SUPREME COURT OF QUEENSLAND

CITATION:	*R v Agboti* [2014] QCA 280
PARTIES:	**R** **v** **AGBOTI, Jacqueline Obianuju** (applicant)
FILE NOS:	CA No 67 of 2014 SC No 433 of 2013
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	7 November 2014
DELIVERED AT:	Brisbane
HEARING DATE:	21 July 2014
JUDGES:	Muir and Morrison JJA and Peter Lyons J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. The application for leave to adduce further evidence is refused.** **2. The application for an extension of time to apply for leave to appeal against sentence is granted.** **3. Appeal allowed.** **4. Set aside the sentence and substitute a sentence of nine years and six months imprisonment, with a non-parole period fixed at four years and six months.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – SENTENCE MANIFESTLY EXCESSIVE OR INADEQUATE – where the applicant pleaded guilty to one count of importing a commercial quantity of a border controlled drug, methamphetamine – where the applicant was sentenced to 11 years imprisonment, with a non-parole period of five years and six months – where in the months leading up to the offence, the applicant had been disowned by her father, commenced using drugs, fallen pregnant, and undergone an abortion, leaving the applicant in a fragile state of mind – where the applicant was 23 years old at the time of the offence – where the applicant had no criminal history – where the cost of travel was the only reward the applicant was to receive for her offending – where the applicant applied for an extension of time in which to appeal against the sentence – whether the sentence imposed was manifestly excessive

Crimes Act 1914 (Cth), s 16A, s 16G
Criminal Code 1899 (Qld), s 671
Criminal Code 1995 (Cth), s 314.4(1)

Bugmy v The Queen (1990) 169 CLR 525; [1990] HCA 18, cited
Director of Public Prosecutions (Cth) v De La Rosa (2010) 79 NSWLR 1; (2010) 243 FLR 28; [2010] NSWCCA 194, considered
Hili v The Queen (2010) 242 CLR 520; [2010] HCA 45, followed
Johnson v The Queen (2002) 26 WAR 336; [2002] WASCA 102, considered
Lau v The Queen [2011] VSCA 324, considered
Markarian v The Queen (2005) 228 CLR 357; [2005] HCA 25, cited
Ng v The Queen [2010] NSWCCA 232, considered
Power v The Queen (1974) 131 CLR 623; [1974] HCA 26, cited
R v Bezan (2004) 147 A Crim R 430; [2004] NSWCCA 342, considered
R v Calis [2013] QCA 165, considered
R v Demaria [2008] VSCA 105, considered
R v Jain [2004] VSCA 30, considered
R v Jimson [2009] QCA 183, considered
R v Kaldor (2004) 150 A Crim R 271; [2004] NSWCCA 425, considered
R v Maniadis [1997] 1 Qd R 593; [1996] QCA 242, cited
R v Mirzaee [2004] NSWCCA 315, considered
R v Mokoena [2009] 2 Qd R 351; [2009] QCA 36, considered
R v Sandford [2006] VSCA 110, considered
R v Scognamiglio (1991) 56 A Crim R 81, considered
R v Spillane [1999] NSWCCA 280, considered
R v Thathiah [2012] QCA 195, considered
R v Tran (2007) 172 A Crim R 436; [2007] QCA 221, applied
R v Wong (1999) 48 NSWLR 340; [1999] NSWCCA 420, considered
Serrette v The Queen (2000) 118 A Crim R 204; [2000] WASCA 405, considered
Speer v The Queen [2004] NSWCCA 118, considered
Wong v The Queen (2001) 207 CLR 584; [2001] HCA 64, followed

COUNSEL: The applicant appeared on her own behalf
G R Rice QC for the respondent

SOLICITORS: The applicant acted on her own behalf
Director of Public Prosecutions (Commonwealth) for the respondent

[1] **MUIR JA:** I agree with the reasons of Peter Lyons J and with the orders proposed by him.

[2] **MORRISON JA:** I have read the reasons of Peter Lyons J and agree with those reasons and the orders his Honour proposes.

[3] **PETER LYONS J:** On 11 February 2014, the applicant pleaded guilty to one count of importing a commercial quantity of methamphetamine. A sentence was then imposed, of a term of imprisonment of 11 years, with a non-parole period of five years and six months. A period of 494 days spent in pre-sentence custody was deemed to be time already served under the sentence. The applicant has applied for leave to appeal against the sentence. She has also made an application for an extension of time, her application for leave to appeal having been filed on 28 March 2014, and thus more than a calendar month after the date of sentence[1].

