years and six months imprisonment with a non-parole period of three years – applicants submitted that the sentencing judge erred in accepting he was bound to order the applicants' release after serving 60 - 66 per cent of the head sentence and that fixing the non-parole period as he did resulted in the sentence being manifestly excessive – whether sentencing judge failed to

have sufficient regard to sentencing principles – whether sentencing judge gave sufficient weight to the circumstances of the case – whether sentence manifestly excessive

Crimes Act 1914 (Cth), s 16A

Caratti v The Queen (2000) 22 WAR 527; [2000] WASCA 279, considered
Director of Public Prosecutions (Commonwealth) v Rowson [2007] VSCA 176, considered
Lowe v The Queen (1984) 154 CLR 606; [1984] HCA 46, cited
R v CAK & CAL; ex parte Cth DPP [2009] QCA 23, disapproved
R v Cappadona (2001) 122 A Crim R 52; [2001] NSWCCA 194, considered
R v Chen (unreported, O'Brien DCJ, District Court, Qld, 30 August 2001), cited
R v Costi [2001] QCA 404, cited
R v Fidler [2010] QCA 25, approved
R v Marshall [2010] QCA 29, approved
R v McQuire (No 2) (2000) 110 A Crim R 348; [2000] QCA 40, cited
R v Ruha, Ruha & Harris; ex parte Cth DPP [2010] QCA 10, approved
R v Tilley (1991) 53 A Crim R 1, cited
R v Togias (2001) 127 A Crim R 23; [2001] NSWCCA 522, cited
Ryan v The Queen (2001) 206 CLR 267; [2001] HCA 21, cited

COUNSEL:

In CA No 226 of 2009:
P E Smith for the applicant
G Long SC for the respondent

In CA No 231 of 2009:
A Glynn SC for the applicant
G Long SC for the respondent

SOLICITORS:

In CA No 226 of 2009:
Legal Aid Queensland for the applicant
Director of Public Prosecutions (Cth) for the respondent

In CA No 231 of 2009:
Fisher Dore for the applicant
Director of Public Prosecutions (Cth) for the respondent

[1] **HOLMES JA:** I agree with the reasons of Muir JA and with the orders he proposes.

[2] **MUIR JA: Introduction**
The applicant, Hi Ngo, was convicted after a plea of guilty of between 24 May 2001 and 11 November 2004 at Brisbane conspiring with his co-accused, Sen Hung Chen

and Chiu Yuan Hsiao, with the intention of dishonestly causing a loss to the Commonwealth (count 1). The applicant, Thanh Hieu Truong, was also charged with conspiring with his co-accused, Chen and Hsaio, during the same period, with the intention of dishonestly causing a loss to the Commonwealth (count 2). The applicants and their co-accused each pleaded guilty and were convicted of the offences.

[3] Hsiao pleaded guilty to and was convicted of the offence of between 1 January 2003 and 11 November 2004 dealing with money valued at $1,000,000 or more, intending that the money would become an instrument of crime (count 3). Chen pleaded guilty to and was convicted of a like money laundering offence over the same period (count 4).

[4] The sentences imposed on each of the offenders, who were sentenced at the same time after a single sentencing hearing, were as follows:

Ngo: four years and six months imprisonment with a non-parole period of three years;

Truong: four years and six months imprisonment with a non-parole period of three years;

Chen: six years imprisonment for each of counts 1 and 2; and 10 years and six months imprisonment with a non-parole period of seven years for count 4; and

Hsiao: five years and three months imprisonment for each of counts 1 and 2; and seven years and six months with a non-parole period of three years for count 3.

The offending conduct

[5] Chen and Hsiao (Chen's wife) established and operated two duty free stores in connection with which they had authority to sell tobacco products on which no duty had been paid, duty free to prescribed persons, essentially travellers, including ships' crews. Chen and Hsiao instituted a system under which for a period of some years they sold duty free tobacco products to domestic purchasers avoiding payment of the prescribed duty and benefiting from the lower price of duty free tobacco. In furtherance of their scheme and to avoid detection, they created false documents to show to customs officers and officers of the Australian Taxation Office. In that regard, they obtained photocopies of passports and other identification documents of members of ships' crews. They also made unauthorised use of passports and identification documents provided to them for legitimate purposes. The signatures of customers on false invoices were forged. In order to create the appearance of authenticity, forged ships' stamps were obtained, initially with the assistance of Truong. The total amount of customs and excise duty evaded through the use of the two duty free stores was at least $8,280,000.

