SUPREME COURT OF QUEENSLAND

CITATION:	*R v Calis* [2013] QCA 165
PARTIES:	**R** **v** **CALIS, Rob Jan** (applicant/appellant)
FILE NO/S:	CA No 313 of 2012 SC No 112 of 2012
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction & Sentence
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	24 June 2013
DELIVERED AT:	Brisbane
HEARING DATE:	18 June 2013
JUDGES:	Chief Justice and Muir and Fraser JJA Separate reason for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. That leave to adduce further evidence be refused.** **2. That the appeal against conviction be dismissed.** **3. That leave to appeal against sentence be refused.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – VERDICT UNREASONABLE OR INSUPPORTABLE HAVING REGARD TO EVIDENCE – APPEAL DISMISSED – where the appellant was convicted of importing a commercial quantity of a border controlled drug, methamphetamine – where the fault element for the offence is "recklessness" – where the appellant gave evidence that he believed that gold was secreted in the lining of the suitcase – where the appellant took no steps to ascertain its contents other than to squeeze the sides of the suitcase – where the circumstances surrounding the appellant's contacts and associates did not suggest commercial substance, solidarity or reliability – where the appellant was conscious of the need to have a cover story – whether it was open to the jury to be satisfied, beyond reasonable doubt, that the appellant was aware of a substantial risk that he was carrying a border controlled drug and that, in the circumstances, it was unjustifiable to take the risk – whether the verdict was unreasonable or insupportable having regard to the evidence CRIMINAL LAW – APPEAL AND NEW TRIAL –

MISCARRIAGE OF JUSTICE – GENERALLY – where the appellant's wife, who was in Gambia, was not called to give evidence on the trial – where the appellant submits that his wife was with him when he paid for the papers to "get the gold over the border of Sierra Leone" – whether the failure to adduce evidence from the appellant's wife amounted to a miscarriage of justice

CRIMINAL LAW – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS OF APPEAL – FRESH EVIDENCE – GENERAL PRINCIPLES – where the appellant submits that the weight of his suitcase changed between the time it left his possession at Dakar Airport and its arrival in Brisbane – where the appellant's solicitors and counsel made a considered decision not to advance any argument based on weight discrepancy – where the appellant seeks to adduce further evidence concerning the respective weights of the suitcase; the absence of his fingerprints inside the suitcase; and CCTV footage from Brisbane and Dakar Airports to show a change in the colour of the plastic in which his suitcase was wrapped – whether the appellant's applications to adduce further evidence should be allowed

CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – SENTENCE MANIFESTLY EXCESSIVE OR INADEQUATE – where the appellant was sentenced to 10 years imprisonment with a non-parole period of six years for importing a commercial quantity of a border controlled drug, methamphetamine – where the appellant relies on personal hardship and hardship to his family members who live in Gambia – whether the sentence was manifestly excessive

Crimes Act 1914 (Cth), s 16A(2)(p)
Criminal Code 1995 (Cth), s 5.4, s 307.1, s 314.4 (repealed)

Clarke v Japan Machines (Australia) Pty Ltd [1984] 1 Qd R 404, cited
Director of Public Prosecutions (Cth) v Gaw [2006] VSCA 51, cited
Hann v Director of Public Prosecutions (Cth) (2004) 88 SASR 99; [2004] SASC 86, cited
Le v The Queen [2006] NSWCCA 136, cited
M v The Queen (1994) 181 CLR 487; [1994] HCA 63, cited
Patel v The Queen (2012) 86 ALJR 954; [2012] HCA 29, considered
Lau v The Queen [2011] VSCA 324, considered
R v Chong; Ex parte Attorney-General (Qld) (2008) 181 A Crim R 200; [2008] QCA 22, cited
R v D'Arrigo; ex parte A-G (Qld) [2004] QCA 399, cited
R v Le [1996] 2 Qd R 516; [1995] QCA 479, cited
R v Oprea [2009] QCA 184, considered

R v Saengsai-Or (2004) 61 NSWLR 135; [2004] NSWCCA 108, cited
R v Thathiah [2012] QCA 195, considered
R v Tran (2007) 172 A Crim R 436; [2007] QCA 221, considered
SKA v The Queen (2011) 243 CLR 400; [2011] HCA 13, cited
TKWJ v The Queen (2002) 212 CLR 124; [2002] HCA 46, considered

COUNSEL: The applicant/appellant appeared on his own behalf
G R Rice QC for the respondent

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

[1] **CHIEF JUSTICE:** I have had the advantage of reading the reasons for judgment of Muir JA. I agree with the orders proposed by His Honour, and with his reasons.