The offence

[4] On 5 October 2012, the applicant arrived at Brisbane International Airport on a flight from Port Moresby. She was selected for a baggage examination that resulted in the discovery in the lining of a suitcase, of a bag of a white crystalline substance, containing methamphetamine. The gross weight of the substance was 2,944.6 grams, the pure weight of methamphetamine being 2,326.5 grams, with an average purity of 79 per cent. The threshold for a commercial quantity of methamphetamine was 750 grams[2]. The street value was said to be between $3.4 million and $10.2 million[3]; although the "wholesale" value was said to be between $454,000 and $779,000[4].

Background

[5] The applicant was born on 22 April 1989, and was 23 years of age at the date of the offence. She was born in Nigeria. She was raised by her mother and her step-father. The family lived in the United States during the early years of the applicant's life, but returned to Nigeria when she was about 11.

[6] The applicant completed high school, and university. While studying, she worked at a radio station.

[7] The applicant had had contact with, and received financial support from, the man she believed to be her father, a former senator in Nigeria. The applicant resided with this man while she attended university. However, as she was completing her degree, she learnt that the man was not, in fact, her father. She was highly distressed by this. At some point she made contact with other children of this man, contrary to what was described as "a cultural taboo". That resulted in the man disowning her, an event which occurred some four months prior to the offence. The applicant said that she felt depressed over the period of these events but has not been formally diagnosed with any mental health condition.

[8] The applicant is engaged to be married to a man in Nigeria, with whom she has been in a relationship for a number of years. She was and is a practising Christian. In the period of about five months leading up to the offence, however, she commenced to drink alcohol more regularly, and was introduced to cannabis, smoking joints up to three times a day. In this period, she again came into contact with a former boyfriend. She had her first sexual experience with this man, and fell pregnant to him. About two days before leaving on the trip which resulted in the commission of the offence, she underwent an abortion. She did not tell her fiancé or her family about her contact with her ex-boyfriend, nor about the subsequent events.

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1 See s 671 of the *Criminal Code* 1899 (Qld).
2 See s 314.4(1) of the *Criminal Code* 1995 (Cth), since repealed.
3 Appeal Record (*AR*) p 25.
4 AR p 8.

[9] In the period shortly before the offence, the applicant met and became friendly with another man, identified only by his first name, Don. At this point, she was expecting to travel overseas. She told the man this, and he asked whether she could travel via Australia, and deliver some medicine to a friend. He offered to pay the extra expense of going to Australia. The applicant refused.

[10] The applicant was "desperate" to leave her country and the circumstances in which she found herself. She had been expecting her mother to pay for the trip overseas. However, her mother did not do so, and the applicant was unable to obtain money for the trip from family friends. The applicant told this to Don, who offered to pay for her travel on condition she go via Australia and deliver the medicine to the friend. The route was somewhat indirect, involving travelling from Douala in Cameroon, to Ethiopia; thence to Rwanda, Qatar, Singapore and Port Moresby, before flying to Brisbane. She understood this to be because Don had purchased a cheap fare.

[11] Don arranged for the applicant to be provided with a suitcase. She was told that the medication was within the suitcase, although it appeared to be empty. She recognised that there was a substantial risk that she was being asked to carry an illegal drug. She attributed her conduct to the fact that she was desperate to get away in view of her personal circumstances.

[12] When the applicant was apprehended at the Brisbane Airport, she declined to participate in an interview. She was detained in custody. The matter proceeded by way of a full hand-up committal.

Sentencing remarks

[13] The learned primary Judge recognised the applicant's relatively young age, and the absence of any prior criminal offending. He also noted the circumstances relating to the applicant's family situation, and the events associated with the resumption of contact with her former boyfriend. He accepted that the cost of travel to Sweden to friends or family was the reward the applicant was to receive for her offending.

[14] The learned primary Judge accepted that the applicant showed genuine remorse; and that the offence was out of character and occurred in the context of her need to get away from the events which had happened recently.

[15] He also noted her quick admission of her involvement in the offence, her co-operation with the police, that the plea was an early plea, and the committal proceeded by way of a full hand up. He noted the importance of general deterrence for an offence such as this.

[16] The learned primary Judge referred to the fact that both the Crown and the applicant's counsel submitted that a sentence of a term of imprisonment of 11 years was appropriate, the difference in their positions relating to the non-parole period. The Crown contended for a period of six years and six months; while the applicant's counsel contended for a period of five years and six months. The learned primary Judge accepted the submission of the applicant's counsel as to the appropriate non-parole period.