[6] Chen and Hsiao were the major beneficiaries of the profits realised through the non-payment of duty. The sentencing judge found they carried out "a large-scale money laundering operation involving the establishment of numerous accounts at a bank which they operated and into which they placed the cash proceeds from the [illegal] domestic sales of cigarettes and tobacco …". They deposited in such accounts sums smaller than $10,000 in order to avoid the reporting requirements of the *Financial Transaction Reports' Act* 1988 (Cth). A total of 449 deposits of cash totalling $3,400,250 were paid into these accounts. Of that sum, $2,419,170 went into the personal accounts of Chen family members.

[7] The sentencing judge held that it was an aggravating feature of the money laundering offences that the offenders were principals in the operation, were laundering their own money and were the beneficiaries of the offences. He accepted the prosecution's submission that tax evasion and money laundering were not to be regarded as victimless crimes, but as a form of corruption requiring general deterrence, as well as particular deterrence.

[8] The sentencing judge found that as each of Ngo and Truong had a similar role in the conspiracy they should be sentenced similarly. It was found that their involvement in the conspiracies was less than that of Chen and Hsiao. They collected and distributed quantities of cigarettes and tobacco once or twice a week over the offending period. Ngo removed duty free labels from the packaging and sold cigarettes and tobacco to numerous small businesses and individuals. An analysis of his bank accounts and financial affairs revealed that the amount of cash found at his house, in his safe deposit box, when added to unexplained cash deposits in accounts operated by him and cash paid on his credit cards, totalled $805,831.07.

[9] The sentencing judge found that Ngo appeared to have received some payment for his services from Chen. He found also that he had pleaded guilty at a late stage and had not been willing to cooperate with law enforcement authorities in the investigation of his offence or other offences.

[10] The sentencing judge found that Truong sold cigarettes to only one customer and that he had cooperated with Chen in obtaining stamps to apply to fraudulent invoices. The agreed statement of facts shows that Truong made his purchases on a regular basis and that he paid Hsiao in cash. The evidence did not reveal whether there was any material disparity in the quantities of product purchased by Ngo and Truong. Truong's counsel informed the sentencing judge that his client estimated that he had benefited from the conspiracy to the extent of an estimated $450,000. There was no financial analysis made of his affairs. Truong also encouraged a potential witness to give a false statement to police and to a customs officer. Truong also pleaded guilty at a late stage.

Ngo's circumstances

[11] Ngo was without a criminal history. He was born in 1958 in Vietnam where he trained as a teacher before moving to Australia in 1977. He worked as a bank officer for approximately 16 years before starting a food exporting business. Between 2002 and 2004 he started to operate as a share trader. His wife was employed as a clerk and their 17 year old son attended secondary school. Ngo's wife suffered a mental breakdown as a result of the applicant's re-arrest in 2007 and underwent extensive surgery in 2004 and 2006 for cancer. She has other "health problems" and suffers from depression. It is unlikely that Ngo will re-offend.

Truong's circumstances

[12] Truong, who had no prior criminal history, was 51 years of age when sentenced. He was born in Saigon and completed his education there. He is married with an employed child and two children of school age. In 1990 he and his wife opened a travel agency. That business was closed recently as a result of the applicant being declared a bankrupt. Truong has demonstrated remorse and it appears unlikely that he will re-offend.

Submissions of counsel for Ngo

[13] Counsel for Ngo did not contend that the head sentence of four and a half years was manifestly excessive: defence counsel on the sentencing hearing submitted that the appropriate sentence was four to four and a half years with a non-parole period of

16 to 18 months. The contention is that the non-parole period was fixed on an erroneous basis as the prosecution submitted, and the sentencing judge appears to have accepted, that it was appropriate, having regard to recent Court of Appeal decisions, that the starting point when considering the parole release period for Commonwealth offences was 60 to 66 per cent of the head sentence.[1] Reliance was placed on *R v Ruha, Ruha & Harris ex parte; Cth DPP*.[2] Ngo's non-parole period was fixed at 66 per cent of his head sentence. His counsel submits that the pre-release period should have been no longer than one year and six months.

[14] Counsel for Ngo submitted that the sentencing judge failed to have sufficient regard to:

(a) The plea of guilty which saved the cost of a substantial trial;
(b) The absence of prior convictions;
(c) Ngo's wife's health problems;
(d) The difficulties facing his son in Year 12 in secondary school;
(e) His good character references;
(f) A favourable psychological report which showed good prospects of rehabilitation; and
(g) The fact that he had not re-offended in the five year period between the conclusion of the offending conduct and the date of his conviction.

