SUPREME COURT OF QUEENSLAND

CITATION:	*R v Thathiah* [2012] QCA 195
PARTIES:	**R** **v** **THATHIAH, Nageswararao** (appellant)
FILE NO/S:	CA No 347 of 2011 SC No 302 of 2011
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction & Sentence
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	20 July 2012
DELIVERED AT:	Brisbane
HEARING DATE:	11 July 2012
JUDGES:	Margaret McMurdo P, Fraser and White JJA Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. Appeal dismissed.** **2. Refuse the application for leave to appeal against sentence.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – VERDICT UNREASONABLE OR INSUPPORTABLE HAVING REGARD TO EVIDENCE – APPEAL DISMISSED – where the appellant was convicted by a jury of importing a commercial quantity of a border controlled drug (methamphetamine) contrary to s 307.1(1) of the *Criminal Code* 1995 (Cth) – where the issue at trial was whether the prosecution could prove beyond reasonable doubt that the appellant knew the bag contained prohibited drugs – where the appellant neither gave nor called evidence – where the case was circumstantial – whether there was some other reasonable hypothesis consistent with innocence – whether the verdict reached by the jury was unsafe or unsatisfactory or unreasonable CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – SENTENCE MANIFESTLY EXCESSIVE OR INADEQUATE – where the appellant was convicted of importing a commercial quantity of a border controlled drug (methamphetamine) contrary to s 307.1(1) of

the *Criminal Code* 1995 (Cth) – where the appellant was sentenced to 10 years imprisonment with a non-parole period of five years and a fixed parole release date – whether the sentence was manifestly excessive

Crimes Act 1914 (Cth), s 16A(2)
Criminal Code 1995 (Cth), s 307.1(1), s 314.1

Azzopardi v The Queen (2001) 205 CLR 50; [2001] HCA 25, cited
Bridge v The Queen (1964) 118 CLR 600; [1964] HCA 73, considered
M v The Queen (1984) 181 CLR 487; [1994] HCA 63, considered
MFA v The Queen (2002) 213 CLR 606; [2002] HCA 53, applied
Plomp v The Queen (1963) 110 CLR 234; [1963] HCA 44, cited
R v Bala [2000] QCA 436, considered
R v Chai & Lim [1998] QCA 187, considered
R v Dehghani; ex parte DPP (Cth) [2012] 1 Qd R 339; [2011] QCA 159, considered
R v Tran (2007) 172 A Crim R 436; [2007] QCA 221, followed
Shepherd v The Queen (1990) 170 CLR 573; [1990] HCA 56, applied
SKA v The Queen (2011) 243 CLR 400; [2011] HCA 13, applied
Weissensteiner v The Queen (1993) 178 CLR 217; [1993] HCA 65, cited

COUNSEL: S Hogg for the applicant/appellant
M E Johnson for the respondent

SOLICITORS: No appearance for the applicant/appellant
Director of Public Prosecutions (Commonwealth) for the respondent

[1] **MARGARET McMURDO P:** The appeal against conviction should be dismissed. It is not suggested the jury were misdirected as to the law. White JA has reviewed the whole of the evidence at trial. That evidence came solely from the prosecution. It is irrelevant to the determination of this appeal that the appellant did not give or call evidence. It is a fundamental principle of our criminal justice system that an accused person is not obliged to do so. Courts must be cautious not to erode this principle: see *Dyers v The Queen*.[1] That said, after reviewing the whole of the evidence at trial, I am persuaded that it was open to the jury to be satisfied beyond reasonable doubt of the appellant's guilt.

[2] I agree with White JA's reasons for refusing the application for leave to appeal against sentence.

[3] I agree with the orders proposed by White JA.

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1 (2002) 210 CLR 285, 305 [52] Kirby J agreeing with Callinan J at 328–329 [125].

[4] **FRASER JA:** I agree with the reasons for judgment of White JA and the orders proposed by her Honour.