Submissions on application

[17] At the hearing in this Court, the applicant represented herself. The sole ground of appeal set out in her application for leave to appeal was that the sentence was in all

of the circumstances manifestly excessive. Her written submissions referred to her unresolved personal circumstances, and her state of depression, at the time of the offence. She referred to *Lahey v Edwards*[5] in relation to the width of the discretion to be exercised on sentencing; and to *R v Scognamiglio*[6], for the proposition that a mental handicap short of a mental illness provides a basis for a reduced sentence. She submitted that the learned primary Judge gave undue weight to the principle of general deterrence; and failed adequately to recognise her own contrition, character, age, and mental condition, all made relevant by s 16A of the *Crimes Act* 1914 (Cth). She submitted that the head sentence should be reduced to a term of imprisonment of nine years, and that the non-parole period should also be reduced. She also referred to *R v Calis*[7]; *R v Thathiah*[8]; *R v Spillane*[9]; and *R v Demaria*[10] for the sentences imposed in those cases; to *Spillane* for the proposition that sentencing does not call for an "arithmetical" approach, where the quantity of the drug is determinative; and to *Demaria* for the significance of remorse.

[18] The submissions for the respondent referred to *Wong v The Queen*[11] for the proposition that in sentencing for an offence like the present one, deterrence is to be given chief weight, with stern punishment being warranted in almost every case. The quantity of the drug was emphasised. It was submitted that the sentence was in conformity with past decisions. A schedule of those decisions had been provided to the learned primary Judge, and was relied upon by the respondent. It is necessary therefore to discuss those decisions.

Other sentencing decisions

[19] The respondent's submissions pointed out that the applicant's non-parole period was lower than the non-parole period in *R v Jain*[12], *Speer v The Queen*[13], and *Ng v The Queen*[14].

[20] In *Jain*, the defendant appealed against a sentence of 10 years, with a non-parole period of eight years, imposed for the importation of a quantity of heroin which was a little in excess of the threshold for a commercial quantity. The defendant had pleaded guilty to this offence, and to an offence of using a falsified passport (for his associated entry into Australia). The heroin had an estimated street value of $3.6 million. The defendant was 26 years of age at the time of the offending, and had no prior convictions. The passport which he used had previously been a genuine passport, but his photograph had replaced the original photograph on it. As in the present case, the drug was packed in the lining of a case. The primary judge had rejected the defendant's explanation of his conduct, which was that his sole reward was to be the forgiveness of a debt of $9,000. He was in fact found to be in possession of several thousand dollars in mixed currency, and a return air ticket. The sentence was described as "clearly a very substantial one"[15]. The court also noted that the

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5 [1967] Tas SR (NC) 266 (NC13).
6 (1991) 56 A Crim R 81 at 85.
7 [2013] QCA 165 (*Calis*).
8 [2012] QCA 195 (*Thathiah*).
9 [1999] NSWCCA 280 (*Spillane*).
10 [2008] VSCA 105 (*Demaria*).
11 (2001) 207 CLR 584 (*Wong*).
12 [2004] VSCA 30 (*Jain*).
13 [2004] NSWCCA 118 (*Speer*).
14 [2010] NSWCCA 232 (*Ng*).
15 *Jain* at [6].

reward which the defendant was to receive, and how he came to be involved in the offence, were unknown. It was accepted that the role of the defendant was that of a courier. The head sentence was maintained, but the court considered that the non-parole period was unduly high, bearing in mind that the defendant was a first offender, with reasonable prospects of rehabilitation. The non-parole period was reduced to seven years.

[21] In *Speer*, the defendant had pleaded guilty to a charge of importing a quantity of heroin, equivalent to 2.5411 kilograms of pure heroin. The threshold for a commercial quantity of that drug was 1.5 kilograms. The street value of the heroin was said to be between $750,000 and $9.034 million. The defendant was sentenced to a term of imprisonment of 16 years, with a non-parole period of 10 years. The defendant was aged 25 years at the time of the offending, and had no previous convictions. He was a gambler, and owed $17,000 to his mother. He had been given $3,500, apparently to cover airfares, accommodation and the like, with the promise of an additional unspecified amount on his return. His plea of guilty was late, made on the day the trial came on for hearing. It was however accepted that he had shown contrition.