Submissions of counsel for Truong

[15] Counsel for Truong, who adopted the submissions of counsel for Ngo based on *R v Ruha*, argued that the sentence imposed on Truong was so high in comparison with the sentences imposed on Chen and Hsiao, having regard to the greater extent of their criminal conduct, as to give rise to a justifiable sense of grievance on Truong's part. Reliance was placed on *Lowe v The Queen.*[3] Counsel pointed out that Chen and Hsiao planned the venture in which Ngo and Truong played relatively minor roles and benefited from their criminal conduct to a much greater extent than did Ngo and Truong. Reliance was placed on mitigating factors similar to those relied on by Ngo.

Consideration

[16] It seems plain from the sentencing remarks that the sentencing judge proceeded on the basis of the existence of a "norm" or "practice" that in fixing a parole release date, a point between 60 and 66 per cent of the head sentence should be adopted unless there were circumstances which operated to displace that prima facie position. That approach was in error.

[17] The following observations in *R v Fidler*[4] with which Holmes and Chesterman JJA, concurred, are pertinent:[5]

> "Reference to recent decisions also leads to the conclusion that the general uniformity of approach referred to in *R v CAK & CAL* does not exist except in relation to drug offences, or, at least, some such offences.[6]

---

1 Record, 129.
2 [2010] QCA 10; *R v Fidler* [2010] QCA 25; and *R v Marshall* [2010] QCA 29.
3 (1984) 154 CLR 606.
4 [2010] QCA 25.
5 At paras [27] – [29].
6 See e.g. *R v Ruha, Ruha & Harris; ex parte Commonwealth DPP* [2010] QCA 10; *R v Robertson* [2008] QCA 164; *R v Mokoena* [2009] QCA 36; *Bertilone v The Queen* (2009) 231 FLR 383; *R v Nguyen and Tran* [1998] VR 394 and *R v Woods* (2009) 24 NTLR 77.

> But, regardless of the existence of any general approach to the fixing of a non-parole period or the making of a recognizance release order, a court exercising its discretion must have regard to all relevant circumstances and not, in effect, abdicate its responsibilities by the mechanical application of a pre-determined formula.[7] The proper approach to the setting of pre-release periods under recognizance release orders is discussed at length in *R v Ruha, Ruha & Harris*. Neither counsel for the respondent nor the applicant sought to cast doubt on or to distinguish the principles articulated in that decision.
>
> In the circumstances, I will content myself with the following further observations. In the exercise of the sentencing discretion reasonable consistency in sentencing is an important consideration.[8] Where Commonwealth offences are concerned, the achievement of reasonable consistency 'will usually require recognition of decisions of other States where those decisions concern like cases'.[9] However, practices which may arise in some jurisdictions should not be permitted to operate as a practical fetter on the exercise of a sentencing court's discretion or to erode the obligation to comply with the requirements of s 16A of the *Crimes Act* 1914 (Cth). Attempts to prescribe the circumstances in which departure from a perceived sentencing norm or practice is justified may assist in improving consistency of sentencing but are likely to discourage the proper exercise of the sentencing discretion by reference to all relevant considerations."

[18] Because of the sentencing judge's understanding of the effect of decisions of this Court in determining the time the applicant would be required to spend in actual custody prior to his release he failed to have sufficient regard to s 16A of the *Crimes Act* 1914 (Cth) which provides that in determining the sentence to be passed "or the order to be made … a court must impose a sentence or make an order that is of a severity appropriate in all the circumstances of the offence". Section 16A(2) requires a sentencing court to take into account the matters listed in paragraphs (a) to (p) inclusive. The more relevant of these provisions are:

> "(a) the nature and circumstances of the offence;
>
> …
>
> (d) the personal circumstances of any victim of the offence;
>
> …
>
> (f) the degree to which the person has shown contrition for the offence:
>
> (i) by taking action to make reparation for any injury, loss or damage resulting from the offence; or
>
> (ii) in any other manner;
>
> (g) if the person has pleaded guilty to the charge in respect of the offence—that fact;
>
> …

---

7 See e.g., *R v Ngui and Tiong* [2000] 1 VR 579 at 583; *R v Harkness* [2001] VSCA 87 and *Bertilone v The Queen* (2009) 231 FLR 383.

8 *Wong v The Queen* (2001) 207 CLR 584 at para [6] - [8] per Gleeson CJ and *Lowe v The Queen* (1984) 154 CLR 606 at 610 - 611.

9 *R v Tran* [2007] QCA 221 at para [8].

