

# SUPREME COURT OF QUEENSLAND

CITATION: *R v Chu; R v Peng* [2020] QCA 12

PARTIES: **In CA No 222 of 2018:**  
**R**  
**v**  
**CHU, Po-Chang**  
(applicant)

**In CA No 223 of 2018:**  
**R**  
**v**  
**PENG, Shu-Min**  
(applicant)

FILE NO/S: CA No 222 of 2018  
CA No 223 of 2018  
SC No 781 of 2018

DIVISION: Court of Appeal

PROCEEDING: Sentence Applications

ORIGINATING COURT: Supreme Court at Brisbane – Date of Sentence: 30 August 2018 (Douglas J)

DELIVERED ON: 7 February 2020

DELIVERED AT: Brisbane

HEARING DATE: 17 July 2019

JUDGES: Philippides and McMurdo JJA and Bradley J

ORDER: **The applications by Mr Peng and Mr Chu for leave to appeal against sentence are refused.**

CATCHWORDS: CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – SENTENCE MANIFESTLY EXCESSIVE OR INADEQUATE – PARITY CONSIDERATIONS – where the applicants pleaded guilty to 10 counts and two counts respectively for offences relating to importing and possessing a commercial quantity of methamphetamine, importing a marketable quantity of a border controlled drug and dealing with proceeds of crime – where the applicants were sentenced to an effective term of 11 years imprisonment with a non-parole period of five and a half years and a parole eligibility date of 13 March 2022, and nine years imprisonment with a non-parole period of four and a half years with a parole eligibility date of 13 March 2021 respectively – where one of the applicants provided names and addresses for delivery of packages containing the illegal substances and used false or

improperly obtained identification details, demonstrating a degree of sophistication and planning in the offending – where the other applicant was in a “subsidiary” role to his co-accused, but still involved in the most serious elements of the offending – whether the sentences imposed were manifestly excessive in all the circumstances – whether there was a lack of parity in the sentences imposed on each co-accused

*Criminal Code 1995 (Cth)*, s 307, s 400

*Director of Public Prosecutions (Cth) v Masange* (2017)

325 FLR 363; [2017] VSCA 204, considered

*DPP (Cth) v Thomas; DPP (Cth) v Wu* (2016) 53 VR 546;

[2016] VSCA 237, considered

*Legault v R* [2014] NSWCCA 271, cited

*Okeke v R* [2010] NSWCCA 266, cited

*R v Boimah* [2017] QCA 50, considered

*R v Cunha; R v Rosso Bernardo* [2017] QCA 6, cited

*R v Grippo* Sentencing Remarks, Boddice J, Indictment

No 451 of 2013, 28 August 2013, cited

*R v Iftima* Unreported, Supreme Court of Queensland,

Boddice J, 7 December 2010, cited

*R v Onyebuchi; Ex parte Director of Public Prosecutions*

(Cth) [2016] QCA 143, considered

*R v Ostrowski; Ex parte Director of Public Prosecutions*

(Cth) [2018] QCA 62, cited

COUNSEL: J Robson for the applicant, Chu  
The applicant, Peng, appeared on his own behalf  
B H P Mumford for the respondent

SOLICITORS: Legal Aid Queensland for the applicant, Chu  
The applicant, Peng, appeared on his own behalf  
Director of Public Prosecutions (Commonwealth) for the respondent

## PHILIPPIDES JA:

### Background

- [1] The applicants, Mr Chu and Mr Peng, seek leave to appeal against sentences imposed on 30 August 2018 on their pleas of guilty. Mr Peng pleaded guilty to 10 counts on an 11 count indictment. His co-accused pleaded to two counts. The applicants contend that their sentences are manifestly excessive. Mr Chu also seeks leave to appeal on a further ground that the lack of sufficient disparity with the sentence of his co-accused, Mr Peng, is such as to give rise to a justifiable sense of grievance.
- [2] Mr Peng was sentenced to an effective term of 11 years imprisonment with a non-parole period of five and a half years and a parole eligibility date of 13 March 2022. A declaration was made as to time served. His individual terms of imprisonment for the 10 counts are as follows:

- 11 years imprisonment on each of one count of importing a commercial quantity of methamphetamine<sup>1</sup> on 11 August 2016 (count 5) and one count of possessing a commercial quantity of methamphetamine<sup>2</sup> on 13 September charged jointly with Mr Chu (count 11).
  - nine years imprisonment on each of seven counts of importing a marketable quantity of a border controlled drug<sup>3</sup>, namely methamphetamine on 6 June 2016, 18 July 2016, 4, 7, 17 and 22 August 2016 and 8 September 2016 (counts 1-4 and 6-8);
  - five years imprisonment for one count of dealing in proceeds of crime worth \$100,000 or more<sup>4</sup> between 30 April 2016 and 12 September 2016 (count 9).
- [3] Mr Chu was sentenced to nine years imprisonment for the count of possessing a commercial quantity of methamphetamine<sup>5</sup> (count 11) and five years imprisonment for dealing in proceeds of crime worth \$100,000 or more<sup>6</sup> (count 10). A non-parole period of four and a half years was imposed with a parole eligibility date of 13 March 2021. A declaration was also made as to time served.