[5] **WHITE JA:** The appellant was charged that on 18 September 2010 at Brisbane he imported a commercial quantity of a border controlled drug, namely, methamphetamine, contrary to s 307.1(1) of the *Criminal Code* 1995 (Cth). He was convicted after a short trial and sentenced to imprisonment for 10 years with a non-parole period of five years with a fixed parole release date of 18 September 2015. The time in pre-sentence custody of 390 days was declared as time served under the sentence.

[6] The appellant appeals his conviction on the sole ground that it is unsafe and unsatisfactory and not according to law. He also seeks to appeal his sentence on the ground that it was manifestly excessive.

[7] Mr Stephen Hogg, who appeared *pro bono* for the appellant, was granted leave to file an amended outline of submissions in substitution for that filed by the appellant. Until very recently the appellant was without legal representation. The court is grateful to counsel for his assistance.

[8] At the commencement of the trial, after the prosecutor's opening, the appellant made certain admissions, namely that he had travelled by air from Ho Chi Minh City, Vietnam, to Brisbane via Brunei Airport, arriving in Brisbane on Royal Brunei Airlines on 18 September 2010; he checked in one piece of luggage at Ho Chi Minh City which was tagged to Brisbane; he travelled on a Malaysian passport; he collected that same bag from a carousel at Brisbane Airport on arrival when requested to do so by immigration officers; on examination the bag was found to contain four plastic bags of white powder which were concealed in the lining of the bag; scientific examination of that powder revealed that it contained methamphetamine with a total weight of powder of 1975.6 grams, the weight of pure methamphetamine was 1454 grams, giving an average purity of 73.6 per cent.[2]

[9] What was in issue at the trial was whether the prosecution could prove beyond reasonable doubt that the appellant intended to import illegal drugs into Australia, that is, that he knew the bag contained prohibited drugs.

The evidence at trial

[10] At about 6.00 am on 18 September Ms Kate Benfer was on duty at the Brisbane airport as an inspector with the Department of Immigration and Citizenship. When the appellant arrived at the immigration booth having filled in an incoming passenger card and having presented his passport, according to Ms Benfer, he fitted a profile which led her to accost him from her position behind the passport stamping booth to ask him further questions.

[11] In response to those questions the appellant said that he was a member of "Angotta Rela" and undertook immigration duties such as helping Malaysian immigration authorities to find illegal workers. He also worked part-time for "Manpower" for a Mr Kumar in Vietnam, providing information on Malaysian

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[2] Initially, the admissions made referred to methylamphetamine (exhibit 1 at AR 147). Evidence was given that the terms methamphetamine and methylamphetamine are used interchangeably (at AR 67-8). As s 314.1 *Criminal Code* (Cth) refers only to methamphetamine (the indictment charged the appellant with importing methamphetamine), the admissions were later discussed using that term.

immigration requirements for workers from Vietnam to work in Malaysia. The appellant told Ms Benfer that Mr Kumar had paid for his airline ticket, having told him that he was to take a holiday in Australia. The appellant told her that he did not know what he would do while in Australia nor what he would see but that he had friends and relatives in Brisbane although not their telephone numbers and would need to call Malaysia to obtain those numbers.

[12] The appellant told Ms Benfer that he had booked one night's accommodation at the Astor Hotel in Brisbane which would cost $200. Evidence at the trial indicated that a booking had been made in another name at the Astor Hotel which was changed within the previous 24 hours. The appellant had travelled to various overseas countries including Mali and Indonesia, which, he said, was to help recruit workers to Malaysia.

[13] When the appellant had retrieved his luggage at the request of Ms Benfer from the carousel he was taken to a secondary examination area. A customs officer, Ms Jenni Ramage, initially x-rayed the appellant's bag for safety reasons. She asked the appellant if he had read the questions on the incoming passenger card, understood those questions, and whether his signature appeared on the card. He responded affirmatively. When asked, he also said that he was fully aware of all of the contents of his bag and that he had packed it himself. Before Ms Ramage opened the bag the appellant said that he had about $900 in US currency in his wallet.

