SUPREME COURT OF QUEENSLAND

CITATION:	*R v Banker* [2016] QCA 74
PARTIES:	**R** **v** **BANKER, David William** (appellant/applicant)
FILE NO/S:	CA No 16 of 2015 SC No 386 of 2014
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction & Sentence
ORIGINATING COURT:	Supreme Court at Brisbane – Date of Conviction & Sentence: 6 February 2015
DELIVERED ON:	1 April 2016
DELIVERED AT:	Brisbane
HEARING DATE:	11 February 2016
JUDGES:	Holmes CJ and Gotterson JA and Jackson J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. Appeal against conviction dismissed.** **2. Application for leave to appeal against sentence refused.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS OF APPEAL – OTHER MATTERS – where the appellant was found with 4,177.1 grams of pure methylamphetamine concealed in his suitcase at Brisbane Airport, arriving from Nadi Airport, Fiji – where the appellant was found guilty, and sentenced to 12 years' imprisonment for importing a commercial quantity of a border controlled drug – where a non-parole period of eight years was fixed – where the appellant filed a notice of appeal against conviction and sentence – where the appellant submits the guilty verdict is unsafe or cannot be supported by the evidence – where the appellant submits that the hypothesis that the suitcase was tampered with by third parties in the hotel in Fiji or at Nadi Airport was not safely excluded – whether the verdict is unsafe or unreasonable CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – SENTENCE MANIFESTLY EXCESSIVE OR INADEQUATE – where the applicant was found with 4,177.1 grams of pure methylamphetamine concealed in his suitcase at Brisbane, airport arriving from Nadi Airport

– where the applicant was found guilty, convicted, and sentenced to 12 years' imprisonment for importing a commercial quantity of a border controlled drug – where a non-parole period of eight years was fixed – where the applicant filed a notice of appeal against conviction and sentence – where the applicant submits the sentence imposed is manifestly excessive – where the applicant alleges the learned sentencing judge placed excessive weight on the quantity of methylamphetamine imported, and failed to give sufficient weight to the applicant's personal circumstances, particularly age – whether the sentence imposed is manifestly excessive

Crimes Act 1914 (Cth), s 16A
Criminal Code (Qld), s 668E(1)

He Kaw Teh v The Queen (1985) 157 CLR 523; [1985] HCA 43, considered
M v The Queen (1994) 181 CLR 487; [1994] HCA 63, applied
SKA v The Queen (2011) 243 CLR 400; [2011] HCA 13, cited
Ng v The Queen [2010] NSWCCA 232, considered
Puan v The Queen [2009] NSWCCA 194, considered
R v Calis [2013] QCA 165, considered
R v Pham (2015) 90 ALJR 13; [2015] HCA 39, applied
R v Thathiah [2012] QCA 195, considered

COUNSEL: S J Keim SC, with C van der Weegen, for the appellant/applicant
M J Woodford for the respondent

SOLICITORS: Guest Lawyers for the appellant/applicant
Director of Public Prosecutions (Commonwealth) for the respondent

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

[2] **GOTTERSON JA:** The appellant, David William Banker, was tried on indictment for an offence against s 307.1(1) of the *Criminal Code* 1995 (Cth). The single count on the indictment alleged that on 1 January 2014 at Brisbane the appellant imported a commercial quantity of a border controlled drug, namely, methylamphetamine. The prosecution case was that 4,177.1 grams of pure methylamphetamine had been imported by the appellant on that date.

[3] The trial continued over four days in February 2015. On 6 February, the appellant was found guilty of the offence and convicted. A sentence hearing ensued and, later that day, the appellant was sentenced to 12 years' imprisonment. A non-parole period of eight years was fixed. Some 400 days of pre-sentence custody was declared to be time served under the sentence. The appellant's parole eligibility date is 1 January 2022.

[4] On 9 February 2015, the appellant filed a notice of appeal to this Court against both his conviction and his sentence.[1] It is appropriate to consider the appeal against conviction first.

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1 AB242-243.

The evidence at trial

[5] **Evidence in the prosecution case:** The appellant arrived at Brisbane International Airport at about 6.45 pm on 1 January 2014. He had travelled on a Virgin flight (VA176) from Nadi, Fiji. According to Virgin's booking records, the following flights had been booked for him with that airline on 30 December 2013:[2] Nadi-Brisbane-Darwin on 1 January 2014, and Darwin-Brisbane-Nadi on 7 January 2014.

[6] At the customs inward line, the appellant was processed by Customs Officer, M Sacco, to whom he gave his Incoming Passenger Card ("IPC"). The IPC gave a negative response to a question which asked whether or not the appellant was bringing illicit drugs, amongst other things, into Australia. The IPC also stated that the appellant's intended address in Australia was Darwin.