[22] On appeal, his sentence was reduced to a term of nine years, with a non-parole period of six years. The sentence was imposed by reference to a range derived in *R v Wong and Leung*[16], and said to be between eight and 12 years, where the amount of heroin was between 1.5 and 3.5 kilograms[17]. A further identified reduction was made by reference to the plea of guilty[18]. The non-parole period was fixed by applying a ratio of two-thirds, said to reflect the defendant's youth, his prospects of rehabilitation, and the fact that the sentence resulted in his first period in custody[19].

[23] On its face, the sentence in *Speer* would suggest that the head sentence in the present case is excessive. However, the court in that case expressly recognised the application of s 16G of the *Crimes Act*, a provision which does not influence more recent decisions in New South Wales. It is unclear to what extent the section affected the sentence. It is accordingly difficult to gain much assistance in the present case from *Speer*.

[24] In *Ng*, the defendant pleaded guilty to a charge of importing a commercial quantity of heroin. He was sentenced to a term of imprisonment of 11.25 years, with a non-parole period of 7.25 years, upheld on appeal. The quantity of heroin was 4.361 kilograms, equivalent to 2.445 kilograms pure heroin, the threshold for a commercial quantity of this drug again being 1.5 kilograms. The estimated wholesale value of this quantity of heroin was said to be $857,500 and $960,400; and its estimated street value between $293,400 and $1,711,500. There is an obvious difficulty with the proposition that the street value might be less than the wholesale value.

[25] The defendant was, in that case, about 47 years of age at the time of the offending. He had a criminal history of some significance, involving terms of imprisonment for extortion, and on two occasions for piracy. Nevertheless, it was said that this was relevant only to the likelihood of reoffending; and that the sentencing judge appropriately took into account that this was the defendant's first conviction for a drug offence. The defendant was sentenced on the basis that his role was no

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16 (1999) 48 NSWLR 340 (*Wong and Leung*).

17 *Speer* at [19].

18 *Speer* at [29].

19 *Speer* at [31].

higher than that of a courier. He was to receive financial benefits of some SGD$20,000. The sentencing judge did not accept that the defendant was ignorant of the quantities of drugs; nor that the defendant believed he was carrying MDMA. The plea of guilty was early. The defendant's regret for his involvement in the offending was associated with its detection, rather than recognition of the harmful consequences which would have flowed from it. The sentencing judge also rejected the defendant's claim that he acted under duress. There was no form of mental condition capable of explaining the offending.

[26] *Speer* was distinguished, not because of the application of s 16G of the *Crimes Act* (Cth), but because Speer was a young offender with no prior record; he had good prospects of rehabilitation; he was unaware of the identity and quantity of the drugs he was carrying; and his remorse was genuine.

[27] In *Ng*, R S Hulme J expressed doubt whether the sentence under appeal was sufficient. He referred to the review of prior decisions carried out in *Wong and Leung*, commenting that the reviews were of sentences imposed when s 16G of the *Crimes Act* was in operation. His Honour stated that this section had the effect of reducing the sentences which would otherwise have been imposed by about one-third. However, neither McClellan CJ at CL nor Davies J, who agreed with McClellan CJ at CL, supported these observations. Rather, McClellan CJ at CL had stated that the sentence at first instance "was within the range of appropriate discretion", confirmed by his Honour's review of cases identified in his judgment in *Director of Public Prosecutions (Cth) v De La Rosa*[20].

[28] In *R v Tran*[21], the defendant pleaded guilty to one count of importing a quantity of heroin, equivalent to 1,473 grams pure heroin, with a value in excess of $1,000,000. The quantity was slightly under the threshold for a commercial quantity. He was sentenced, on appeal, to a term of 10 years imprisonment with a non-parole period of five years. His role was that of a courier. He was 41 years of age, married, with a good work history, and no previous convictions.

[29] The heroin was imported in two large clear plastic jars or barrels, which contained cut sections of fish. Mr Tran said that he did not know what was in the barrels, but suspected they contained illegal drugs. Mr Tran lived in Sydney; but his incoming passenger card nominated an address at Inala as his residence, being the same address as another passenger on the plane, whom he claimed not to know. Mr Tran explained his possession of the jars of fish on the basis that he was going to use them in his restaurant; but he also said he came to Brisbane because he wanted to start a restaurant. Mr Tran had been offered $10,000 to bring the barrels to Brisbane. He was to meet an unidentified person, and exchange them for the money; failing which he was to take them to the address at Inala. Shortly after the discovery of the heroin by customs officials, Mr Tran underwent a formal record of interview, making full admissions as to his conduct.