[2] **MUIR JA**: The appellant was convicted on 7 November 2012, after a three day trial in Brisbane, of importing a commercial quantity of the border controlled drug methamphetamine. He was sentenced to 10 years imprisonment with a non-parole period of six years. Pre-sentence custody of 484 days was declared time already served under the sentence. The appellant appeals against conviction and sentence. The grounds of appeal in the appellant's notice of appeal are, in substance, as follows:

1. The jury was made up of 11 females and 1 male.

2. There was a miscarriage of justice as the appellant was unable to have his wife, who was in Gambia, give evidence.

3. The weight of the appellant's suitcase, in which methamphetamine was located at Brisbane Airport, changed between the time at which it left the appellant's possession at Dakar Airport and its arrival on the conveyor belt in Brisbane.

4. The clear plastic in which the suitcase was wrapped at Dakar Airport had been changed en route to a blue plastic wrapper.

5. The verdict should be set aside as being unreasonable and not supported by the evidence.

The prosecution evidence

[3] The appellant arrived at Brisbane International Airport aboard an Emirates flight from Dubai on the morning of 12 July 2011. He was travelling on a temporary tourist visa which had been granted online on 7 July 2011. His incoming passenger card showed the purpose of his visit as "Holiday" and his intended address in Australia as the "Eco Lodge City Star Brisbane", a motel at Kangaroo Point. The appellant had no room reservation at the motel. He had in his possession approximately US$600, no wallet and no credit cards.

[4] The appellant was selected for baggage examination by customs officers. He identified his suitcase and backpack to customs officers and confirmed ownership of it and its contents. Asked, "So you are fully aware of everything that is in the bags?" he replied, "All my things that I put in there, yes". He agreed that he had packed the suitcase himself, taken it to the airport and checked it in. He confirmed that it had been under his control for the whole of the journey except at Dakar Airport where he said he paid a black man, who took his suitcase away and wrapped it in plastic. He said that he had come to Australia "for a holiday, to meet a friend and just look around".

[5] The suitcase was inspected and x-rayed. A substance, which was subsequently identified as methamphetamine, was found in the retractable handles and supporting edges of the suitcase. It contained assorted garments including singlets, trousers, t-shirts, shorts, shoes and underpants.

[6] The appellant had bandages on his legs. His ankles were very puffy and he complained of having trouble with his legs. In cross-examination, the appellant said that he did not know what had caused his infection. He speculated that it could have been a spider or a scorpion.

The appellant's evidence

[7] The appellant gave evidence to the following effect. He was a Dutch national who had been employed in Holland at a service station. On a visit to Gambia, about five years before the events in question, he became emotionally attached to a woman whom he travelled back to see regularly, sometimes twice a year. They married in Gambia on 20 June 2011. After the wedding, the appellant found himself in financial difficulties.

[8] At the time, the appellant and his wife lived in a house with James, a refugee from Sierra Leone, his wife and child. The cooking was done outside the house and there were "a lot of animals walking around" inside it. James told him about "mining in Sierra Leone and … about diamonds and gold … [which] he brings … all over the world". James asked him to "get involved" because he had a European passport and was "allowed to travel all over the world". James had raised this matter with him on a number of occasions prior to their cohabitation but he declined involvement as he "still had enough money to do (sic) a living and [he] thought it was risky". He eventually agreed to become involved after he ran out of money as a result of the wedding.

[9] After the appellant agreed to become involved in a smuggling operation, he paid about €200 "for the paperwork to get [the smuggled goods] out of Sierra Leone". His wife was unhappy because she wanted the money to be used for the impending wedding. The arrangement with James was that the appellant would be paid US$7,000 for taking gold, in the form of gold dust, to Australia.

[10] About two weeks prior to the appellant's departure for Australia, a man called Junction, in response to a request by the appellant, took him in company with a man called Fatou to see the gold in a tailor shop in Banjul. The two men explained how the gold would be hidden in compartments in a suitcase. He was also shown diamonds.