### **Circumstances of the offending**

- [4] Over a four month period between 6 June and 8 September 2016, the AFP intercepted and examined eight international express mail packages sent from Taiwan. In each package, a crystalline substance was located, which on forensic analysis was found to contain methamphetamine. These constituted the importing counts (1-8).
- [5] Mr Peng provided the names and addresses for delivery of the packages. Three of the packages were addressed to a residential address where Mr Peng lived with Mr Chu, but did not use Mr Peng's name. The other packages were addressed to other addresses and recipients, whose names were found to be associated with Mr Peng and for whom there were no record of ever entering Australia.
- [6] Seven of the packages contained in excess of 2 grams and constituted the counts of importing marketable quantities of methamphetamine (counts 1-4 and counts 6-8). The quantities ranged from 134 to 409.5 grams of pure methamphetamine. One package contained 804.3 grams of pure methamphetamine being in excess of the commercial quantity of the drug (of 750 grams) (count 5). The total quantity of crystalline substance imported in this manner was 3,487 grams containing a total of 2,746 grams of pure methamphetamine, a purity of 78.74 per cent.
- [7] On 13 September 2016, police executed a search warrant at Mr Peng's residence, which as mentioned was the consignee address for three of the consignments. At the time of the search, both Mr Chu and Mr Peng were present and communicated with police through an interpreter. During the search of a bedroom, identified as that occupied by Mr Peng and Mr Chu, police located scales, clip seal bags, a number of phones and various documentation that linked Mr Peng to the names on the imported packages.

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<sup>1</sup> Section 307.1(1) of the *Criminal Code* 1995 (Cth).

<sup>2</sup> Section 307.8(1) of the *Criminal Code* 1995 (Cth).

<sup>3</sup> Section 307.2(1) of the *Criminal Code* 1995 (Cth).

<sup>4</sup> Section 400.4(1) of the *Criminal Code* 1995 (Cth).

<sup>5</sup> Section 307.8(1) of the *Criminal Code* 1995 (Cth).

<sup>6</sup> Section 400.4(1) of the *Criminal Code* 1995 (Cth).

- [8] Police also found a black bag which Mr Chu admitted belonged to him and which contained \$10,000 in cash. Its possession by Mr Chu formed part of the proceeds of crime offence charged against him (count 10).<sup>7</sup>
- [9] Police also located, in a wardrobe in the bedroom, a suitcase which Mr Peng admitted he owned. The suitcase was opened with a key from inside the black bag belonging to Mr Chu. Inside the suitcase were three packages containing a crystalline substance, the total weight of which was 2,133.6 grams of which 1,712.6 grams was analysed to be methamphetamine, with a purity of 80.27 per cent. That methamphetamine constituted the commercial possession (count 11) with which Mr Peng and Mr Chu were jointly charged.
- [10] A subsequent examination of the bank accounts of Mr Peng and Mr Chu revealed a number of significant cash deposits received into their accounts and corresponding international money transfers out of the accounts identified as having occurred over a four and a half month period between 30 April and 12 September 2016. Those transactions constituted the proceeds of crime offences. There were 11 transfers from Mr Peng's bank account totalling \$189,774 which constituted count 9. There were also seven transfers from Mr Chu's account totalling \$164,856, which together with the \$10,000 cash, constituted count 10. The actual source of the funds was not able to be identified. The transfers were not related to the drugs the subject of the importation and possession offences.
- [11] The fault element alleged in relation to these offences was knowledge or belief rather than recklessness.

### **Submissions at sentence**

#### ***Prosecution submissions on sentence***

- [12] The prosecution emphasised the quantity of the drugs imported and possessed and the high purity of the latter. The prosecution submitted that counts 5 and 11 were the most serious charges and were "roughly comparable" in their criminality. The prosecution submissions in relation to Mr Peng proceeded on the basis that, although there was no evidence that he knew what was being imported were drugs, he at least suspected that the substance was a border controlled drug of some kind. The use of false or improperly obtained identification details in the addresses to which the packages were delivered was a serious element demonstrating some sophistication and planning, although Mr Peng also used his own address.
- [13] The prosecution tendered a comparative sentence schedule for each applicant.
- [14] In relation to Mr Peng, the prosecutor placed particular reliance on the Victorian decision of *DPP (Cth) v Thomas; DPP (Cth) v Wu*<sup>8</sup> as the most relevant authority. In that case, on appeal, the offender's sentence was increased to one of 10 years and six months imprisonment with a non-parole period of seven and a half years<sup>9</sup> for

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<sup>7</sup> Police located the cash in a yellow envelope, given to Mr Chu by Mr Peng, in a black basket woven bag which contained identification material in Mr Chu's name and which Mr Chu identified belonged to him.