[30] *Tran* established that, in this State, sentences for federal offences imposed by other intermediate appellate courts in Australia should be taken into account when sentencing for similar offences in Queensland. However, Atkinson J (with whom the other members of the Court agreed) pointed out that while the amount of drug imported is a relevant factor, it is "not necessarily the most important factor to be

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20 (2010) 243 FLR 28 (*De La Rosa*).

21 (2007) 172 A Crim R 436 (*Tran*).

taken into account in determining the correct sentence to be imposed"[22]. Keane JA (with whom White J agreed) also emphasised the significance of "the mitigating force of the circumstances personal to this applicant"[23].

[31] Some of the cases analysed by Atkinson J in *Tran* are of some assistance in the present appeal. Thus in *R v Bezan*[24], a decision of the New South Wales Court of Criminal Appeal, the defendant was convicted by a jury of the offence of importing, contrary to s 233B(1)(b) of the *Customs Act* 1901 (Cth) a trafficable quantity of heroin (an offence carrying a maximum penalty of 25 years imprisonment; a trafficable quantity of heroin was a quantity between 2 grams and 1.5 kilograms). The amount imported was equivalent to 260 grams of pure heroin, and worth up to $900,000. The jury rejected the defendant's claim that he had no knowledge of the drugs. He was found to be the importer of the drug[25], and not merely a courier. However, he had no criminal history. On a Crown appeal against sentence, a term of imprisonment of eight years was imposed, with a five year non-parole period.

[32] The defendant in *R v Mirzaee*[26] pleaded guilty to one charge of importing 578 grams of heroin (a trafficable quantity), contrary to s 233B(1)(b) of the *Customs Act*. The street value of the drug was said to be $2 million, though this was contentious. The sentence imposed on appeal was a term of nine years imprisonment, with a non-parole period of four and a half years. The defendant was 58 years of age at the time of the offence, and had used a false Italian passport. He had three children, and was without prior criminal conviction. He committed the offence because of financial problems he was experiencing.

[33] The defendant in *R v Kaldor*[27] was convicted by a jury of the procurement of the importation of 479.3 grams of pure heroin, contrary to s 233B(1)(b) of the *Customs Act*. The quantity exceeded the amount which defined a trafficable quantity, the offence carrying a maximum term of imprisonment of twenty-five years. On a successful Crown appeal, a sentence of seven years imprisonment with a non-parole period of four years was imposed. The defendant was 57 years of age at the date of the offence, and had a limited criminal history. He plainly knew that the venture involved the importation of drugs. He had prevailed upon a friend, with whom he was travelling, to carry a guitar case as part of his luggage, and through customs. There was no evidence that the defendant knew the quantity of the drug, or was to receive a profit. However, it was said that, in the absence of evidence to the contrary, a person in the position of the defendant should be assumed, in a general sense, to know the quantity of the drug; and similarly it should be assumed that such a person is committing the offence for profit[28]. When apprehended, the defendant had agreed to participate in a controlled delivery, but this did not occur, and was not referred to in the discussion on sentence.

[34] In *R v Sandford*[29] the defendant was convicted, apparently after trial, of counselling and procuring a courier to import 396.7 grams of pure heroin, contrary to s 233B(1)(d) of the *Customs Act*. He had promised to pay another person, who was described as

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22 *Tran* at [52].
23 *Tran* at [9].
24 (2004) 147 A Crim R 430 (*Bezan*).
25 *Bezan* at [6].
26 [2004] NSWCCA 315.
27 (2004) 150 A Crim R 271 (*Kaldor*).
28 *Kaldor* at 297.
29 [2006] VSCA 110 (*Sandford*).

vulnerable, the sum of $35,000 for importing the drug. The defendant made the arrangements for the importation. He was considered to be, in relation to the drug trade, "a recruiter for others placed above him in the criminal hierarchy"; and at "a level above the level of courier"[30]. He was sentenced to a term of six years imprisonment with a non-parole period of three and a half years. The defendant's application for leave to appeal against this sentence was refused.

[35] Sentences imposed in Western Australia were not relevantly affected by s 16G of the *Crimes Act*. The defendant in *Serrette v The Queen*[31], a decision of the Court of Criminal Appeal of that State, had pleaded guilty to importing 925.4 grams of pure cocaine. The sentence of 10 years imprisonment with a non-parole period of six years was not disturbed on appeal. While he had no prior criminal history, he was regarded as playing a more significant part in the importation than as a mere courier[32].