[7] After passing through the line, the appellant approached the baggage examination area with his luggage which he had collected from the carousel. At about 6.57 pm Customs Officer, T Millers, spoke with the appellant and asked him to accompany her to an X-ray machine for baggage examination. She took his passport and IPC at that point.

[8] In the course of the X-ray examination, Customs Officer, R Barden, noticed an anomaly in one of the appellant's three bags, a "Swiss Polo" brand suitcase ("the suitcase").[3] He told Officer Millers who took the bag to an examination bay. She questioned the appellant about his understanding of the questions on the IPC and sought his confirmation that he had packed the suitcase himself.

[9] At about 7.00 pm, Customs Officer, S Elphick, spoke to the appellant about his itinerary. He gave evidence of his conversation with the appellant from the record he made of it, as follows:

> "I said what is the purpose of your trip.
>
> He said to visit my friend Harrison Clark who I'm meeting in Darwin.
>
> He's a friend from London who is on a holiday in Darwin.
>
> I said how long are you in Fiji.
>
> He said three days.
>
> I said where did your trip start from.
>
> He said the US about seven days ago to New Delhi for three nights.
>
> I said why only three nights.
>
> He said I was supposed to meet a friend who was with the missions who did not show up. My travel agent then changed my travel to Mumbai for one night, transit via Hong Kong to Fiji and then to Brisbane and Darwin.
>
> I said why did the travel agent change your itinerary.
>
> He said they said it was because it was a busy period for travel and I would have to go via Hong Kong and Fiji to Australia.

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2 AB44; Tr1-34 ll44-45.

3 The other two bags were not noticed to contain any items of interest.

I said how long did you stay in Hong Kong.

He said I didn't leave the airport."[4]

(The appellant's passport indicated that he had arrived in Fiji on 29 December 2013.)[5]

[10] The suitcase had a Virgin "Heavy" luggage tag on it which stated its weight to be 32 kilograms.[6] It also had an identification tag with the appellant's name on it and a Virgin flight tag. The suitcase was not weighed by customs officers before it was opened in Brisbane.

[11] Officer Millers removed the visible contents of the suitcase. It had contained curtain material and clothing of different sizes. She then weighed the suitcase and found its weight to be 13.6 kilograms. She remarked upon the weight and the appellant volunteered that it had been hauled by two different taxis in Mumbai.

[12] A swab was taken of the suitcase. Customs Officer, D Fennell, analysed the swab. It showed positive to methylamphetamine. The appellant was then cautioned and informed of his rights.

[13] Officer Fennell subsequently X-rayed the empty suitcase. He noticed anomalies. Customs Officer, S Still, took it to an investigation room. He drilled a small hole into the structure and obtained a sample of a white powdery substance presumptive for methylamphetamine.

[14] The following documents were located in the appellant's laptop bag:

(a) his Virgin Airlines premium economy boarding pass for VA176 on 1 January 2014;[7]

(b) an email received by the appellant at 4.31 am on 28 December 2013 from a Nigerian entity "Le Infinite Travels Ltd" advising him of Qantas economy class bookings made for him, namely, Nadi-Sydney (Flight 392 departing 9 am) and Sydney-Darwin (Flight 846) on 1 January 2014, and Darwin-Sydney (Flight 5671) and Sydney-Nadi (Flight 391) on 7 January 2014;[8] and

(c) a second written communication received by the appellant from Le Infinite Travels Ltd which he forwarded to an email address hexagonintl@connect.com.fj at 5.05 pm on 30 December 2013.[9] This communication referred to bookings made for the appellant on the same Qantas flights, with the exception that the Nadi-Sydney flight on 1 January 2014, which was shown as Flight 346 departing at 1.30 pm.

[15] The Australian Federal Police ("AFP") were contacted at about 7.20 pm and the appellant was arrested a little later. He participated in a recorded interview with leading Senior Constable A Duque and Constable O Windler which began at 10.39 pm. A DVD recording of the interview was tendered at trial and viewed by the jury.[10]

[16] During the interview, the appellant said that he resided in Descanso, a small town on the edge of San Diego, California. He was semi-retired. He undertook mission work

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4 AB46; Tr1-36 l40 – AB47; Tr1-37 l3 (reformatted).
5 Exhibit 2.
6 Exhibit 11.
7 Exhibit 4; AB181.
8 Exhibit 5; AB182-183.
9 Exhibit 6; AB184-185. It may be inferred that the appellant received this communication by email. However, the time and date of receipt are not stated on it. The appellant had forwarded the email received on 28 December 2013 to the same Fiji email address at 4.42 pm on 30 December 2013: AB182.
10 Exhibit 14, AB75; Tr1-5 l1. A transcript of the Record of Interview was marked "MFI B".

with his Church, Faith Chapel, which supported about 75 missionaries.[11] His work was to source funding which required a reasonable amount of travel. He said that on this trip his first stop was New Delhi. He then flew to Mumbai so that a flight route could be found for him. He went to a hotel in Mumbai, printed out his ticket and then left the airport. He flew to Hong Kong where he remained in transit, and then on to Fiji for two days prior to flying to Brisbane.