<sup>8</sup> (2016) 53 VR 546.

<sup>9</sup> (2016) 53 VR 546.

drug offending that was said to be broadly comparable.<sup>10</sup> The total amount of the drugs involved in Mr Peng's charges was 4,400 grams which was about 500 grams more than the drugs involved in *Wu*.<sup>11</sup> While Mr Peng was much younger than the offender in *Wu*, that was counterbalanced by the fact that *Wu* did not involve the additional money laundering offending committed by Mr Peng.<sup>12</sup>

- [15] Reference was also made to the decision of this Court in *R v Onyebuchi; Ex parte Director of Public Prosecutions (Cth)*,<sup>13</sup> where, on appeal, the Court imposed a sentence of nine years imprisonment with a non-parole period of four and a half years was imposed for one count of commercial importation (791.9 grams of pure methamphetamine). In addition, reference was made to the New South Wales decision of *Legault v R*,<sup>14</sup> where a sentence of nine years and four months imprisonment with a non-parole period of six years for importation of almost three times the commercial quantity of methylamphetamine was not interfered with. They were submitted to be of less assistance since they concerned drug importation which was only part of Mr Peng's offending. Those authorities were relied on to support the contention that the overall head sentence should be at least that imposed in *Wu*. As to the proceeds of crime offending, reference was made to *R v Iftima*<sup>15</sup> and *Okeke v R*,<sup>16</sup> the latter as "an example of a case where there was proceeds of crime offending in addition to drug offending".<sup>17</sup>
- [16] In relation to Mr Chu, the prosecution referred primarily to *R v Boimah*.<sup>18</sup> That case concerned a co-accused of the offender in *Onyebuchi* who was sentenced to eight years imprisonment with a non-parole period of four years imposed for attempted possession of a commercial quantity of methamphetamine and whose challenge to the sentence on the basis of lack of parity was rejected. It was submitted that, although *Boimah* concerned a lesser quantity of the drugs there was a higher level of knowledge and involvement by Mr Chu than that which *Boimah* had.<sup>19</sup> It was submitted that, ultimately, when the proceeds of crime offending was taken into account, the appropriate sentence in Mr Chu's case to reflect overall criminality should be more than that imposed in *Boimah*<sup>20</sup> and closer to the nine year sentence imposed in *Onyebuchi*.<sup>21</sup>

### ***Defence submissions on behalf of Mr Peng***

- [17] Counsel for Mr Peng emphasised various matters of mitigation, including Mr Peng's age and that he had come to Australia as an only child to work so he could send money to his parents in Taiwan, who were poor. His parents also suffered from physical ailments in respect of which documents were tendered. His father's condition was deteriorating and becoming more dire.

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<sup>10</sup> AB at 33.40.

<sup>11</sup> AB at 34.21.

<sup>12</sup> AB at 34.6.

<sup>13</sup> [2016] QCA 143.

<sup>14</sup> [2014] NSWCCA 271.

<sup>15</sup> Unreported, Supreme Court of Queensland, Boddice J, 7 December 2010.

<sup>16</sup> [2010] NSWCCA 266.

<sup>17</sup> AB at 36.42.

<sup>18</sup> [2017] QCA 50.

<sup>19</sup> AB at 38.32.

<sup>20</sup> AB at 39.5.

<sup>21</sup> AB at 38.45.

- [18] It was submitted that when Mr Peng first became aware that he was involved with “a serious drug”<sup>22</sup> he intended to go to Adelaide where he knew someone to avoid pressure to do other illicit things. Mr Peng had not had “any great exposure to life” and was unable to stand up and say, “No, I’m not doing these things”.<sup>23</sup> Mr Peng was remorseful and had written a letter of apology which was tendered with references.<sup>24</sup> For his involvement in the offending, Mr Peng received somewhere between \$3,000 and \$5,000, which he sent to his parents.<sup>25</sup> Although he had control of the money deposited into his account, he “couldn’t get access to it”.<sup>26</sup>
- [19] Counsel contended for a sentence of nine and a half years imprisonment, with a non-parole period of four years as appropriate.<sup>27</sup> Reference was made to *R v Ostrowski; Ex parte Director of Public Prosecutions (Cth)*,<sup>28</sup> which concerned the commercial importation of 3,148.1 grams of pure methamphetamine by a 24 year old offender with a minor criminal history. The sentence of eight years imprisonment was interfered with to increase the non-parole period to four years. It was accepted by counsel that the offender had an addiction and did not engage in the additional money laundering offending of Mr Peng. Reliance was also placed on *R v Cunha; R v Rosso Bernardo*.<sup>29</sup> Cunha was sentenced to eight years imprisonment with a non-parole period of five years for importation of a marketable quantity of cocaine (1,338.8 grams of pure cocaine). Bernardo was sentenced to nine years imprisonment with a non-parole period of five and a half years for importation of a commercial quantity of cocaine (2,069 grams of pure cocaine).