[14] The bag had three separate compartments held closed by zippers. Two of the compartments were on the sides of the bag. Each was opened. The contents comprised clothing and toiletries which were turned out on a bench. Ms Ramage picked up the bag. Its weight suggested that, although apparently empty, there was something still in it. An ion scan to detect the presence of drugs was done on the bag, the appellant's shoes and his jacket with negative results.

[15] A second customs examination officer, Mr Raymond Waugh, then attended. He x-rayed the bag. That procedure revealed an organic substance on either side of the bag. Mr Waugh, who was holding a small folding knife, picked up the bag saying that he was going to make a cut in the lining. The appellant protested. Mr Waugh said that it was thought that there was something inside the lining and it was necessary to make a small cut to check. The appellant, according to Ms Ramage, said:

> "But it's my boss's bag. He will be upset if it's damaged."[3]

[16] While the bag was taken away Ms Ramage examined the other contents. The toiletries bag contained what might have been regarded as the usual items for a man. The clothing was, however, in various sizes. There were size 30 pants; size 34 pants suitable to the passenger's build; some pants of size 40 - much too big for a man of the appellant's build - a size 10 pair of jeans suitable for a woman or a child; and underwear and socks. The clothing did not appear new.

[17] At about 6.46 am as a result of information given by a colleague, Ms Ramage informed the appellant that some items located in his bag were prohibited. She administered the usual caution. He asked what "prohibited" meant. Ms Ramage explained that they were items not permitted to be brought into

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[3] AR 60.

Australia and which appeared to be inside his bag. The appellant said he had only clothes and nothing prohibited in his bag. An Australian Federal Police Officer attended.

[18] Mr Waugh gave evidence that when the lining of the bag was cut a crystal-like substance was found. It was tested and proved positive for an illegal substance.

[19] Ms Catherine Farrugia, an AFP scientific officer, examined and photographed the bag. She described it as a

> "trolley style soft-sided suitcase [with] a retractable handle on one end and some plastic wheels on the other. It [had a] zipper across the top, sort of like a briefcase."[4]

Ms Farrugia found a section in the front and back panels of the bag comprised of cardboard and tape and yellow padded material secreted in the lining. She opened them and found inside each of the two sections two plastic bags containing amounts of white crystalline substance which, after testing, was consistent with methamphetamine. A perusal of the bag, which was tendered as exhibit 4, shows it to be a smallish, soft travel bag, rather like a sports bag, with a main section and two smaller zippered "pockets" on the side. It was about the size of a large soft cabin bag. It has grip handles over the top and a retractable handle at one end and wheels at the other (removed by Ms Farrugia) so that it could be pulled along "on end".

[20] The appellant was observed to have apparently fallen asleep about 7.30 am while tests were carried out.

[21] The principal investigating officer, Federal Agent David Reynolds, gave evidence in cross-examination that there were no anomalies associated with the appellant's passport. His enquiries showed that the accommodation at the Astor Hotel had been made by an organisation in Malaysia named Triways and that the name of the person who was to be staying had been changed to the appellant's 24 hours before the appellant arrived in Australia, from another Malaysian name. Nothing of any forensic value was obtained from the four SIM cards taken from the appellant. Fingerprint checks sent to Malaysia returned no criminal history. One fingerprint only was found on the bag, not that of the appellant, and was in the lining of the bag. Federal Agent Reynolds admitted in cross-examination that despite being given information by the appellant about his employment, the travel agency and that the bag belonged to his boss, Mr Kumar, it was unlikely that any investigations were made in south east Asia to test the accuracy of the information.

[22] The appellant neither gave nor called evidence.

[23] After the close of the prosecution case the jury sent a note asking about the street value of the drugs. The primary judge explained, with the agreement of counsel, that there was no evidence of value but that there was a tiered system of quantities in the legislation. A commercial quantity, with which the appellant had been charged, was at the top of the tier which affected penalty. They were warned not to speculate about the value.

The appellant's submissions

[24] In his address below, defence counsel[5] reminded the jury that the appellant's assertion that his travel bag belonged to his boss was not contradicted and that there

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4 AR 68.