[17] The appellant denied that he had imported methylamphetamine. He was questioned about how he obtained the suitcase. The questioning took the following course:

"Q161	Can you explain to me where you obtained the bag from originally?
A	Originally?
Q162	Yes.
A	It was just, like, a swap meet type of thing.
Q163	It was like a what, sorry?
A	Like a swap meet, you know. I didn't – I didn't get it personally it was just – we collect stuff to – to – to send, you know, for missions.
Q164	Okay. So who gave it to you?
A	Who gave it to me?
Q165	Yes.
A	It's just – it's just in a location and we collect stuff and – and, um ---
Q166	Can you tell me where the location was?
A	In San Diego.
Q167	San Diego. All right.
A	Yeah.
Q168	So it wasn't really – you didn't actually buy it did you?
A	No it's just an old junky bag.
Q169	Okay. And ---
A	I – I'm not sure – I mean to – to me there would have to be somewhere along the lines of an airlines that, you know, somewhere somebody had to – to do something to it.
Q170	Yes. All right. So did you ---
A	I mean it came, you know, to – to come through all those stops and then – and then nothing – nothing show up is ridiculous.
Q171	When did you obtain that bag?

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[11] At trial, the appellant said that he had volunteered for the Faith Chapel for some 30 years and had also volunteered for a related San Diego Institution, the St James Ministry.

A	In – in Mumbai when I tried to get into the station they have guys out there with tags on saying they belong to the airport, you know, they – they work for the airport and once they found out I had, you know, some money on me well I – I – they moved every – everywhere back and forth. I couldn't even get in the airport there was such a – a mob over there of people. They only let you in if they – if you have a – a valid, um, layout, you know, the, you know, the flight pattern and I mean the flight name and everything. And so I couldn't get in the airport so there could be something that happened at that time. That's all I can figure out. But I – I have no idea, you know, who messed with the bag.
Q172	Okay. How long have you had it for?
A	Oh, probably just for a – about a week.
Q173	About a week?
A	Yeah.
Q174	All right. So when – the first time you obtained the bag it was empty?
A	Right.
Q175	Yes. And before you travelled into Australia did you pack the bag yourself?
A	I did, um, I didn't pack the bag – no – not before – just before I came into Australia? "[12]

[18] The appellant claimed not to have "packed" the suitcase himself before arriving in Australia. Its contents were "just stuff we threw in there". Some of the clothing was new, some of it used. It was intended for the missions. Initially, he had intended to distribute the clothing in New Delhi. That did not happen because those whom he had intended to meet up with were travelling. It was a holiday period and he had set off later than he had planned. He was looking at distributing the clothing in Darwin instead.

[19] When asked about his travel movements, the following responses were given by the appellant in the interview:

"Q216	Okay. Now I – I – I just wanted to ask you about your travel movements in general. When was the last time – where was the first time you left your place of origin – whatever it is that you come from – this … (indistinct) … when did you leave that?
A	It was on, ah, Sunday morning.
Q217	Sunday. Do you know the date?
A	I'd have to look at a calendar ---
Q218	All right.
A	--- and see the – a week ago Sunday.

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12 AB219-221.

Q219 Did you have the same items of luggage with you?

A Right.

Q220 Yes. All right. So you left Sunday morning being the twenty-ninth – is that correct. I'll just ---

A I don't think it's the twenty-ninth.

Q221 I'll just check a – I'll have a look at the calendar and I'll tell you what Sunday was. Sunday was the twenty-ninth of December. Would that be right. According to this calendar that I have with me Sunday was the twenty-ninth unless it was the Sunday before?

A No it would have been the Sunday before then.

Q222 So it was Sunday the twenty-second. Would you agree with that?

A Yes.

Q223 Okay. So on Sunday the twenty-second you left [Descanso] with three items of luggage. Is that correct?

A Yes.

Q224 Where did you go to?

A Ah, the first stop was, um, New Delhi, India.

Q225 New Delhi?

A Right.

Q226 And then Fiji? Because that's where it came from.

A No I went, ah, I flew into, um, Mumbai because there's – they were trying to find a route for me to make it to Australia ---

Q227 Okay.

A And, ah, they took me, ah, to a hotel and as soon as I got to the hotel they – they sent me the, ah, um, the proper print out and the print out said that I had to leave at – leave at, ah, be at the airport ---

Q228 Yes.

A --- at two – at twelve and so I – I didn't stay at the hotel I just, you know, left right away.

Q229 All right. And then from Mumbai where did you go?

A Went to Hong Kong.

Q230 Whereabouts in Hong Kong did you stay?