[11] About three weeks after his wedding, the appellant received a telephone call from Fatou, who asked him to go to a bar in Banjul. Fatou mentioned that the appellant would have to leave on a plane the following day. The appellant said, "… they make all the arrangements. That cost (sic) about US$5,000 for tickets and everything. If I didn't go ahead with it, I would have to pay it back". The appellant was instructed that he would have to cross the Gambian border and proceed to Dakar to catch a flight to Brisbane via Dubai. He was instructed to send an SMS to a number which had been programmed into his mobile phone on arrival in Dakar, Dubai and Brisbane.

[12] After crossing from Gambia into Senegal with Fatou, Junction met the appellant and Fatou in a taxi. Junction showed the appellant the suitcase he was to carry and opened it up. The appellant squeezed the sides of the suitcase and it felt "like sand [was] in there". He believed that gold was secreted in the lining of the suitcase. The interior of the suitcase contained "[a] lot of clothes" which he had never seen before. A man called Daniel got into the taxi with him and they drove about 500 kilometres to Dakar. After spending the night at the hotel with Daniel, he and Daniel went to a market where they bought clothes for the appellant's use and to fill up the suitcase.

[13] In evidence-in-chief, the appellant was shown items of apparel taken from the suitcase. He identified some of the items as his and some as having been purchased from the markets in Dakar. He said that he did not recognise a substantial number of the garments.

[14] The appellant said that the suitcase had been wrapped in clear plastic at the airport in Dakar but that in Brisbane he had difficulty identifying the suitcase as it was wrapped in "dark blue thick plastic". When he arrived in Brisbane, his expectation was that he would be picked up or, failing that, he would proceed to the "Eco Lodge" by bus. He had the address of a hotel in Sydney and expected that after arrival in Brisbane he would receive more information by telephone about what he was to do in Sydney.

Ground 1 – the composition of the jury

[15] There is no entitlement at common law or under the *Jury Act* 1995 (Qld) to a jury comprised of any particular mix of males or females or, for that matter, to have jurors of both genders. The appellant was informed of his right of challenge but chose not to exercise it. There is nothing in this complaint.

Ground 2 – the failure of the appellant's wife to give evidence

[16] The appellant complained that his wife, who he asserts was with him when he paid for "the papers to get the gold over the border of Sierra Leone", could have given evidence. He stated that his solicitor spoke to her and that she was ready to give evidence. However, his barrister, according to the appellant, said that it would take too long to raise funds to get her to Australia and that her evidence was "not fresh anymore". She was not called to give evidence on the trial and no affidavit from her or the appellant's legal advisors was produced.

[17] The trial appears to have been competently conducted by the defence and there is no reason to suppose that, if the appellant's legal representatives thought that useful

oral evidence could have been adduced from the appellant's wife, an attempt would not have been made for her to give evidence by telephone. This appears to be part of a general complaint by the appellant that insufficient investigatory work was undertaken by the authorities with a view to establishing his innocence.

[18] The appellant is bound by the conduct of his legal representatives on the trial.[1] There being no reason to suppose that the failure to call the appellant's wife to give evidence by telephone was not the consequence of a reasonable forensic decision, the appellant's application for leave to adduce evidence from the appellant's wife should be refused. Moreover, the evidence does not establish, in any permissible way, that the evidence of the appellant's wife could not have been adduced on the trial or that the evidence she could have given could have had a material effect on the outcome of the trial. No appellable error has been shown.

Applications to adduce further evidence and grounds 3 and 4

[19] The appellant applied to adduce the following further evidence: DVD recordings made at Brisbane Airport on 12 July 2011; evidence concerning fingerprints (or their absence) in the suitcase and examination of the suitcase by customs officers; evidence of the contents of the suitcase and of note taking and questions asked at Brisbane Airport by Mr Blundell, a customs officer; and evidence concerning the respective weights of the suitcase and of the clothes taken from it.

[20] The evidence of the total weight of the suitcase and its contents at Brisbane Airport compared with such weight at Dakar Airport could have been led on trial. The defence considered the question whether there was any material discrepancy in weight, presumably with a view to arguing that the drugs could have been placed in the suitcase en route from Dakar if it was apparent that the suitcase and its contents weighed more at Brisbane Airport than at Dakar Airport. The defence implicitly decided not to advance any argument based on a weight discrepancy. There was good reason for that. It was improbable that the methamphetamine would have been substituted for gold in Dubai. Also, the suitcase had been dismantled and subjected to testing in Brisbane and it was unclear whether all of its contents had been retained.