5 Not counsel on appeal.

were many ways in which the drugs could have been placed in the bag unknown to the appellant since it was not his.

[25] The prosecutor had addressed the jury that the appellant's answers about his intentions in coming to Brisbane and his connections here were vague. Defence counsel challenged that characterisation. He was critical of the Australian Federal Police in as much as there could have been further investigation in Malaysia of the exculpatory information provided by the appellant. Counsel suggested that the one night's accommodation at the Astor Hotel was not inconsistent with a tourist getting his bearings and deciding where to go for the balance of his holiday, noting that the appellant had indicated on his incoming passenger card that he proposed staying in the country for 10 days. Counsel suggested that the change of name at the hotel was consistent with the original employee for whom it was intended, for some reason being unable to come to Brisbane.

[26] Counsel suggested that the "extra" weight of two kilograms in the bag which had checked in at 15 kilograms was not remarkable so as to arouse suspicion. He suggested that the items of clothing, which clearly could not have fitted the appellant, may have been inadvertently picked up by him when he was working in some other place away from home and put in his bag. He emphasised that the appellant had provided a Malaysian telephone number as a contact number on his incoming passenger card. He also suggested that $900 in United States dollars was unremarkable coming from Asia. He emphasised that there was no direct evidence implicating the appellant in any knowledge of the drugs in his bag.

[27] There is no challenge to the primary judge's summing up and, particularly, of her description of the requisite mental element. The appellant's counsel adopted the possible exculpatory explanations offered by counsel below for the various pieces of evidence relied on by the prosecution as pointing to guilt. These, he submitted, allowed for other possibilities than guilt and were consistent with innocence.

Discussion

[28] The approach of an appellate court to a complaint that a verdict is "unsafe or unsatisfactory" or "unreasonable" is as set out in *MFA v The Queen*.[6] That decision adopted the approach in *M v The Queen*[7] and in particular the passage in the joint judgment of Mason CJ, Deane, Dawson and Toohey JJ at 494-5 (citations omitted):

> "… [w]here the evidence lacks credibility for reasons which are not explained by the manner in which it was given, a reasonable doubt experienced by the court is a doubt which a reasonable jury ought to have experienced. If the evidence, upon the record itself, contains discrepancies, displays inadequacies, is tainted or otherwise lacks probative force in such a way as to lead the court of criminal appeal to conclude that, even making full allowance for the advantages enjoyed by the jury, there is a significant possibility that an innocent person has been convicted, then the court is bound to act and to set aside a verdict based upon that evidence. In doing so, the court is not substituting trial by a court of appeal for trial by jury, for the ultimate question must always be whether the court thinks that upon the whole of the evidence it was open to the jury to be satisfied beyond reasonable doubt that the accused was guilty."

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6 (2002) 213 CLR 606 at 623-624 per McHugh, Gummow and Kirby JJ.

7 (1994) 181 CLR 487.

[29] More recently, in *SKA v The Queen*[8] French CJ, Gummow and Kiefel JJ stressed[9] that:

> "[B]y applying the test set down in *M* and restated in *MFA*, the Court is to make 'an independent assessment of the evidence, both as to its sufficiency and its quality'".

The appellate court:

> "… was required to determine whether the evidence was such that it was open to a jury to conclude beyond reasonable doubt that the applicant was guilty of the offences with which he was charged."[10]

[30] As was recognised, this was a circumstantial case consisting of strands of evidence which, on the prosecution contention, cumulatively led inexorably to a conclusion of guilt.

[31] In *Shepherd v The Queen*[11], McHugh J described the approach in such a case:

> "Ordinarily, in a circumstantial evidence case, guilt is inferred from a number of circumstances – often numerous – which taken as a whole eliminate the hypothesis of innocence. The cogency of the inference of guilt is derived from the cumulative weight of circumstances, not the quality of proof of each circumstance."[12]

[32] The jury must be satisfied that guilt should not only be a rational inference but should be the only rational inference that can be drawn from those circumstances.[13] It follows that if there is some other reasonable hypothesis consistent with innocence then the jury must acquit.