***Defence submissions on behalf of Mr Chu***

- [20] Reliance was placed on Mr Chu’s age; he was 21 to 22 during the offending period and 24 at sentence. He had no previous criminal history. Mr Chu and Mr Peng had been close friends for five years.<sup>30</sup> He was travelling from home for the first time, visiting from Taiwan on a working visa.<sup>31</sup>
- [21] It was submitted that Mr Chu’s criminality was significantly less than Mr Peng’s, not only because he was not involved in importation offences but also mirroring admissions made through Mr Peng’s counsel, because Mr Chu was led astray by Mr Peng. Mr Peng expressed his regret through his counsel for involving Mr Chu in the offending<sup>32</sup> and acknowledged that Mr Chu “didn’t know much about all of this”.<sup>33</sup> It was submitted that Mr Chu’s involvement in the offending was reflective of his being subservient to Mr Peng<sup>34</sup> who led him into assisting in the commission of the offences.<sup>35</sup> Mr Chu did not receive any significant financial benefit; his

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<sup>22</sup> AB at 43.37.

<sup>23</sup> AB at 43.45.

<sup>24</sup> AB at 111-112.

<sup>25</sup> AB at 44.32; see also at 46.40 and 48.3.

<sup>26</sup> AB at 47.26-46; 48.1.

<sup>27</sup> AB at 41.19.

<sup>28</sup> [2018] QCA 62.

<sup>29</sup> [2017] QCA 6.

<sup>30</sup> AB at 51.24.

<sup>31</sup> AB at 51.15.

<sup>32</sup> AB at 43.23, 43.28 and 44.10.

<sup>33</sup> AB at 43.24.

<sup>34</sup> AB at 51.29; 52.14; 54.45; 56.14.

<sup>35</sup> AB at 51.27.

benefit was that he was receiving accommodation and living expenses from Mr Peng.<sup>36</sup>

- [22] Counsel for Mr Chu sought to distinguish *Onyebuchi* on the basis that the offender there was well up the chain in the importation activity and participated in a deliberate and planned manner. Likewise, *Boimah* concerned greater criminality in that that offender was involved in use of a false passport. A sentence of seven years imprisonment was contended for, with a non-parole period of “of less than the usual mark”.<sup>37</sup> Reliance was placed on the sentence in *R v Grippo*.<sup>38</sup>

### **Sentencing remarks**

#### ***Mr Peng***

- [23] In sentencing Mr Peng, his Honour had regard to the prosecution submission that, in relation to the importation of the drugs, Mr Peng’s role was not as a principal or organiser, but that he was more than just a courier. Mr Peng had a central role in organising the importation and delivery of the drugs and their being kept until they were collected. Mr Peng facilitated the importation by the use of false identification and only ceased because of his apprehension by the police.
- [24] His Honour noted that the prosecution accepted that Mr Peng did not know the identity of the drug being imported, but contended that he was “reckless in respect of [his] knowledge of the drug” and “suspected” that it was a border controlled drug.
- [25] His Honour had regard to the very serious nature of the offences, which in the cases of counts 5 and 11 attracted maximum sentences of life imprisonment, and the value of the drugs, which in respect of counts 1 to 8 was in the vicinity of between \$800,000 and \$4.1m and in respect of count 11 was between \$500,000 and \$2.5m. The combined value of the 4.4 kilograms of methamphetamine with which Mr Peng had been involved was in the range of \$1.3m to \$6.6m.
- [26] His Honour referred to the prosecution submission that it should be inferred that Mr Peng was paid for what he was doing and defence counsel’s submission that Mr Peng was naïve, not very experienced in the world, and was only paid \$3,000 to \$5,000.
- [27] His Honour also considered as significant that Mr Peng “regularly, over a significant period, transferred money overseas as the proceeds of crime”.
- [28] His Honour had regard to Mr Peng’s antecedents. He was 21 at the time of the offences and 23 at sentence, had entered an early plea of guilty and had no previous convictions. Mr Peng had never used drugs or alcohol. He was not an Australian citizen and was on a working holiday visa. His Honour had regard to Mr Peng’s written apology which made it apparent that Mr Peng was very remorseful. He was particularly ashamed of what he had done to his parents and family. Mr Peng’s father was very ill and his mother also had some illnesses and he was concerned as to his inability to be at home to assist them. He would be separated from his family for a significant period while in custody. His Honour also noted in Mr Peng’s

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<sup>36</sup> AB at 54.11.