A At – just at the airport.

Q231 All right so you stayed on transit there?

A Right.

Q232 Transfer at Hong Kong. Where did you go then?

A	To Fiji.
Q233	How long did you stay in Fiji for?
A	I was there about two days.
Q234	And from Fiji you came to Brisbane?
A	Right."[13]

[20] The appellant said that although it looked as if he had been "used" to import drugs, he did not know of anyone having used him for that purpose. He recounted that the suitcase had been hauled on to the top of a taxi in Mumbai and hinted that something might have been switched in it then. At Mumbai Airport, he paid different people to move him around the airport in a car and he was moved from one gate to another. His luggage was never in any distant location or kept by another person in storage.

[21] According to the appellant, he was at Nadi Airport for six to eight hours before his flight to Brisbane departed. The suitcase had been checked in for the flight during his wait.

[22] On the following day, the suitcase was examined by an AFP crime investigator. It was deconstructed and a quantity of loose crystalline substance and two separate clip seal bags containing the same type of substance were located in a plastic insert that had been screwed into the structure of the suitcase, covered with fabric, and stitched up. The substance was shown on analysis to weigh 5243.4 grams which contained 4177.1 grams of pure methylamphetamine.

[23] **Evidence in the defence case:** The appellant gave evidence at his trial. He said that he left San Diego on 22 December 2013 to travel to New Delhi to look at a mission facility there. He had not had direct contact with those whom he intended to meet up with in the weeks prior to his departure. His other purpose in travelling in India was to finalise a loan for a humanitarian charitable trust. His intention was that once that had been done, he would travel on to London to obtain legal assistance in setting up the fund.[14] As things eventuated, the loan was not finalised because the loans officer failed to pick him up at New Delhi Airport.

[24] It was put to the appellant in cross-examination that he had told Officer Elphick that his travel plans were changed by his travel agent when he was in New Delhi. He denied that he had said that.[15] The appellant said that he made plans to go to Fiji and then Darwin while he was in Mumbai but that he had flights booked to take him as far as Fiji only.[16] It was to be a one-way trip to Darwin. He said he did not request the travel agent to book any flight for him from Darwin and did not remember how it was that the return flights had been booked for him. He was still hoping to travel from Darwin to London.[17]

[25] In his evidence-in-chief, the appellant said that the suitcase was purchased in Mumbai.[18] He gave the following evidence with respect to the circumstances in which it was purchased:

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13 AB224-225.

14 In evidence-in-chief, the appellant said that it was Harrison Clark who was to provide the legal assistance. He did not think he would have told Officer Elphick that he was to see Harrison Clark in Darwin: AB92; Tr1-22 l7 – AB93; Tr1-23 l9.

15 AB106; Tr1-36 ll1-11.

16 AB107; Tr1-37 ll38-46.

17 AB109; Tr1-39 ll16-29.

18 AB85; Tr2-15 ll4-6.

> " … Where did you get the bag in relation to airport?---Around 8 – 8, 9 o'clock at night.
>
> All right. Was that at the airport or on – before the airport?---No. It was just – they have – people are all along the street there. I call it a swap meet. I'm not sure what they call it over there, but everywhere there's people along the street. The taxi driver just picked a spot. I told him what I wanted, and he didn't buy a new case; he bought a used one.
>
> All right. So when you say a swap meet, is that like a market where you can go and buy - - -?---Right. Yeah. I didn't get out of the car. I – I didn't feel safe in – in India at all.
>
> All right. Why did you want the bag?---I – I was carrying clothes, and my High Top shoes wouldn't fit in my suitcase, and I've had trouble getting in airports with – if you try to carry any type of thing other than a regular suitcase.
>
> All right. Well, what were you carrying the clothes in?---I had a number of items, and I had my High Top shoes, shaver, things like that that wouldn't fit in my – when I – when I changed my – to my dress shoes, they would fit in my case. My High Top, my boots would not.
>
> What, were you just carrying them?---In a bag.
>
> In a bag. What sort of bag?---I – I guess a decorator bag or whatever you would call it. Like a gift bag.
>
> So the Indian taxi driver purchases a bag; is that correct?---Yeah. He purchased a suitcase.
>
> All right?---I had Indian money.
>
> So you paid for it?---Well, I gave him the money, and he – he took care of everything."[19]

[26] The appellant said that before they set off for the airport, he looked through the suitcase and shook it to throw out anything that might have been in it. He put his items in it and the driver loaded it onto the top of the taxi. It took about 45 minutes to get to the airport because three different groups mobbed him and took his Indian currency and his luggage, apart from his laptop. He retrieved the suitcase and the other item of luggage with the assistance of an armed guard.

[27] In cross-examination, the appellant said that he had instructed the taxi driver to use whatever money was left after he had purchased the suitcase to buy clothes. These were put in the suitcase with the appellant's own clothing.