[33] Here, in common with most circumstantial cases, there were a number of pieces of evidence which, if taken alone, would not lead to a conclusion of guilt. However, the prosecution relied on a number of unchallenged facts which cumulatively led to a conclusion of guilt beyond reasonable doubt and which excluded any other reasonable hypothesis consistent with innocence. Those facts were:

- the appellant was sent on a holiday in Australia by an employer for whom he worked part-time for which that employer paid;
- the appellant's accommodation for one night in Brisbane had been booked in another name by a travel agency in Malaysia and his name substituted 24 hours prior to arrival in Australia;
- although asserting that he had friends and relatives in Brisbane the appellant neither volunteered their names nor telephone numbers nor addresses nor any details about them;
- the appellant asserted that he had packed the bag and was aware of its contents;
- the appellant said it was his boss's bag and he did not want it damaged;

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8 (2011) 243 CLR 400.
9 At 406.
10 At 408.
11 (1990) 170 CLR 573.
12 At 592-3.
13 *Shepherd v The Queen* (1990) 170 CLR 573 at 578 per Dawson J; *Plomp v The Queen* (1963) 110 CLR 234.

- he had $US900 in cash with him;
- amongst the used clothing in the bag was clothing in assorted sizes, some of which could not have fitted the appellant, other items which may very well not have fitted him and all of which was used;
- the physical nature of the bag itself, being relatively small, was such that an extra two kilograms when empty would be noticeable.

[34] In *Weissensteiner v The Queen*[14] the plurality quoted with approval the following passage from the judgment of Windeyer J in *Bridge v The Queen*:[15]

> "An accused person is never required to prove his innocence: his silence can never displace the onus that is on the prosecution to prove his guilt beyond reasonable doubt. A failure to offer an explanation does not of itself prove anything. Nor does it, in any strict sense, corroborate other evidence. But the failure of an accused person to contradict on oath evidence that to his knowledge must be true or untrue can logically be regarded as increasing the probability that it is true. That is to say a failure to deny or explain may make evidence more convincing, but it does not supply its deficiencies."

[35] While other scenarios were posited to the jury by defence counsel and adopted on appeal there was no evidence to support those possibilities.[16] The accumulation of the various strands of evidence to which reference has been made was, despite the appellant's counsel's careful submissions to the contrary, sufficiently strong to bear the weight of a verdict of guilty. That is, the jury could have been satisfied beyond reasonable doubt that those various pieces of evidence taken together led to that conclusion to the requisite standard. The verdict was thus neither unsafe nor unreasonable and was reached according to law.

[36] I would dismiss the appeal.

Sentence Application

[37] The maximum penalty for the offence with which the applicant was charged is life imprisonment. The weight of the drugs was 1454 grams, significantly in excess of the commercial quantity for that drug which is 750 grams.[17] In sentence submissions the defence had contended for a sentence in the middle of an eight to 12 year range, the prosecutor for a head sentence of 10 to 12 years with 60 per cent of that period as a non-parole period.

[38] On appeal the appellant's counsel relied on the decision of *R v Dehghani; ex parte Director of Public Prosections (Cth)*[18] as indicating that the sentence imposed was manifestly excessive. There is little that is comparable between the facts and circumstances of this case and that in *Dehghani*. *Dehghani* was an appeal by the Commonwealth DPP against the inadequacy of the sentence imposed for a drug importation offence. There were 81,000 ecstasy pills weighing 26.096 kilograms in two boxes posted from the United Kingdom. The pure weight of MDMA was 5.219 kilograms. The commercial quantity for that drug was 500 grams.

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14 (1993) 178 CLR 217; [1993] HCA 65.
15 (1964) 118 CLR 600 at 615; [1964] HCA 73.
16 *Azzopardi v The Queen* (2001) 205 CLR 50; [2001] HCA 25.
17 Section 314.1 *Criminal Code* (Cth).
18 [2011] QCA 159.