[36] The last of the cases analysed in *Tran* to which I propose to refer is *Johnson v The Queen*[33]. There the defendant pleaded guilty to one count of importing 805.2 grams of pure MDMA (a commercial quantity) and one count of importing 131.7 grams of pure cocaine (a trafficable quantity). He was 22 years of age at the time of offending. He was sentenced to cumulative head sentences of eight years for the MDMA offence, and three and a half years for the cocaine offence, the sentencing Judge thereby recognising his participation in the "fast-track" approach, and his remorse. He was eligible for parole after serving five and a half years of the sentences. He was described as "an intermediate courier", with a more serious involvement in drug importation than a mere courier[34]. He was to collect the drugs from the importer, and to pass them on to someone else, for a significant fee[35], to be used to reduce his indebtedness to the National Australia Bank. His sentence was upheld on appeal, on the basis that he committed two offences, and the sentences taken together sufficiently gave effect to the totality principle.

[37] Another case referred to by the respondent was *R v Mokoena*[36]. The defendant in that case pleaded guilty to one count of importing heroin. The quantity was equivalent to 497.5 grams of pure heroin (a marketable quantity), with a street value of just under $1,000,000. The sentence of nine years imprisonment, with a non-parole period of four years and nine months, was upheld in this court.

[38] A feature of this case was that the defendant carried the drug within his body, having swallowed some 80 pellets containing the drug. His plea of guilty was timely, and he co-operated as far as he could with the authorities. His motivation was to obtain money to meet his debts, and to support his wife, children and elderly grandmother; though the amount he was to obtain is not identified.

[39] In *R v Jimson*[37], the defendant had pleaded guilty to a charge of importing a marketable quantity of cocaine. The quantity equated to 1,686.8 grams of pure cocaine with a value, depending on how it was sold, of some $759,083.49 up to in

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30 *Tran* at [45]; *Sandford* at [4].
31 (2000) 118 A Crim R 204 (*Serrette*).
32 *Tran* at [48]; *Serrette* at [19].
33 (2002) 26 WAR 336 (*Johnson*).
34 *Johnson* at [55].
35 *Tran* at [51]; *Johnson* at [6].
36 [2009] 2 Qd R 351.
37 [2009] QCA 183.

excess of $2,000,000. The sentence was eight years imprisonment, with a non-parole period of four years and six months. The defendant, a Malaysian woman of limited education from poor circumstances, was to receive money for her role as a courier. The amount is not clear, but she was found to be in the possession of USD$1,300. After her arrest, she assisted police to the best of her ability in unsuccessful attempts to identify others involved in the importation. Her age is not stated, but it would appear that it was at least 40.

[40] The respondent also relied on *Lau v The Queen*[38]. The defendant there had pleaded guilty to one count of importing a marketable quantity of methamphetamine towards the top of the range for a marketable quantity of this drug. He was aged 54 at the time of the offence, and had no prior convictions. The defendant was said to have assisted the authorities, but the information provided by him was described as "valueless", and the sentencing judge expressed "very serious doubts as to [the defendant's] frankness in this exercise"[39]. Notwithstanding the defendant's early plea of guilty, which was itself taken into account in the sentence, the learned sentencing judge did not accept that the plea was accompanied by remorse or contrition. The sentence of nine years imprisonment, with a non-parole period of six years, was held not to be manifestly excessive.

[41] The applicant relied on the sentences imposed in four cases: *Calis*; *Thathiah*; *Spillane*; and *Demaria*.

[42] Mr Calis was convicted by a jury of importing a commercial quantity of methamphetamine. He was sentenced to a term of imprisonment of 10 years, with a non-parole period of six years. The total pure weight of the methamphetamine was 1,294.2 grams, the threshold for a commercial quantity of this drug being 750 grams. This defendant was described as a "bare courier" and was to make no more than USD$7,000 out of the importations[40]. The sentence was held not to be manifestly excessive.

[43] Mr Thathiah was convicted after a trial on one count of importing a commercial quantity of methamphetamine. The quantity of the material equated to 1,454 grams pure methamphetamine. He was sentenced to a term of 10 years imprisonment, with a non-parole period of five years. The sentence was upheld on appeal.

[44] It is difficult to derive any assistance from *Spillane*. It was a decision of the New South Wales Court of Criminal Appeal, prior to the repeal of s 16G of the *Crimes Act*. Likewise, *Demaria* provides no assistance in determining the appropriate sentencing range. It involved a different offence (trafficking), under the state law of Victoria. To the extent that it includes a discussion of relevant considerations in the sentencing process, it adds nothing to what is identified in s 16A of the *Crimes Act*.