<sup>37</sup> AB at 57.2.

<sup>38</sup> Sentencing Remarks, Boddice J, Indictment No 451 of 2013, 28 August 2013.

favour that he had a good work history and was working in Australia under the visa in an abattoir and had good prospects of rehabilitation.

- [29] In considering the comparative authorities referred to in submissions, his Honour found the case of *Wu* relied on by the prosecution to be the most useful. His Honour observed that it concerned the importation of two intercepted consignments of methylamphetamine having a total weight of almost 4 kilograms of pure methylamphetamine. The 28 year old offender in that case had no previous convictions and good prospects of rehabilitation. He stood to earn \$20,000. That offender was sentenced to 10 and a half years imprisonment with a non-parole period fixed at seven years and six months. His role was more sophisticated than a mere courier, as was Mr Peng's. His Honour observed that the offender was seven years older than Mr Peng but that, as against that factor, Mr Peng had also engaged in the serious crime of money laundering over a significant period in large sums of money which indicated an involvement at an organisational level that was important.
- [30] His Honour distinguished the authorities relied on by defence counsel on the basis that they concerned offenders who were drug addicts or involved in drugs, such as cocaine, that required larger quantities to amount to commercial quantities.
- [31] His Honour's approach to sentencing was to impose sentences that reflected Mr Peng's overall criminality by imposing significant sentences of 11 years' imprisonment in respect of counts 5 and 11 but to also reflect matters of mitigation such as Mr Peng's youth, his naivety and legitimate worry about his parents, in the non-parole period fixed at half that term.

### ***Mr Chu***

- [32] In sentencing Mr Chu, his Honour noted that he was encouraged into the offending by Mr Peng and that Mr Chu was "subservient to him".<sup>39</sup> His Honour referred to the admission made on behalf of Mr Peng that the \$10,000 cash found by police had been given to him by Mr Peng, who Mr Chu "assisted" in making the deposits the subject of the proceeds of crime offending. His Honour inferred that the money may have been intended as another deposit. Mr Chu's lesser role was reflected in his not paying rent or living expenses. His Honour noted Mr Chu's age and antecedents.
- [33] By way of comparatives referred to the Court, his Honour referred to *Boimah* on which the prosecution had placed reliance where a sentence of eight years was imposed with a non-parole period of four years on a 29 year old offender. His Honour observed that the quantity of the methylamphetamine in that case was about half of that the subject of count 11 and there was not the additional feature of persistent involvement in money laundering.

### **Application for leave to appeal against sentence by Mr Peng**

- [34] In contending that the sentences imposed were manifestly excessive, Mr Peng submitted that the appropriate range for his offending was between five and seven years. He complained that the sentencing judge referred to him as having played "a central role [in] this crime" and disputed that to be the case.<sup>40</sup> He also

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<sup>39</sup> AB at 63.27.

<sup>40</sup> Applicant's outline, under the heading "Grounds upon which application is based".

complained that his counsel did not submit all of the statements of antecedents and facts. He attached to his outline a new medical certificate of diagnosis and photos relating to his parents' health and a statement of "antecedents and fact" which he contended was not shown to the sentencing judge. The statement attached referred to Mr Peng having come to Australia from Taiwan in 2016 on a working visa and that he was not an Australian citizen and did not have family in Australia.