(m) the character, antecedents, age, means and physical or mental condition of the person;

(n) the prospect of rehabilitation of the person;

…'"

[19] Although both applicants pleaded guilty at a late stage it was, nevertheless, important to acknowledge their guilty pleas by reducing their sentences. Section 16A(2) required guilty pleas to be taken into account.[10] The guilty pleas obviated the need for a lengthy trial, thus conserving the time and resources of the prosecution and others.[11]

[20] A psychologist's report before the sentencing judge revealed that Ngo had been treated for depression and anxiety disorders and that further treatment was recommended in that regard. The report showed that he had "obsessional thoughts regarding the current legal proceedings … [and] feels a great deal of guilt and remorse for the plight of his family and the collapse of his business … he has expressed his sorrow for being involved in the business relationship with the two other perpetrators". The evidence suggested that the applicant's prospects of rehabilitation were good.

[21] Mrs Ngo's mental and physical health was poor. In reliance on *R v Togias,*[12] counsel for the respondent submitted that before familial hardship could operate to reduce a sentence, it was necessary to show exceptional hardship. The applicant's counsel did not question this proposition. Nor did counsel suggest that the following observations of Thomas J in *R v Tilley*[13] referred to with approval in *R v Costi*[14] were not applicable:

> "Mention has been made of the hardship that would result in view of the fact that [the offender] would be parted, if a greater custodial term were imposed, from her two and half-year-old daughter. Courts, of course, take account of such matters in a number of ways but are not overwhelmed by them. It is well recognised that very often a prison sentence will result in equal hardship to persons other than the offender. In the case of a male, his wife and children may be the ones who suffer because they lose a father and a person who provides financial support. In the case of a female, it may mean the temporary loss of a mother. It is common that hardship or stress is shared by the family of an offender but that may be an inevitable consequence if the offender is to be adequately punished. An offender cannot shield himself under the hardship he or she creates for others, and courts must not shirk their duty by giving undue weight to personal or sentimental factors. The public, which includes many people who struggle to bring up their children with moral standards, would be poorly served if the courts gave in to the temptation. In making these remarks, I have had regard to *Boyle* (1987) 34 A Crim R 202; *Moore v Fingleton* (1972) 3 SASR 164 and D A Thomas, *Principles of Sentencing*, pp 211-212, and *Current Sentencing Practice* (1982), par C4(2)(a)."

---

10 *Ryan v The Queen* (2001) 206 CLR 267 at 275.

11 C.f. *R v McQuire (No 2)* [2000] QCA 40.

12 (2001) 127 A Crim R 23 at paras [16] and [79] - [80].

13 (1991) 53 A Crim R 1 at 3 - 4.

14 [2001] QCA 404 at 6.

[22] It therefore does not appear to me that Mrs Ngo's health has much bearing on the exercise of the sentencing discretion.

[23] A psychiatrist, in a report prepared by him for Truong's solicitors, was of the opinion that Truong had some psychiatric conditions which affected his mental functions. It was not suggested that these disorders caused the offending conduct. Truong's prospects of rehabilitation also appeared to be good. These were all factors which s 16A(2) required to be considered. Also relevant were the ages, good work histories, lack of prior criminal histories and the applicants' non-offending in the five years before their sentencing. Although previous good character must be taken into account,[15] it is not regarded as a mitigating factor of much weight where the offender has defrauded the revenue in a calculated systematic way.[16] On the other hand, the authorities emphasise the importance of general deterrence in sentencing for such offences.[17]

[24] It is now appropriate to consider the application of the parity principle which was invoked by counsel for Truong and later embraced by counsel for Ngo. It is the obligation of a sentencing judge in sentencing an offender for more than one offence, to fix an appropriate sentence for each offence.[18] Counsel for the applicants submitted, and I accepted, that the sentencing judge gave careful consideration to each of the sentences imposed on Chen and Hsiao.

[25] In *Lowe v The Queen*,[19] Gibbs CJ[20] said that in order to invoke the parity principle the disparity in the sentences under consideration must be "such as to give rise to a justifiable sense of grievance, or in other words to give the appearance that justice has not been done". His Honour also observed in *Lowe*, that:[21]

> "It is obviously desirable that persons who have been parties to the commission of the same offence should, if other things are equal, receive the same sentence, but other things are not always equal, and such matters as the age, background, previous criminal history and general character of the offender, and the part which he or she played in the commission of the offence, have to be taken into account."