Consideration

[45] As mentioned, the ground of appeal identified by the applicant is that the sentence imposed was manifestly excessive. It is apparent from *Hili v The Queen*[41], that it is therefore necessary to consider whether the sentence imposed is outside the range of

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38 [2011] VSCA 324 (*Lau*).

39 See *Lau* at [16].

40 *Calis* at [41].

41 (2010) 242 CLR 520 (*Hili*) at [58]-[60].

sentences that could have been imposed. Whether that be so, and whether error is revealed, is determined by a "consideration of all of the matters that are relevant to fixing the sentence"[42]. For present purposes, such matters are identified in s 16A of the *Crimes Act*. The applicant's submissions focused appropriately on a number of the provisions of this section; though the question whether the sentence is manifestly excessive cannot be determined solely by reference to the provisions relied upon by the applicant. Ultimately, the task of a sentencing judge is to "impose a sentence … that is of a severity appropriate in all the circumstances of the offence"[43]. That task informs the identification of the range of sentences that could have been imposed.

[46] The fact that there is such a range, reflects the discretionary nature of the sentencing task. Although there is no single, correct sentence[44], as Gleeson CJ stated in *Wong*[45] there should be "reasonable consistency" in the administration of criminal justice, which includes the sentencing process. That does not call for "numerical equivalence" in sentences imposed[46]. Rather what is sought is "consistency in the application of the relevant legal principles" and in particular in the application of the sentencing provisions of the *Crimes Act*[47]. This was described by Gleeson CJ in *Wong*[48] as the treatment of like cases alike, and different cases differently.

[47] In *Hili*, the court pointed out that sentencing judges must have regard to what has been done in other (relevantly similar) cases[49]. In that case[50], the Court adopted the views expressed by Simpson J in *De La Rosa*[51] about the proper use of information about sentences that had been passed in other cases. That included a statement to the effect that a history of sentencing can establish a range of sentences that have in fact been imposed; but such a history does not establish that the range is the correct range. Nevertheless sentencing patterns result from the application of the accumulated experience and wisdom of sentencing judges and appellate courts, and provides a yardstick against which to examine a proposed sentence. That a particular sentence may not be of assistance in identifying the proper range is demonstrated by the discussion by Atkinson J in *Tran*[52], where her Honour pointed to the difficulty of reconciling the sentence imposed in *Mohlasedi v The Queen*[53] with the sentences earlier discussed by her Honour.

[48] It is also convenient to make some observations about the relationship between the head sentence and the non-parole period. The latter "is a minimum period of imprisonment to be served because the sentencing judge considers that the crime committed calls for such detention"[54]. Both general and personal deterrence are relevant[55]. Nevertheless, where legislation makes provision for the identification of a non-parole period in a sentence, the intention is "to provide for mitigation of the

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42 *Hili* at [60].
43 See s 16A(1) of the *Crimes Act*.
44 *Markarian v The Queen* (2005) 228 CLR 357 at [27]; and at [133] per Kirby J; and see at [55], [65] per McHugh J.
45 At [6].
46 *Hili* at [48].
47 *Hili* at [49].
48 At [6].
49 *Hili* at [53].
50 At [54].
51 At [303]-[305].
52 At [52].
53 [2006] WASCA 267.
54 *Power v The Queen* (1974) 131 CLR 623 (*Power*), 628.
55 *Power* at 628.

punishment of the prisoner in favour of his rehabilitation through conditional freedom, when appropriate, once the prisoner has served the minimum time that a judge determines justice requires that he must serve having regard to all the circumstances of his offence"[56]. While the considerations to be taken into account when fixing a minimum term will be the same as those applicable to the setting of the head sentence, the weight to be attached to them and the way in which they are relevant will differ, due to the different purposes associated with the fixing of each of these periods[57]. In fixing the minimum term, the various interests of the community which imprisonment of an offender is designed to serve, are to be balanced against the advantages to the community which release on parole is thought likely in the particular circumstances to confer, and against whatever degree of mitigation mercy to the offender may claim without injustice[58]. The nature of the offence, though relevant, does not then assume the same importance when determining the minimum term, as it does when the head sentence is determined. The prisoner's perceived prospects of rehabilitation will then generally make a significant difference to the fixing of the minimum term[59].