[28] It was put to the appellant in cross-examination that in the interview, he had said that the suitcase was purchased in San Diego. He replied that on that occasion he was referring to clothing and not the suitcase. It was also put to him that he had said in the interview that he had had the same three items of luggage (including the suitcase) with him all the way from San Diego to Brisbane. The appellant claimed that that statement was incorrect. He had arrived in Mumbai with only two items of luggage. He claimed that he had misunderstood the question in the interview and attributed his misunderstanding to the duration of the interview, and to difficulties with language.

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[19] AB85; Tr2-15 l36 – AB86; Tr2-16 l21.

[29] The appellant gave further evidence that he did not handle the suitcase again in Mumbai or at all in Hong Kong. He said that he did not unpack the suitcase in Fiji but did open it there to take out, and then put back again, a pair of shoes.

[30] The appellant said that he stayed at a hotel in Fiji. He left it about 10.00 am on the day of his departure. The trip to the airport took about half an hour and he had to wait until noon to check-in. The hotel porter collected his luggage from his room. The luggage was taken to the airport by hotel transport and unloaded for him onto a cart. He wheeled the cart to the check-in where, in due course, a clerk picked it up. During the check-in, he was upgraded to business class for both legs of the flight to Darwin. He was given the boarding pass found in his laptop bag to which I have referred and also a boarding pass for business class travel from Brisbane to Darwin on 1 January 2014.[20]

[31] The check-in process took between 30 and 40 minutes. The clerk left the appellant on two occasions, purportedly to speak to a supervisor. The appellant claimed to have seen the clerk speak to someone in the crowd rather than go to the back office. His flight, which was scheduled to depart at about 4.55 pm, was delayed by two hours or so.

The offence and its elements

[32] In the course of his summing up, the learned trial judge directed the jury that in order to find the appellant guilty, the prosecution must prove beyond reasonable doubt each of the five elements of the charge. The elements were set out on a sheet handed to the jury as:

1. The defendant imported a substance.
2. He intended to import a substance.
3. The substance is a border controlled drug.
4. He knew it was a border controlled drug.
5. The quantity of substance imported was a commercial quantity.[21]

[33] His Honour identified the second element as the one which had predominated in the addresses of both the prosecutor and defence counsel. He directed that intention would be established if the defendant knew, or was aware that there was, or was likely to be, a substance of some kind concealed in his suitcase. He explained that the defendant's intention was to be ascertained by inference from facts found to have been established concerning his state of mind, and cautioned that an inference consistent with guilt might be drawn if it was the only rational inference that could be drawn from the circumstances. With respect to the fourth element, his Honour explained that it was not necessary that the defendant have known the particular identity of the border controlled drug.

[34] No issue was taken on appeal with these directions. Those with respect to intention to be inferred from circumstantial evidence are entirely consistent with the observations of McMurdo P with whom Fraser and White JJA agreed, in *R v Thathiah*.[22]

The ground of appeal against conviction

[35] The sole ground of appeal against conviction is that the verdict of guilty is "unsafe and unsatisfactory". This ground seeks to invoke the requirement of s 668E(1) of the

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20 Exhibit 15; AB199.
21 AB136 ll1-7.
22 [2012] QCA 195 at [30]-[32] and with the cases to which her Honour there referred.

Criminal Code (Qld) that the Court allow the appeal if it is of the opinion that the jury's verdict should be set aside on the ground that it is unreasonable or cannot be supported having regard to the evidence.

[36] The task for the appellant court where an appellant relies on this ground was described by Mason CJ, Deane, Dawson and Toohey JJ in *M v The Queen*[23] in the following terms:

> "Where, notwithstanding that as a matter of law there is evidence to sustain a verdict, a court of criminal appeal is asked to conclude that the verdict is unsafe or unsatisfactory, the question which the court must ask itself is whether it 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."

More recently, French CJ, Gummow and Kiefel JJ in *SKA v The Queen*[24] emphasised that, in performing this task, the appellate court is to make an independent assessment of the evidence, both as to its sufficiency and its quality.

The submissions

[37] **Appellant's submissions:** In written submissions, senior counsel for the appellant contended that the hypothesis that his client's suitcase had been tampered with by third parties either in the hotel in Fiji or at Nadi Airport was not able to be safely excluded. The contention proposed that the likelihood is that such parties at both the hotel and the airport were involved in causing the drugs to be secreted in the suitcase.

[38] In addition, a catalogue of evidential features were listed as unsupportive of the proposition that the appellant intentionally imported the drugs. As a 70 year old semi-retiree who volunteered in doing the good works of missions, he presented as a most unlikely drug courier. He would have been "an easy target". There was no evidence linking the appellant with any source, in Fiji or elsewhere, which might have supplied the drugs to him. There was no DNA or fingerprint evidence linking him to that part of the suitcase where the drugs were secreted. There were opportunities for the suitcase to have been tampered with by a third party during his absences from his hotel room. Certain hotel and airport staff had been "assiduous" in seeing to it that the appellant's luggage was taken to Nadi Airport and checked in for the Brisbane flight.