- [35] Dealing first with Mr Peng's dispute as to the finding that he played a central role, it is apparent from the evidence before the Court that there was no error made by the sentencing judge in that regard and that the characterisation of Mr Peng's role in the offending was entirely open. As the respondent submitted, Mr Peng provided the consignees' names and addresses. The prosecution submission that Mr Peng was not a principal or organiser but his role was greater than that of a courier was not contested at sentence. Mr Peng used false or improperly obtained identification details. He was in possession of a large quantity of drugs. As the respondent submitted, had the packages not been intercepted at the border, the available inference was that Mr Peng would keep them until they were collected by others and, additionally to his role in the importation, he transferred just under \$190,000 overseas that was the proceeds of crime.
- [36] As to the contention that Mr Peng's antecedents and personal circumstances were not fully put before the sentencing judge, the respondent argued a comparison of the submissions made on behalf of Mr Peng at sentence with the documents sought to be relied upon in this application reveals that there is little, if any difference at all. An examination of the transcript at sentence indicates that counsel for Mr Peng made fulsome submissions as to relevant antecedents and took care to emphasise Mr Peng's remorse and contrition, which were matters expressly referred to by his Honour in his sentencing remarks.<sup>41</sup> The sentencing judge was aware that Mr Peng's parents were not in good health and that their situation was deteriorating. The document that Mr Peng claimed was not put before the Court reflects the circumstances considered by the sentencing judge.
- [37] As to the contention that the sentence imposed is manifestly excessive and that a sentence in the range of between five and seven years should have been imposed, Mr Peng did not rely on any comparatives and, importantly, it is to be observed that the sentence contended for by Mr Peng's counsel was one of nine and a half years, with a release after four years. In oral submissions, Mr Peng's main submission was that the non-parole period should be reduced.
- [38] The sentencing judge took into account all relevant considerations as to the gravity of the offending. These include matters pertinent in the sentencing regime for Commonwealth offences of the type in question including the quantity of the drug involved, the role of the offender and the need for general deterrence. His Honour also had appropriate regard to countervailing matters of mitigation. Counts 5 and 11 involved very serious offending in large quantities of drugs in circumstances where Mr Peng played a central role, whose overall criminality was compounded by his having engaged in money laundering offending over a period of nearly five months with significant amounts deposited into his bank account.

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<sup>41</sup> AB at 62.8-12.

- [39] The respondent's submission that the sentences imposed, in particular, the head sentence of 11 years' imprisonment for counts 5 and 11 sat comfortably with the sentences relied upon by the prosecution must be accepted. The decision in *Wu*, on which the sentencing judge placed reliance, indicates that the sentences were well within the sound exercise of the sentencing discretion. As already mentioned, on a Crown appeal the sentences imposed on Wu were increased to 10 and a half years with a non-parole period fixed at seven years and six months. The total quantities of drugs imported by Wu were similar to the total imported and possessed by Mr Peng (Wu was involved in two consignments of commercial quantities of methamphetamine totalling 3,965 grams of pure methamphetamine over a shorter period). Wu's role was not dissimilar to Mr Peng's in that Wu was more than a courier, being involved in "setting up the addresses and the use of different names" and as such was engaged at a level and in a role that had considerable value to the overall operation.<sup>42</sup>
- [40] The sentencing judge was correct to take into account that, while Mr Peng was younger than Wu, his offending also included the serious offence of money laundering,<sup>43</sup> which was required to be taken into account in assessing Mr Peng's overall criminality. Further, although some recognition was appropriate (as in *Wu*) of the fact that, given Mr Peng was a foreigner with limited English with no friends or family being able to visit as a result of significant cultural differences, his imprisonment would be harsher than for the ordinary prisoner, there is no basis to conclude that these matters were not appropriately taken into account in the present case.
- [41] There is no merit in the matters raised in the application for leave and it should be refused.

#### **Application for leave to appeal by Mr Chu**

- [42] The applicant, Mr Chu raised two matters in his application for leave to appeal against sentence, first that the sentences were manifestly excessive and secondly the issue of parity. It was submitted that the sentence that should have been imposed was one of imprisonment within the range of seven to eight years, with a non-parole period of three and a half to four years.

#### ***Ground 1 - Manifestly excessive?***

- [43] Counsel for Mr Chu submitted that the sentencing judge had been led into error by the Crown's particular reliance on the decisions in *Onyebuchi* and *Boimah* as being usefully comparable.
- [44] Counsel for Mr Chu placed reliance on a decision of the Victorian Court of Appeal that was not put before the sentencing judge, namely *Director of Public Prosecutions (Cth) v Masange*.<sup>44</sup> Particular reliance was placed on the indicative sentence for the co-offender *Kachunga*, as a close comparator. This decision concerned

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<sup>42</sup> *Wu* at [220].

<sup>43</sup> Mr Peng's translated statement of antecedents stated that he arrived in Australia on either 21 April 2016 or 19 April 2016, indicated that he had commenced money laundering not more than a fortnight after arriving in Australia and he could be characterised as a foreign national who commenced offending not more than 14 days after his arrival in Australia.

<sup>44</sup> (2017) 325 FLR 363.

sentences imposed on Masange and his co-accused Kachunga who were members of a Congolese drug syndicate, which on Crown appeals were found to be manifestly inadequate.