[39] The offender pleaded guilty to one count of importing a commercial quantity of the border controlled drug 3, 4-methylenedioxymethamphetamine (MDMA) in contravention of s 307.1 of the *Criminal Code* (Cth). He was sentenced to 10 years and 10 months imprisonment with a non-parole period of six years and six months and concurrent lesser terms for certain money transactions. In arriving at the sentence for the drug importation, as described in the judgment of Margaret Wilson AJA[19], the sentencing judge started at 18 years reduced to 15 years with a non-parole period of nine years on account of the plea of guilty and past co-operation. That sentence was reduced to 10 years and 10 months to take account of an undertaking to co-operate with the authorities in respect of co-offenders.

[40] The offender was declared hostile in the subsequent trial of a co-offender and the Commonwealth DPP appealed on the basis of his want of co-operation. He was re-sentenced to 14 years imprisonment. The court was bound by the notional head sentence of the original sentencing judge to go no higher than 15 years.[20]

[41] Counsel sought to make *Dehghani* relevant by submitting that the much greater quantity of the prohibited drug in that case should, in some manner, be reflected in a notional pro rata discount in penalty. The amount of the imported drug is one of many factors to take into account. The facts in *Dehghani* are so different from those presently under consideration that it is not fruitful to compare the cases further. Clearly, the plea of guilty in *Dehghani* is of great significance. The starting point of 18 years before that plea and past co-operation points to the 10 years imprisonment imposed here as a moderate sentence.

[42] The primary judge was referred to the leading case of *R v Tran*[21] where an extensive examination of the authorities and the approach which should be taken to sentencing Commonwealth offenders for drug importation offences together with the impact of the plea of guilty were fully discussed. In that case the drug was heroin and the penalty for importing a marketable quantity with which the offender was charged was 25 years imprisonment. The penalty for importing a commercial quantity (in excess of 1,500 grams) was life imprisonment. Two cases discussed in *Tran* of *R v Bala*[22] and *R v Chai*[23] concerned the importation of a commercial quantity of heroin (*Bala*) and trafficable quantity (*Chai*). In *Bala* the offender was sentenced to 15 years imprisonment with parole after seven years, not disturbed on appeal. He had pleaded guilty to bringing two kilograms of heroin into Australia concealed in his luggage. *Chai* was also given a sentence of 15 years imprisonment with parole after seven years for importing a trafficable quantity of heroin after pleading guilty.

[43] In order to be consistent with decisions of intermediate courts of other States and Territories and to reflect the factors in s 16A(2) of the *Crimes Act*, this court in *Tran* substituted a sentence of 10 years imprisonment with a fixed non-parole period of five years. The sentence in *Tran* which concerned a lesser maximum penalty and a plea of guilty clearly suggests that the 10 years imposed here was comfortably within range.

[44] It is not contended that the primary judge overlooked any relevant sentencing factor when sentencing this offender. Her Honour noted:

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19 At [6].
20 At [48].
21 [2007] QCA 221.
22 [2000] QCA 436.
23 [1998] QCA 187.

- the quantity was almost twice the deemed commercial quantity of methamphetamine;
- the offender was a courier and not a principal offender;
- the trial was conducted in a streamlined manner making appropriate admissions so that the only point in issue could be tested;
- the offender's previous good character and lack of criminal history;
- the street value of the drugs was significant;
- general deterrence;
- the difficulty of detecting and preventing offences of this type;
- the need for condign punishment;
- the offender would be required to serve his sentence in Australia away from his family and friends in Malaysia; and
- his good prospects for rehabilitation.

[45] In fixing the non-parole date at five years the primary judge reflected the further burden on the applicant of serving his punishment in a foreign prison with no prospects of family visitation.

[46] It has not been demonstrated that her Honour fell into error in any particular way or that overall the sentence could be regarded as manifestly excessive.

[47] I would refuse the application.

[48] The orders which I propose are:

1. Appeal dismissed.
2. Refuse the application for leave to appeal against sentence.