[39] It was submitted in writing that alleged inconsistencies between answers given in the appellant's record of interview and his oral testimony trial must have been given undue prominence by the jury. It was said that, at times, the questioning at the interview was "confused". Particularly, it was submitted that the appellant had not clearly stated in the interview that he had acquired the suitcase in San Diego. Allowance needed to have been made for the facts that the interview was conducted late in the evening and that the appellant had been travelling all that day.

[40] In oral submissions, it was maintained for the appellant that "the most likely set of events was that there was a conspiracy between the hotel staff and the airport staff".[25] Counsel opened by referring the Court to the "Heavy" luggage tag stating the weight of the suitcase to be 32 kilograms. The absence of a "Heavy" luggage tag for the flight from Hong Kong to Nadi, it was suggested, implied that the suitcase must have gained weight in Fiji because drugs were secreted in it there.

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23 (1994) 181 CLR 487 at 493.

24 [2011] HCA 13; (2011) 243 CLR 400 at 406.

25 Appeal transcript 1-5 ll35-36.

[41] With regard to the appellant's credibility, it was submitted that his stated inability at trial to remember the circumstances in which the return flights were booked was understandable after 12 months and was not an indication that his evidence was generally unreliable. It was suggested that Officer Elphick may have mistakenly recorded what the appellant said about the attorney, Harrison Clark, because the interview was conducted in a distracting way with one interviewer in front of him and the other to his left. The jury had the opportunity to observe the appellant both in the record of interview and in oral testimony. They may well have concluded that he was lying with respect to these matters.

[42] **Respondent's submissions:** The respondent submitted that the defence hypothesis of third party intervention in Fiji was without evidential foundation. It was based on nothing more than speculation. Further, it was open to the jury to have been satisfied beyond reasonable doubt that any reasonable hypothesis consistent with innocence had been excluded. Additional to the evidence of the importation of the suitcase, evidential factors which consolidated the prosecution case or eroded the appellant's credibility were:

(a) that he was travelling alone;

(b) his travel arrangements were haphapzard – those whom he was to meet in New Delhi were absent, and the loans officers failed to meet him;

(c) his travel itinerary to Australia via Hong Kong and Fiji was unusual;

(d) his account that his travel to Australia was not booked until he arrived in Fiji on 29 December 2013 was contradicted by the earlier bookings made for him on the Qantas flights and inconsistent with his claimed intention to fly from Darwin to London; and

(e) the appellant's use of the suitcase to transport curtain material and an assortment of clothing for the needy from India to Darwin was also unusual. Moreover, he gave different accounts as to where the clothing had been acquired.

Discussion

[43] In this appeal, it is common ground that there was comprehensive evidence with respect to all of the physical elements of the offence. Thus, the relevant enquiry is as to the quality and sufficiency of the evidence in the prosecution case as a foundation for inferences that the appellant intended to import the substance secreted in the suitcase and that he knew that the substance was a border controlled drug. Such inferences, once drawn, would have permitted the jury to have been satisfied beyond reasonable doubt of those matters. Was there a reasonable hypothesis consistent with an absence of the requisite intention and knowledge on the appellant's part which was left open on the prosecution case?

[44] In undertaking this enquiry, the separate observations of Gibbs CJ and Dawson J in *He Kaw Teh v The Queen*[26] are of assistance. That case concerned the fault elements of drug importation under s 233B(1) of the *Customs Act* 1901 (Cth), the statutory antecedent of s 307.1. There, drugs concealed in flight luggage had been imported into Australia.

[45] The Chief Justice observed:

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26 [1985] HCA 43; (1985) 157 CLR 523.

> " … I am by no means persuaded that it is virtually impossible, or even particularly difficult, to prove the state of mind of an importer of narcotic goods in the absence of admissions. If a person enters Australia carrying a suitcase which has narcotics concealed in it, and offers no convincing explanation of the presence of the narcotics, I should be surprised if a jury would draw any inference other than that he knew that the narcotics were in the case …"[27]

To similar effect, Dawson J said:

> "Moreover, I do not think that, upon this view, the difficulty of proof will, in practice, be as considerable as might be imagined. Clearly, the fact that an accused has been found bringing narcotic goods into the country may ordinarily found an inference that the goods are being imported intentionally, notwithstanding protestations by the accused that he was unaware of their presence or of their nature or quality. At the very least, proof that the goods were brought into the country by the accused will ordinarily mean that there is a case to answer."[28]

[46] Here, the appellant was detected entering Australia with a suitcase with a concealed quantity of a border controlled drug in it. He did not offer any explanation for the presence of the drugs. In essential aspects, the case at hand resembles the illustration given by Gibbs CJ.

