SUPREME COURT OF QUEENSLAND

CITATION:	*R v Van Huynh* [2003] QCA 371
PARTIES:	**R** **v** **VAN HUYNH, Hieu** (applicant)
FILE NO/S:	CA No 140 of 2003 SC No 174 of 2002
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED EX TEMPORE ON:	28 August 2003
DELIVERED AT:	Brisbane
HEARING DATE:	28 August 2003
JUDGES:	Williams and Jerrard JJA and Philippides J Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**Application for leave to appeal against sentence refused**
CATCHWORDS:	CRIMINAL LAW – JURISDICTION, PRACTICE AND PROCEDURE – JUDGMENT AND PUNISHMENT – SENTENCE – FACTORS TO BE TAKEN INTO ACCOUNT – PARITY – CO-OFFENDERS – DISCRIMINATION BETWEEN CO-OFFENDERS – where applicant convicted after trial of possession of the dangerous drug heroin in a quantity exceeding two grams – where applicant sentenced to 12 years imprisonment – where applicant's co-offender pleaded guilty to same offence and sentenced to eight years imprisonment – where applicant contends the disparity in sentences gives him a justifiable sense of grievance – where applicant involved in offence at much greater level than co-offender – whether disparity reflects the overall level of criminality in the behaviour of each offender *R v Nagy* [2003] QCA 175; CA No 24 of 2003, 2 May 2003, referred to *R v Truong* [1997] QCA 49; CA No 528 of 1996, 27 February 1997, discussed

COUNSEL:	K M McGinness for the applicant P F Rutledge for the respondent
SOLICITORS:	Legal Aid Queensland for the applicant Director of Public Prosecutions (Queensland) for the respondent

1. JERRARD JA: On 9th April 2003 Hieu Van Huynh was found guilty by a jury of the offence of having had possession of the dangerous drug heroin, in a quantity which exceeded two grams. Such possession being on the 13th day of June 2000 at Coolangatta. He was sentenced that same day to 12 years imprisonment. A co-offender, Quynh Dinh Trinh, who had pleaded guilty to that same offence on 1st April 2003, was sentenced on 9th April 2003 to eight years imprisonment and the learned Judge recommended that Mr Trinh be considered for parole after serving three years of that sentence.

2. The Judge explained that that recommendation was a reflection of Mr Trinh's plea of guilty. Mr Huynh has appealed against his sentence, arguing that it is manifestly excessive by reason of the disparity between his 12 year sentence and the eight year sentence with a recommendation for parole imposed upon Mr Trinh and that that disparity gives him a justifiable sense of grievance, warranting appellant intervention by this Court.

3. His counsel has helpfully referred the Court to remarks in the decisions in *Lowe v. The Queen* at 154 CLR 606, *Postiglione v. The Queen* at 189 CLR 295 and I refer to remarks of Justice Williams in *The Queen v. Nagy* [2003] QCA

175. The sentencing remarks of the learned Judge record that Mr Trinh was driving a car, to Queensland from Sydney, which was intercepted at Coolangatta by Queensland Police Service officers and officers of the National Crime Authority in the early hours of the morning of 13 June 2000.

4. It is common ground in this appeal that concealed in the door panels of the car were a number of balloons containing 347 grams of white powder, which in turn, contained 131 grams of pure heroin. The sentencing remarks record that the learned Judge had been informed that that quantity of heroin could be purchased for between $37,500 and $52,000 and have a street value, if cut as far as possible, of $700,000. Mr Trinh had undertaken the role of courier of that heroin from Sydney to Brisbane for a fee of $1,000.

5. The Judge remarked that Mr Trinh had a stable family background and a removalist business, which the learned Judge had been told was in financial difficulties at the relevant time. Mr Trinh had three children and no previous criminal history. The Judge accepted that although his plea of guilty was late, that fact was largely attributable to location and language difficulties. The eight year sentence imposed on Mr Trinh has not been made the subject of any application for leave to appeal.

6. I respectfully observe that it appears a sentence very much within the range, when regard is had to the sentence upheld

by this Court in the matter of The Queen v. Truong, CA No 528 of 1996. In that matter, that applicant had pleaded guilty on an ex-officio indictment, charging her with one count of possession of heroin in excess of two grams. The heroin in that case was a total of 76.896 grams of pure heroin contained within a bag of powder, weighing in total 135.143 grams and was thus less than the quantity involved in this case.

7. The applicant Truong had no prior criminal history, was married and had two young children aged five and seven. She had accepted an offer of $5,000 to convey heroin from Sydney to Brisbane and had been apprehended at Brisbane airport when the heroin was located in her child's backpack. She had provided what this Court described on the appeal as limited, but nonetheless substantial co-operation with the authorities, which co-operation had involved her identifying the person who had given her the instructions on how to collect the heroin in Sydney, together with the description of that person's address.

8. That applicant was described as remorseful and as having a particularly close relationship with her youngest child and the judgment of this Court recorded that that child would have difficulty in adjusting to the mother's absence. That applicant had wanted the money she was to be paid so that she could send it to her relatives in Vietnam and had suffered considerable shame within her own family and

community, as well as her husband's anger at the offence she had committed.

9. This Court upheld a sentence of nine years imprisonment with a recommendation for consideration for release on parole after that applicant had served three and a half years. That head sentence was described by the President as towards the high end of the range as a head sentence, which range the respondent had conceded in submissions in that appeal to be between seven to 10 years imprisonment.

10. This applicant's co-accused accordingly received a sentence of eight years imprisonment, about which no successful complaint could be made for acting as a courier of a significant quantity of heroin. This applicant's conduct was significantly more serious than that of a courier. As described by the learned Judge and conceded in the applicant's outline of argument, this applicant had bought the car that Mr Trinh was driving and the heroin that Mr Trinh was carrying and had arranged for its transport from Sydney to Brisbane.

11. In those circumstances, it was appropriate that he receive a sentence which reflected his far greater degree of involvement in the acquisition and distribution of heroin than that demonstrated by a person shown only to be a courier. The judgment of this Court in *Truong* settles that even offenders in that latter class can expect to receive up to ten years imprisonment.

12. This applicant’s constructive possession of heroin being far more serious in the overall circumstances of Mr Trinh's actual possession of it, caused for a considerably heavier sentence than that imposed on Mr Trinh. This is without the distinguishing feature of the latter's plea of guilty. The learned sentencing Judge took into account in the applicant’s favour that he had no significant criminal history, was likely to be isolated in imprisonment because of his language restrictions and also that he was suffering when sentenced from a fractured pelvis, which caused him some difficulties but for which, of course, he could receive appropriate treatment while in custody. The applicant does not complain that the learned Judge overlooked any matters in mitigation, but only of the disparity between the two sentences.

13. That disparity simply reflects the overall level of criminality in the behaviour of each co-offender. As was remarked by the present presiding Judge in *Nagy* at paragraph 49 of that judgment, "Where there are sufficient factors supporting different treatment then no justifiable sense of grievance flows from the fact that one offender received a heavier sentence.”

14. The sentencing Judge was quite correct in describing the amount of heroin involved as being very large and any lesser sentence imposed on this applicant would have failed to reflect sufficiently the far greater degree of

wrongdoing by the applicant than that exhibited by Mr Trinh. Accordingly the application for leave to appeal should be dismissed.

WILLIAMS JA: I agree.

PHILIPPIDES J: I also agree.

WILLIAMS JA: The order of the Court is the application for leave to appeal against sentence is refused.