[26] It is plainly the case that the offending conduct of Chen and Hsiao was much greater than that of Ngo and Truong. In recognition of this, the sentencing judge imposed on Chen a head sentence for each conspiracy offence of eight years reduced to six to take into account his guilty plea, and for Hsaio, seven years reduced to five years and three months to take into account a guilty plea. In Hsaio's case the sentencing judge set a non-parole period of three years because of the finding that she acted at her husband's direction and was the carer of her severely disabled 30 year old son. There was psychiatric evidence of Hsaio's dependent personality.

[27] In considering the application of the parity principle it is not possible, as the applicants' counsel sought to do, to ignore the time Chen will have to serve in

---

15 *Ryan v The Queen* (2001) 206 CLR 267 at 275.

16 *R v Cappadona* (2001) 122 A Crim R 52 at para [23]; *DPP v Hamman* (unreported, CCA, NSW, No's 60388 and 60457 of 1998, 1 December 1998); *R v Ronen & Ors* [2005] NSWSC 991 at para [109] and the cases they cited.

17 *Director of Public Prosecutions (Cth) v Goldberg* (2001) 184 ALR 387 at para [51]; *R v O'Connor* [2002] NSWCCA 156 at para [37] citing *DPP v Hamman* (unreported, CCA, NSW, No's 60388 and 60457 of 1998, 1 December 1998).

18 *Pearce v The Queen* (1998) 194 CLR 610 at 623, 624.

19 (1984) 154 CLR 606.

20 At 610.

21 At 609.

custody before his parole release date. Under his money laundering sentence of 10 years he has a non-parole period of seven years. In effect, his lesser offence has been subsumed in the greater. Concurrent sentences were appropriate as the more serious offence was, in a sense, a product of the lesser and an extension of it. However, because of the conclusion I have reached as to the appropriate sentences to be imposed, it is unnecessary to pursue the parity argument further. If there was a legitimate complaint about lack of parity, it will be redressed adequately by the sentence I propose.

[28] In support of his submission that the sentence imposed on his client was too high, counsel for Ngo referred to: *Caratti v The Queen*;[22] *Director of Public Prosecutions v Rowson*;[23]; *R v Chen*;[24] and *R v Cappadona*.[25] In *Caratti*, the offender and his father fraudulently avoided tax over a lengthy period causing a loss to the revenue of approximately $570,000. The offender's father died and the offender continued the fraudulent practices for two years before being detected. The offender was sentenced to four and a half years imprisonment with a non-parole period of two years and three months. It was held on appeal that the sentencing judge had erred by sentencing on the basis that the tax avoided was $1,000,000. A sentence of three years with parole eligibility after 18 months was substituted for the sentence at first instance.

[29] The Victorian Court of Appeal in *Rowson*, an appeal by the Director of Public Prosecutions, substituted an effective sentence of five years imprisonment with a non-parole period of three years for a sentence of imprisonment of three years and one day with a non-parole period of 18 months. The offender had dishonestly obtained refunds of goods and services tax totalling over $2,400,000 and had attempted to obtain refunds of such tax of $1,333,173. The 31 year old offender in *Chen*, who participated in a scheme under which in excess of $1,000,000 sales tax was avoided, was sentenced to five years imprisonment with a non-parole period of 15 months.

[30] In *Cappadonna*, the offender, whose undeclared payments of cash to employees and sub-contractors over a period of about five years deprived the revenue of about $3,500,000, would have been sentenced to a term of five years imprisonment were it not for the operation of s 16G of the *Crimes Act* 1914 (Cth), an early plea of guilty, the fact that he was being re-sentenced on an appeal by the Director of Public Prosecutions and his cooperation with the authorities.

[31] These comparable decisions appear to me to support the applicants' counsels' submissions that the sentences imposed were high. Counsel for the respondent relied on a number of sentences which were conveniently digested in a schedule. These sentences concerned losses to the revenue ranging from just over $1,000,000 to $20,000,000. A feature of the subject offending conduct of the applicants, not present in most of the decisions relied on by the respondent, was the applicants' subsidiary roles.

[32] Consideration of the decisions relied on by all counsel leads me to the conclusion that the sentences of four years and six months imprisonment should not be

---

22 [2000] WASCA 279.
23 [2007] VSCA 176.
24 Unreported, O'Brien DCJ, District Court, Qld, 30 August 2001.
25 (2001) 122 A Crim R 52.

disturbed but that a non-parole period of two years should be set. That will give appropriate recognition to the late pleas of guilty and the other mitigating factors discussed above.

Conclusion

[33] In each appeal, I would order that:

- the application for leave to appeal be allowed;
- the appeal be allowed;
- the sentence imposed by the sentencing judge be set aside, but to the extent only that a non-parole period fixed at 24 months be substituted.

[34] **MULLINS J:** I agree with Muir JA.