- [45] Masange was sentenced to seven years' imprisonment with a non-parole period of four years after pleading guilty to importing a commercial quantity of methamphetamine, dealing in proceeds of crime worth less than \$100,000 and making a false statement in relation to a passport application. The residual discretion was held not to apply and the Court would have resentenced Masange to an effective sentence of 11 years and six months' imprisonment with a non-parole period of seven years, but for parity considerations arising from the dismissal of the appeal against Kachunga's sentence (to whom the residual discretion was found to apply). As a result, Masange was resentenced to nine years and six months imprisonment with a non-parole period of six years.
- [46] Kachunga pleaded guilty to dealing in proceeds of crime worth less than \$100,000, attempting to possess a marketable quantity of methamphetamine, possessing a commercial quantity of methamphetamine and one count of possessing a marketable quantity of cocaine. His offending occurred over about a six month period during which he turned 29. He was sentenced to five years' imprisonment with a non-parole period of two years and six months. Although the comparable cases referred to by the Court indicated that the sentence was manifestly inadequate, the appeal was dismissed in the exercise of the residual discretion, taking into account that some six months before judgment was delivered he was released on parole. He was in a stable relationship and in employment, with excellent references, and he and his partner were expecting their first child. But for the residual discretion, the Court would have resentenced Kachunga to a total effective sentence of seven years and six months with a non-parole period of four years and six months.<sup>45</sup> It was that indicative sentence on which counsel for Mr Chu placed reliance.
- [47] Masange facilitated the importation of methamphetamine and cocaine in 10 postal consignments. The total amount of methamphetamine imported was 2,702.1 grams of which 2,400 grams was pure (which was over three times a commercial quantity) in addition to 20.1 grams of pure cocaine contained in one consignment. The prosecution estimated that the value of the methamphetamine was \$540,000 to \$594,000 wholesale and \$2.025m to \$2.7m retail. Masange was not the head of the operation but his role was one of high responsibility and he was important to the importations and made substantial money transactions related to the drug importations. It was "considered, organised criminal activity over a considerable duration" according to the primary judge.<sup>46</sup> The proceeds of crime offence consisted of five cash transactions over seven months (\$77,850.83) and cash found in his possession (\$22,030) totalling \$99,880.83 being reasonably suspected of being proceeds of crime. He had also applied for a false passport while on bail. While he had an expectation of and received substantial reward (\$80,000, \$30,000 of which he sent to his family and a similar amount to a charity),<sup>47</sup> his plea of guilty occurred after a trial listing and after significant concessions were made as to the original trial indictment. He was 28 years old and had no prior convictions and was remorseful.

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<sup>45</sup> *Director of Public Prosecutions (Cth) v Masange* (2017) 325 FLR 363 at [9] and [214].

<sup>46</sup> (2017) 325 FLR 363 at [99].

<sup>47</sup> (2017) 325 FLR 363 at [100].

He also suffered from PTSD, associated with the trauma of his early life experience which was recognised as making his prison time more difficult.

- [48] As mentioned, counsel for Mr Chu placed reliance on the indicative sentence for *Kachunga* on the basis of his comparable circumstances in being under the influence of his co-offender, acting on his directions from Masange who had a “more extensive and senior role”. *Kachunga* played a trusted role, above that of a courier, which “was important for those higher up”. He received “modest remuneration”. In relation to the attempted possession of a marketable quantity, he asked someone to collect an international parcel from a post office which contained approximately 504 grams of methamphetamine. The offence of possession of a commercial quantity of methamphetamine came to light when his home was raided by police and he was found to be in possession of a total of 2,799.4 grams of pure methamphetamine, the estimated value of which was between \$560,000 and \$616,000 wholesale and between \$2.1m and \$2.8m retail. He was also found to be in possession of 12.2 grams of pure cocaine which constituted the offence of possession of a marketable quantity of cocaine. The proceeds of crime offending related to six money transactions over four months totalling \$88,637. He had no prior convictions, was otherwise of good character, and had “good” prospects of rehabilitation.
- [49] Counsel for Mr Chu submitted that *Kachunga* was in possession (and attempted possession) of some 3.3 kg of pure methamphetamine which is close to twice as much pure drug as Mr Chu possessed in this case and also possessed a marketable quantity of cocaine and that *Kachunga* had a comparatively more serious role in his possession offence. *Kachunga* did not have the benefit of an early plea of guilty (coming after the trial was listed to commence and after a *Basha* hearing) and, although the money laundering charges faced by Mr Chu were graver, it was submitted that that was not sufficient to explain the more severe sentence Mr Chu received.
- [50] As to the latter matter, it is to be borne in mind that the money laundering charges faced by Mr Chu attract a maximum sentence of 20 years as opposed to that of two years faced by *Kachunga* and that it was accepted that Mr Chu’s criminal responsibility for that offending was on the basis that he knew or believed the money was proceeds of crime. Further, *Kachunga* had features that weighed on considerations of mitigation arising from aspects of his personal circumstances, including having “suffered an extremely disadvantaged and damaging early life” whilst living in and then fleeing the Democratic Republic of Congo (a feature not present in Mr Chu’s case).<sup>48</sup> The very significant aspects in his favour in terms of rehabilitation while released on parole additionally influenced the Court to exercise the residual discretion in dismissing the appeal and allowing the sentences to stand.
- [51] I am unable to accept the proposition that the indicative sentences for *Massange* or *Kachunga* demonstrate that the sentence imposed on Mr Chu was not within the sound exercise of the sentencing discretion when regard is had to the quantity of the drug possession and the seriousness of the money laundering offence, even bearing in mind the plea and other factors in his favour, including his youth.
- [52] By way of comparatives referred to the Court, his Honour referred to *Boimah* on which the prosecution had placed reliance where a sentence of eight years was imposed with a non-parole period of four years on a 29 year old offender. His

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<sup>48</sup> (2017) 325 FLR 363 at [200].