[47] It is evident that the jury rejected the appellant's claim that he did not know that the drugs were concealed in the suitcase at the time of importation and that he did not intend to import them. His claim was not independently supported by features of the evidence and there was justifiable reason for the jury to reject it. The appellant's credibility was impaired by the different accounts that he gave as to where the clothing was sourced and his evidently untrue claims that arrangements for him to travel to Australia had not been made until he arrived in Fiji and that no travel arrangements had been made for him to travel on from Australia.

[48] I would accept that the answer given by the appellant to Question 166 in the record of interview does not unambiguously relate to the suitcase and that the appellant may have thought that the question was about the clothing, and not about the suitcase. If the answer is treated as related to the clothing, then there was a marked inconsistency with his later account that the clothing was acquired by the taxi driver in Mumbai.

[49] Further, I am unpersuaded that there was available on the evidence a reasonable hypothesis, much less a likelihood, of third party interference with the suitcase in Fiji. The modifications made to it in order to conceal the drugs were substantial. The mode of concealment was quite sophisticated. Considerable time and care would have been required to fill and seal the black insert, screw it into the suitcase structure, and then stitch up the lining fabric. It borders on the fanciful to suppose that, in the short time that he was in Fiji, the appellant was sourced as a hapless target, his travel plans were ascertained, the suitcase was accessed in his hotel room, the modifications were carried out either at the hotel or at the airport and, consistently with this hypothesis, yet other third parties were alerted to intercept the suitcase in Australia in order to retrieve the drugs. Moreover, it would be logically inappropriate to attempt to draw an inference about the weight of the suitcase on arrival in Fiji merely from the presence or absence of a particular "Heavy" luggage tag on it when it arrived in Brisbane.

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27 At 536-7.
28 At 597.

[50] For these reasons, I consider that, on the whole of the evidence, it was clearly open to the jury to have been satisfied beyond reasonable doubt that the appellant was guilty of the offence charged. This ground of appeal cannot succeed. The appeal against conviction must therefore be dismissed.

Sentence application

[51] The applicant is a foreign national and a citizen of the United States of America. He was 71 years old at the time of sentence. He is divorced and has two children. He had worked in real estate and other ventures into his sixties. He had been involved with the Faith Centre for over 30 years. He has no family in Australia who might visit him in prison.

[52] The applicant had no criminal record. He had cooperated with the administration of justice by participating in the interview, by consenting to a full hand-up committal without cross examination, and by making sensible and appropriate admissions at trial.

[53] The learned sentencing judge stated that he was required to take into account the matters identified in s 16A of the *Crimes Act* 1914 (Cth) as they were applicable. He mentioned all of the factors to which I have just referred in his sentencing remarks. As well, he mentioned the following aspects of the offending:

(a) the applicant's involvement was as a courier;

(b) the amount of pure methylamphetmine imported exceeded by five times the statutory commercial quantity of 750 grams;

(c) that the absence of evidence that the applicant was aware of the quantity of drugs he imported was unremarkable in that a courier would not be expected to have a full knowledge of a planned importation;

(d) the applicant's convoluted travel itinerary; and

(e) the sophisticated way in which the drugs were concealed in the suitcase.

[54] The maximum penalty for the offence for which the applicant was convicted is life imprisonment.

The ground of appeal against sentence

[55] The applicant's sole proposed ground of appeal is that the sentence is manifestly excessive. It is not contended that the learned sentencing judge overlooked any relevant sentencing factor.

The submissions

[56] **The applicant's submissions:** Senior counsel for the applicant submitted that the circumstances of the offending in *Thathiah* were comparable with the exception that the quantity of drugs was higher in the applicant's case. That case indicated that a non-parole period of five years was appropriate here. A non-parole period of eight years is manifestly excessive. The learned sentencing judge placed "excessive" weight on the quantity of methylamphetamine imported and he failed to give sufficient weight to the applicant's personal circumstances, particularly his age, both at the time of offending and over the duration of the non-parole period.

[57] **The respondent's submissions:** Counsel for the respondent submitted that the sentence is not manifestly excessive. That that is so is demonstrated by consideration of the sentences imposed in *Puan v The Queen*,[29] *Ng v The Queen*[30] and *R v Calis*.[31]

Discussion

[58] In view of the attention given to comparable sentences in the respective submissions, I propose to consider them first.