[21] The appellant attached copies of his solicitor's file notes to his submissions. These suggest that the appellant's solicitors and counsel had carefully considered the evidence of any possible change in weight. The decision not to raise an alleged weight discrepancy as an issue was an apparently rational, and even reasonable, decision made by the defence in the conduct of the trial. As such it did not give rise to a miscarriage of justice.[2]

[22] The appellant's outline of argument appears to complain of the absence of CCTV film from Dakar Airport which may have shown the suitcase being wrapped or otherwise handled. The pursuit of this film amounts to no more than exploring a line of enquiry. If a recording existed which showed the colour of the plastic wrapping, it was likely to have been of marginal use, if any, for reasons discussed in relation to the weight discrepancy point. The critical issue, as the respondent pointed out, was not whether or not drugs were carried, but the appellant's state of mind.

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1 *Patel v The Queen* (2012) 86 ALJR 954 at [65] and [114].

2 *TKWJ v The Queen* (2002) 212 CLR 124 at 128 per Gleeson CJ.

[23] As for the CCTV film taken at Brisbane Airport on which the appellant wishes to rely, some parts of it were put in evidence on the trial at the request of the appellant. Other parts were tendered as part of the prosecution case. The evidence does not reveal that the defence would have encountered any difficulty in putting into evidence any other parts of the footage had they wished to do so. By reference to some of the footage in evidence, defence counsel was able to submit to the jury that the CCTV footage supported the appellant's evidence that he had been uncertain about the identification of his bags at the luggage carousel and had checked at the counter in that regard.

[24] In his outline of argument, the appellant stated that he is sure that his fingerprints were not "inside the suitcase" and that the "investigators" did not look for them. The existence, or otherwise, of the appellant's fingerprints inside the suitcase had no relevance to either the prosecution or defence case. The prosecution did not seek to prove that the appellant had placed the drugs in the suitcase or had touched or inspected anything inside the lining. The appellant's case was that he had not disturbed the lining and was thus unaware that he was carrying drugs. A forensic officer, Mr Wynd, gave evidence that any potential prints on metallic surfaces were likely to have been disturbed when the suitcase was manually dismantled. There is no substance to this argument.

[25] All of the further evidence sought to be adduced by the appellant, with the exception of the Dakar Airport CCTV footage, if it existed, could have been obtained with the use of reasonable diligence. It was not shown that, if received, it would probably have had an important, though not necessarily decisive, impact on the outcome of the appeal.[3] Consequently, the evidence fails to meet the normal requirements for the reception of further evidence on appeal. For that and the other reasons identified above, I would refuse the applications to adduce further evidence. Grounds 3 and 4 were not made out.

Ground 5 – the unsafe and unsatisfactory ground

[26] The subject offence was importing a commercial quantity of a border controlled drug.[4] The fault element for the offence is "recklessness".[5]

[27] Methamphetamine was defined as a "border controlled drug" in s 314.4 of the *Criminal Code* 1995 (Cth) (the Code).[6] Section 5.4 of the Code relevantly provides:

> "(1) A person is reckless with respect to a circumstance if:
>
> (a) he or she is aware of a substantial risk that the circumstance exists or will exist; and
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> (b) having regard to the circumstances known to him or her, it is unjustifiable to take the risk."

[28] The jury were directed that:

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3 *Clarke v Japan Machines (Australia) Pty Ltd* [1984] 1 Qd R 404 at 408.

4 *Criminal Code* 1995 (Cth), s 307.1.

5 *Criminal Code* 1995 (Cth), s 307.1(2).

6 This section was repealed by the *Crimes Legislation Amendment (Serious Drugs, Identity Crime and Other Measures) Act* 2012 (Cth).

> "… the prosecution must prove beyond reasonable doubt that [the appellant] was reckless as to the circumstance that the substance in the suitcase was a border-controlled drug.
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> …
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> A person is reckless with respect to a circumstance if the person is aware of a substantial risk that the circumstance exists and having regard to the circumstances known to the person, it is unjustifiable to take that risk …
>
> … a substantial risk means a real or possible risk or a risk that has substance in contrast to an ephemeral or speculative or remote risk."

[29] No issue is taken with the trial judge's directions in this or in any other regard.

[30] The jury were entitled to conclude that the appellant was bringing illegal, prohibited matter into Australia in his suitcase. He understood that the matter had been secreted behind the lining and in the handle of the suitcase. He also understood that the suitcase had been filled with selected items of apparel in an attempt to lead any customs official who inspected it to believe that it contained normal travel items.