[49] As commonly happens, none of the sentences referred to earlier are identical with the present case. Not all of those defendants pleaded guilty. Most of the defendants were of more mature age than the present applicant; and in many cases they received or were to receive more substantial rewards. Some played a more significant role in the importation. Some had actual knowledge of the drug, including the quantity of it. Other factors may demonstrate some greater criminality, such as the use of a false passport in *Jain*; or the story about the proposed use of the fish in *Tran*. On the other hand, some of those defendants provided cooperation to the investigating authorities, though in no case was there significant assistance in identifying other offenders.

[50] Looked at in isolation, the head sentence of 11 years appears to be unduly high, when compared with the other sentences considered earlier. However, it is significantly tempered by the relatively short non-parole period. The question to be considered is whether the sentence, as a whole, is outside the range of sentences that could have been imposed, in light of all the circumstances of the case. The seriousness of the offending, including the quantity of the drugs and the important role played by couriers, and the need for general deterrence, might in some circumstances justify such a sentence.

[51] However, there are circumstances which make this case very different from those previously discussed. None of the other cases involved such an unusual series of events, which was likely to have left the applicant in a fragile state of mind, bordering on desperation. Her age at the time is also of relevance in considering the significance of these events.

[52] Much reliance was placed by the respondent on the quantity of drugs involved. Indeed, it appears to have been influential in the submissions made by the applicant's counsel as to the appropriate sentence. However, there is no suggestion the applicant had any knowledge of the quantity. She was initially asked to make

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56 *Power* at 629.

57 *Bugmy v The Queen* (1990) 169 CLR 525 (*Bugmy*), 531, per Mason CJ and McHugh J.

58 *Bugmy* at 531; citing *Attorney-General v Morgan* (1980) 7 A Crim R 146, 155, per Jenkinson J; see also *Bugmy* at 538, per Dawson, Toohey and Gauldron JJ. And see *R v Ruha* (2010) 198 A Crim R 430 at [46].

59 *Bugmy* at 532.

the delivery, without reward, save for recompense for the extra cost of travelling to Australia, and no doubt at some inconvenience. Ultimately, she was offered no more than a cheap airline ticket involving a complicated journey via Australia and ultimately to Sweden. Those circumstances are unlikely to have suggested a drug importation of the scale which in fact occurred. No doubt, suspecting that drugs were involved, she ran the risk of such an importation; but it seems to me that her culpability is somewhat less than a person who, receiving a more substantial financial reward, would have greater reason to suspect a transaction of some magnitude.

[53] When the circumstances of the case as a whole are considered, including the applicant's plea of guilty, against the sentences which have been discussed earlier, it seems to me that in the present case, the sentence was beyond the range of sentences that could have been imposed.

Application for extension of time

[54] Nothing was relied upon, for refusing the applicant's application for an extension of time within which to commence these proceedings, beyond the submissions made in opposition to the proposed appeal. In light of the conclusion which I have come to, I consider it appropriate to grant an extension of the time for commencing her application for leave to appeal, to and including the date of her filing of that application.

Application to adduce further evidence

[55] The applicant sought to put in evidence in this Court, character references from her mother, her step-father, a Pastor who was her former employer, and her godmother; as well as a Rehabilitation Needs Assessment dated 19 June 2014. Her application was opposed, substantially on the ground that the evidence was not sufficiently cogent to warrant its receipt.

[56] The learned sentencing Judge had accepted the applicant was of good character; as well as a number of other matters relating to her background. In my view, the evidence would not materially assist in determining whether some sentence other than that imposed at first instance, was warranted in law. Nor would its exclusion result in a miscarriage of justice[60].

[57] Although the Rehabilitation Needs Assessment came into existence recently, for similar reasons, I would not be prepared to admit it on this appeal.

[58] Accordingly, I would refuse the application to adduce further evidence.

Conclusion

[59] For the reasons set out earlier, it seems to me that it is appropriate to grant the applicant leave to appeal against her sentence; and to allow the appeal. In the circumstances of this case, and bearing in mind the sentences discussed earlier, it seems to me appropriate to sentence the applicant to a term of nine years and six months imprisonment, with a parole release date four years and six months after the commencement of the term.

[60] Accordingly I would propose the following orders:-

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60 See *R v Maniadis* [1997] 1 Qd R 593, 597.

(a) Extend the time within which the applicant might apply for leave to appeal against her sentence to and including 31 March 2014;

(b) Refuse the applicant's application for leave to adduce further evidence; and

(c) Allow the appeal, set aside the orders imposing a term of imprisonment and fixing the non-parole period, and for those orders substitute orders that the applicant be sentenced to a period of imprisonment of nine years and six months, and an order fixing the non-parole period as four years and six months.