[59] The offender in *Thathiah* was a Malaysian national without family in Australia. He had no previous convictions. He had imported slightly less than two kilograms of a substance which contained 1454 grams of pure methylamphetamine. The drugs were in plastic bags concealed in the lining of his travel bag. The offender was sentenced to 10 years' imprisonment with a fixed parole release date after serving five years which included declared pre-sentence custody of 390 days. White JA, with whom McMurdo P and Fraser JA agreed, was of the view that the 10 years was "comfortably within range".[32] Her Honour noted that in fixing the parole release date, the primary judge reflected the further burden on the applicant of serving his punishment in a foreign prison with no prospect of family visits.[33]

[60] In *Calis*, also a decision of this Court, the offender was a 45 year old Dutch national. He had a wife and young children who lived in Gambia. He had medical conditions which required further treatment. This offender imported substance containing 1294.2 grams of pure methylamphetamine concealed in the retractable handles and supporting edges of a suitcase. He was a courier who made no more than about $7,000 from his participation. He cooperated during the trial by not putting the prosecution to proof on matters such as continuity. He was sentenced to 10 years' imprisonment with a non-parole period of six years. His application for leave to appeal against the sentence on the ground that it was manifestly excessive failed.

[61] The offender in *Yi* was sentenced after conviction at trial to 12 years' imprisonment with a non-parole period of eight years. He was a 35 year old Singaporean with children in his country of nationality. He had imported 839.2 grams of pure methylamphetamine in a liquid form stored in two cognac bottles carried in a "duty free" bag on a flight from Hong Kong to Sydney. The wholesale value of the drug was about $230,000. The offender had a prior conviction for dishonesty for which he had been imprisoned in Singapore. In the New South Wales Court of Criminal Appeal, Howie J, with whom Hodgson JA and Fullerton J agreed, stated that, notwithstanding that the sentence was a heavy one having regard to the amount of drug imported, he was not satisfied that it fell outside the discretion of the sentencing judge.[34]

[62] In *Ng*, the offender was a Singaporean national who had imported 4361 grams of a substance containing 2445 grams of pure heroin concealed in toiletries and food items brought with him on a flight into Sydney.[35] It was unlikely that he had participated at a level above that of a courier. He was promised that a gambling debt of

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29 [2009] NSWCCA 194.
30 [2010] NSWCCA 232.
31 [2013] QCA 165.
32 At [43].
33 At [45].
34 At [65].
35 The statutory commercial quantity for heroin was 1.5 kilograms.

SGD$11,000 would be cleared and a sum of SGD$9,000 would be paid to him for his participation. He was 49 years old at the time of his appeal and without family or friends in Australia. He had been imprisoned elsewhere for prior offences of extortion and piracy. The offender was sentenced to 11 years three months' imprisonment with a non-parole period of seven years three months. His appeal on the ground that the sentence was manifestly excessive failed.

[63] The quantity of pure methylamphetamine imported by the applicant markedly exceeded that imported by the offenders in *Thathiah*, *Yi* and *Calis*. It was well over double the quantity imported in each of those cases. It far exceeded the quantity of pure heroin imported in *Ng*. Yet the applicant's term of imprisonment is similar to that imposed in *Yi* and *Ng*. It exceeds that imposed in *Calis* and in *Thathiah*. Upon a comparison with those cases, it cannot be said that the sentence imposed here of 12 years' imprisonment is manifestly excessive.

[64] It remains to consider whether the sentence is manifestly excessive in so far as it imposes a non-parole period of eight years. That period equals the corresponding period imposed in *Yi* and is slightly more than that imposed in *Ng*. It exceeds by two years the non-parole period in *Calis* and by five years that in *Thathiah*. The learned sentencing judge expressly referred to the quantity of pure methylamphetamine imported by the applicant as being "at least three times" the quantity imported in *Calis*.[36] His Honour was evidently minded on that account to impose a significantly longer non-parole period than the six years imposed in that case. It was neither unjust nor unreasonable for him to have adopted that approach.

[65] A countervailing consideration is the applicant's age. A non-parole period of eight years for a 70 year old is a greater burden than for someone much younger. It represents a much higher fraction of life expectancy. As with each of the other offenders, it is a time that will be spent without regular contact with family or friends. His Honour expressly referred to this hardship.[37]

[66] I have considered the sentence imposed with particular regard for the considerations referred to in the immediately two preceding paragraphs. I have come to the conclusion that the non-parole period fixed, although stern, is not unreasonable or plainly unjust. Applying the approach recently endorsed by French CJ, Keane and Nettle JJ in *R v Pham*,[38] I am not driven to a conclusion that there must have been some misapplication of principle on the part of the learned sentencing judge.

[67] The proposed ground of appeal is, for these reasons, not one that can be made out, in my view. I would therefore refuse leave to appeal against sentence.

Orders

[68] I would propose the following orders:

1. Appeal against conviction dismissed.

2. Application for leave to appeal against sentence refused.

JACKSON J: I agree with Gotterson JA.

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36 AB174 ll6-9.
37 AB172 ll43-46.
38 [2015] HCA 39; (2015) 325 ALR 400 at [28].