[31] The jury were entitled to disbelieve the appellant's evidence. It was open to the jury to accept that Mr Blundell had been told by the appellant that he was "here for a holiday, to meet a friend and just look around". His story about paying €200 for paperwork to get the gold out of Sierra Leone was remarkable having regard to his evidence of his impoverished state. The persons identified by the appellant as his contacts and associates for the importation venture were shadowy, only one name was provided for each of them: James; Fatou; Junction; and Daniel. He had also falsely stated on his entry card that he was a "Salesman". His oral evidence was that he worked in a service station.

[32] The jury were also entitled to accept that the appellant had told Mr Blundell that a black man had taken his "case away and had it wrapped" at Dakar Airport. He denied in his oral evidence that there was such an incident and he did not accept having told Mr Blundell that.

[33] The fact that it was open to the jury to reject the appellant's evidence, however, did not prove either that he was aware that he was carrying a border controlled drug or that he was aware that there was a substantial risk[7] that he was doing so and that, having regard to the circumstances known to him, it was unjustifiable to take the risk. The circumstances known to the appellant, which may be thought relevant in this regard, are:

- there were no facts known to the appellant which could justify his having confidence in what he had been told by James, Fatou and their associates as to the true nature of the substance he was being requested to carry clandestinely;
- there was nothing about the circumstances of those persons and the premises from which they operated, or with which they were connected, which was suggestive of commercial substance, solidity or reliability. The appellant was

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[7] See e.g. *R v Saengsai-Or* (2004) 61 NSWLR 135 at 147 and *Hann v Director of Public Prosecutions (Cth)* (2004) 88 SASR 99 at 107.

given an account by James about his transporting gold and diamonds all over the world but if the appellant is to be believed, he was asked to provide €200 in order to bring the gold from Sierra Leone;

- he was a Dutch citizen aged about 44. He had been employed in Holland and had travelled regularly from Holland to Gambia by air. The jury were entitled to conclude that he was not ignorant of the existence of widespread international drug trafficking as well as the risks inherent in carrying containers for strangers, or comparative strangers, on aircraft;
- James and his family had been living with the appellant and his family in singularly modest circumstances;
- on taking delivery of the suitcase, and thereafter, the appellant took no steps to ascertain its contents other than squeezing the sides of the suitcase when it was in the boot of a taxi before travelling to Dakar; and
- the appellant chose not to make any enquiry into the utility of smuggling gold dust into Australia.

[34] The respondent also relied on these matters:

- the appellant had insufficient funds for an intended nine day holiday and no credit cards;
- the suitcase contained an assortment of mismatched clothing sizes;
- the appellant had no accommodation booking;
- the appellant said that the suitcase belonged to him, that he had packed it and checked it in at the airport;
- the appellant travelled a long distance from Africa with badly infected legs, requiring him to sit during the baggage examination. This did not sit well with the appellant's declared intention to holiday and "look around".

[35] Those matters tend to show that the appellant was content to place himself at the disposal of James and his associates and that he was conscious of the need to have a "cover" story. The jury were entitled to conclude that, in the circumstances listed in paragraphs [33]–[34] above, the appellant was aware of a substantial risk that he was carrying a border controlled drug and that, in such circumstances, it was unjustifiable to take the risk.

[36] The risk was unjustifiable because there was no purpose for taking it other than securing a pecuniary benefit for the appellant and the risk arose out of what the appellant understood to be an illegal smuggling operation. Lack of justification may be found also in the knowledge of the appellant that there were no considerations which tended to suggest that he could rely on the statements of the persons with whom he was dealing.

[37] Having considered the whole of the evidence, I have concluded that it was open to the jury to be satisfied beyond reasonable doubt of the appellant's guilt.[8]

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[8] *M v The Queen* (1994) 181 CLR 487 at 493–495; *SKA v The Queen* (2011) 243 CLR 400 at 406–409.

[38] For the above reasons, I would order that the appellant be refused leave to adduce further evidence and that the appeal against conviction be dismissed.

Appeal against sentence

[39] The appellant appeals against his sentence on the ground that it was manifestly excessive. The appellant was 45 years of age when sentenced. He had no previous criminal history. The total pure weight of methamphetamine imported was 1,294.2 grams. A commercial quantity of methamphetamine was 750 grams.[9] The maximum penalty for the subject offence is imprisonment for life or 7,500 penalty units (a fine of $825,000) or both. The appellant has a wife and young child in Gambia. His wife also has an eight year old son.