Honour observed that the quantity of the methylamphetamine in that case was about half of that the subject of count 11 and there was not the additional feature of persistent involvement in money laundering.

- [53] As to the submission that there was error in his Honour's exercise of the sentencing discretion arising from his consideration of *Boimah*, his Honour clearly considered it significant that the sentence of eight years with a non-parole period of four years was imposed in respect of a quantity of drugs that was half that involved in Mr Chu's possession. His Honour erroneously referred to *Boimah* as an importation case (it was his co-accused who was the importer) rather than an attempted importation case. He played a role of "an intermediary" rather than that of a mere "courier" and his offending was premeditated. However, that cannot be said to have worked against Mr Chu, given the basis on which the possession charge proceeded and the additional matter of the serious and persistent money laundering offending. Further, while *Onyebuchi*, who was convicted of importation, was well up the chain of importation and engaged in conduct that was deliberate, planned and motivated by profit, it was not the sentence imposed for the drug offending there relied on by his Honour. Rather, as mentioned, it was the co-offender *Boimah's* sentence for drug offending that was considered relevant in imposing a sentence for count 11 that reflected Mr Chu's overall criminality and not only his drug offending.
- [54] The head sentence of nine years imprisonment with a non-parole period of four and a half years is in conformity with the sentencing yardsticks of the comparatives considered by his Honour and those referred to by counsel for Mr Chu. The sentence imposed cannot be said to be markedly different from the comparatives so as to point to a misapplication of principle or that the sentence is unreasonable or plainly unjust.<sup>49</sup>

***Ground 2 - lack of parity***

- [55] As to the complaint arising from parity considerations, Mr Peng and Mr Chu were jointly charged with the commercial possession of the border controlled drug methamphetamine (count 11) and each faced similar money laundering offences, in counts 9 and 10, however, counsel for Mr Chu pointed to two distinguishing matters which it was said needed to be recognised in the respective sentences but were not. The first matter relied on in advancing that submission was that Mr Peng was involved in an additional eight importations of some 2.7 kg of pure methamphetamine over a three month period (counts 1 to 8) and that that offending was acknowledged as the most serious before the Court. A second matter of distinction raised by counsel for Mr Chu was that Mr Chu's role in the offending was accepted to be "subsidiary" to Mr Peng, who was the instigator and primary offender and accordingly Mr Chu's criminality was less than that of Mr Peng. This disparity in their criminality was said not to have been sufficiently recognised in the sentence imposed on Mr Chu. His head sentence was only two years less than Mr Peng's and his non-parole period meant that he would be eligible for release only 12 months earlier, resulting in a justifiable sense of grievance.
- [56] As to the first complaint, there is no dispute that Mr Peng committed more offences than Mr Chu, nor that Mr Chu was in a subsidiary role to Mr Peng. The first complaint, however, overlooks the prosecution submission that both the commercial importation count (count 5 of the eight counts only charged against Mr Peng) and

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<sup>49</sup> *Hili v The Queen* (2010) 242 CLR 520 at [58], [59].

the commercial possession count jointly charged (count 11) were the most serious offences, count 11 involving over twice the quantity of count 5. That was also the approach taken by the sentencing judge in fashioning sentences that ensured that Mr Peng's overall criminality was taken into account on the concurrent sentences for each of counts 5 and 11 and that the same approach was adopted in respect of Mr Chu on count 11, in respect of which they were co-offenders. As to the second complaint, the lesser involvement of Mr Chu was recognised by his Honour in a reduction of two years' imprisonment between the head sentence of Mr Peng and Mr Chu on count 11 which was a substantial one and was reflected also in the 12 month reduction in the non-parole period. Although the parity principle was not specifically adverted to, it is clear that the sentencing judge did give proper effect to it in the sentences passed on count 11.

### **Order**

- [57] The applications by Mr Peng and Mr Chu for leave to appeal against sentence are refused.
- [58] **McMURDO JA:** I agree with Philippides JA.
- [59] **BRADLEY J:** I agree with the reasons for judgment of Philippides JA and the order her Honour proposes.