[40] The appellant completed two years of high school before leaving school and starting work in petrol station. He has had a number of other occupations, including that of a motor mechanic.

[41] The trial judge sentenced the appellant on the basis that he was a "bare courier" who stood to make no more than US$7,000 out of his activities. The trial judge referred to "other medical conditions" suffered by the appellant which required further treatment. She noted that imprisonment in Australia would impose hardship because of the appellant's separation from his family in an unfamiliar setting. She remarked on the appellant's lack of prior criminal history and his cooperation in the course of the trial, such that the prosecution was not put to proof on matters such as continuity and the number of witnesses called for the prosecution was so confined that the prosecution case finished in less than a day. She found that the appellant's prospects of rehabilitation were reasonable.

[42] The prosecution submitted that an appropriate sentencing range was 11–12 years with a non parole period of seven to seven and a half years. Defence counsel submitted that a sentence of nine years with a non–parole period of four and half to five years was appropriate.

[43] In his outline of submissions, the appellant relied on the following:

- his offending arose because of his need to feed his wife and his wife's child;
- he was ignorant as to the precise nature of the substance that he was carrying and was taken advantage of by unscrupulous persons. He had checked to see if it was gold dust that he was being asked to bring into Australia and, to that extent, had taken some precautions against unwittingly smuggling drugs;
- he was not aware of drugs being used in Gambia to the extent to which they were used in Amsterdam; and
- personal hardship and hardship to family members.

[44] The sentence imposed by the primary judge is not manifestly excessive. It is amply supported by comparable sentences such as:

- *R v Tran* (2007) 172 A Crim R 436 – a sentence of 15 years imprisonment with a non–parole period of seven years imposed on a 41 year old offender for importing 1,473 grams of pure heroin after an early plea of guilty and

[9] See Item 99 of s 314.4 of the *Criminal Code* (Cth) as it was on 12 July 2011.

cooperation with the authorities was reduced on appeal to 10 years imprisonment with a non–parole period of five years.

- *Lau v The Queen* [2011] VSCA 324 – an appeal against a sentence of nine years imprisonment with a non–parole period of six years imposed on a 56 year old offender with no previous convictions after an early plea of guilty for the importation of 709.8 grams of pure methamphetamine was dismissed.

- *R v Oprea* [2009] QCA 184 – an application for leave to appeal against a sentence of 10 years imprisonment with a non–parole period fixed at six and a half years imposed after a trial on a 46 year old offender (with a prior conviction for supplying a dangerous drug) for the offence of attempting to possess a marketable quantity of cocaine (1,489.7 grams pure) was refused.

- *R v Thathiah* [2012] QCA 195 – leave to appeal against a sentence of 10 years imprisonment with a non–parole period fixed at five years imposed after a trial on a 48 year old offender with no criminal history for the importation of 1,454 grams of pure methamphetamine was refused.

[45] In all of those cases, the offender was sentenced as a courier.

[46] Although the trial judge did not specifically refer to "the probable effect that any sentence … would have on any of the [appellant's] family or dependants",[10] it is unlikely that her Honour did not take that into account. She adverted to the fact that the appellant's wife was pregnant at the time of the offending and had since borne his child. She remarked, as well, on the "great sorrow" experienced by the appellant as the result of his being separated from his wife and child and the problems faced by the appellant in communicating with his wife. She noted the additional hardship suffered by the appellant through incarceration in a foreign country.

[47] Hardship to family members cannot overwhelm considerations such as the need for deterrence, denunciation and punishment.[11] Section 16A(2)(p) of the *Crimes Act* 1914 (Cth), which requires "the probable effect that any sentence … would have on any of the person's family or dependants" to be taken into account, has been held to be declaratory of the common law.[12] In any event, the sentence imposed sufficiently allowed for any mitigation on account of hardship.

[48] Accordingly, I would refuse leave to appeal against sentence.

[49] **FRASER JA**: I agree with the reasons for judgment of Muir JA and the orders proposed by his Honour

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10 *Crimes Act* 1914 (Cth), s 16A(2)(p).

11 *R v Le* [1996] 2 Qd R 516 at 522; *R v D'Arrigo; ex parte A-G (Qld)* [2004] QCA 399; *R v Chong; Ex parte Attorney-General (Qld)* (2008) 181 A Crim R 200.

12 See eg *Director of Public Prosecutions (Cth) v Gaw* [2006] VSCA 51 at [19]; *Le v The Queen* [2006] NSWCCA 136 at [25].