Tramontano v The Queen [2002] NTCCA 4

PARTIES:	PIETRO TRAMONTANO
	v
	THE QUEEN
TITLE OF COURT:	COURT OF CRIMINAL APPEAL OF THE NORTHERN TERRITORY
JURISDICTION:	APPEAL FROM THE SUPREME COURT EXERCISING TERRITORY JURISDICTION
FILE NO:	No. CA5 of 2001 (9924449)
DELIVERED:	17 May 2002
HEARING DATES:	22 March 2002
JUDGMENT OF:	MARTIN CJ, MILDREN & RILEY JJ

CATCHWORDS:

Appeal – Appeal against sentence – whether sentence manifestly excessive – whether medical condition to be considered in sentencing – whether sentencing Judge erred in applying guidelines in *R v Wong*.

Statutes:

Crimes Act, s 16.
Criminal Code, s 411

Cases cited:

Cranssen v the King (1936) 55 CLR 509 at 519-520, referred to.
Douglas v The Queen (1995) 56 FCR 465, referred to.
Huang (2000) 113 A Crim R 386 at 391, referred to.
Leroy (1984) NSWLR 441 at 446-7, referred to.
Ngui v Tiong (2000) 111 A Crim R 593 at 596, referred to.
R v Ferrer-Esis (1991) 55 A Crim R 231, referred to.
R v Henry (1999) 46 NSWLR 346 at 382-385, referred to.

R v Klein [2001] NSWCCA 120 at para [24] referred to.
R v Olbrich (1999) 199 CLR 270, referred to.
R v Smith (1987) 44 SASR 587 at 589, referred to.
R v Su and Ors (1997) 1 VR 1 at 75, referred to.
R v Tsiaras (1996) 1 VR 398 at 400, referred to.
R v Warfield (1994) 34 NSWLR 200 at 203, referred to.
R v Wong; R v Leung (1999) 48 NSWLR 340 (1999) 108 A Crim R 531, referred to.
Ragggett, Douglas & Miller (1990) 50 A Crim R 41 at 47, referred to.
Salmon v Chute & Anor (1994) 94 NTR 1, referred to.
Veen v The Queen (No 2) (1987-88) 164 CLR 465 at 477-8, followed.
Waye v The Queen (2000) 3 NTJ 1567, refered to.
Wong v The Queen (2002) 185 ALR 233, followed.

REPRESENTATION:

Counsel:

Appellant:	I. Rowbottam
Respondent:	P. Strickland

Solicitors:

Appellant:	I. Rowbottam
Respondent:	Commonwealth Director of Public Prosecutions

Judgment category classification:	B
Judgment ID Number:	ril0210
Number of pages:	35

ril0210

IN THE COURT OF CRIMINAL APPEAL
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

Tramontano v The Queen [2002] NTCCA 4
No. CA5 of 2001 (9924449)

BETWEEN:

PIETRO TRAMONTANO
Appellant

AND:

THE QUEEN
Respondent

CORAM: MARTIN CJ, MILDREN & RILEY JJ

REASONS FOR JUDGMENT

(Delivered 17 May 2002)

MARTIN CJ:

[1] I have had the advantage of the draft judgments prepared by each of Justices Mildren and Riley. With the exception of the ground of appeal relating to the learned trial Judge's reference to the guideline published by the Court of Criminal Appeal of New South Wales, there is nothing I would wish to add. Otherwise, I agree with them.

[2] As to the guideline, it should be noted that although it was accepted as being irrelevant to the ultimate decision of the Court of Criminal Appeal, it would have been relevant in this case had it not been overruled by the majority of

the High Court after the sentence, the subject of this appeal, had been imposed.

[3] Justice Mildren has provided a number of references to those reasons. They are to be seen in the context of their Honour's views of the guideline judgment and the purpose which it was intended to serve. I am reminded that in the joint judgment of Justices Gaudron, Gummow and Hayne it was held that the selection of weight of narcotic as the chief factor to be taken into account in fixing a sentence represented departure from fundamental principles [70]. Their Honours also said:

> "The production of bare statistics about sentences that have been passed tell the judge who is about to pass sentence on an offender very little that is useful if the sentencing judge is not also told why those sentences were fixed as they were" [59].

[4] It is not suggested that the weight of the narcotic is not a factor, nor that bare statistics are of no use. At [17] Chief Justice Gleeson said there was no suggestion that the information was incorrect or misleading or selectively prepared.

[5] The joint judgment held that the principles which informed the construction of the guideline were flawed by the error in selecting weight of narcotics as the chief factor in sentencing, and were either incomplete (because of insufficient reference to other factors mentioned in s 16A of the Commonwealth Crimes Act) or were not stated at all [87]. Other substantial criticisms were made of the guideline, for example, it was considered to

operate so as to be prescriptive [44] or to restrain the exercise of the sentencing discretion, per Gleeson CJ [31]. However, the question is whether the learned trial Judge here so erred in his reference to the decision in the Court of Criminal Appeal as to lead this Court "to the opinion that some other sentence, whether more or less severe, is warranted in law and should have been passed" (s 411(4) Criminal Code).

[6] His Honour's remarks disclose that he:

1. acknowledged he was bound to consider a range of matters specified in s 16A of the Crimes Act and said he had done so. His Honour's assertion in that regard must be accepted and his further remarks demonstrate the fact;

2. regarded the principle of general deterrence as being important and, by reference to the Court of Criminal Appeal decision, affirmed the central importance of deterrence as a sentencing objective. Nowhere does it appear that his Honour regarded the weight of the narcotic as being of central or a chief factor to be taken into account when fixing the sentence;

3. noted that in the decision of the Court of Criminal Appeal it was said that the guideline was not binding. In any event, it was not binding on the Judges of the Supreme Court of the Northern Territory. It seems to me that the concerns expressed by the High Court as to the prescriptive nature of the guideline, did not operate upon

his Honour's mind. He clearly considered himself free to make up his own mind. His sentencing discretion was not thereby restrained. His Honour had said that he considered all the matters referred to in the Crimes Act, and the range of objective and subjective features of the case specifically dealt with in the course of sentencing remarks demonstrate his Honour's attention to matters of principle and detail;

4. regarded the guideline as having been determined primarily on the basis of existing sentencing patterns, both in New South Wales, other States and Territories and, noted that they were "Australia wide". That is correct. It must be accepted that both sentencing and appellate tribunals have in appropriate cases taken into account the range, pattern, or standard of sentences commonly to be found in relation to particular offences. Assuming a sufficient sample of cases, I consider that it must be taken that any such range has been established as a result of the application of relevant principles, including by taking into the account the seriousness of the offence with reference to the prescribed penalty and the criminal act in the particular case. As to this type of offence, the majority of the High Court held at [67] that within the categories of offence prescribed by Parliament, "... the particular amount of narcotic involved can have significance in fixing the sentence ...". Clearly, it is a factor amongst many which must be taken into account by the sentencing

tribunal. There will always be room for departure from the range to take account of cases that are out of the ordinary;

5. had adopted the suggested guideline as a "starting point" for sentencing in the appellant's case. On the face of them, it is unclear what his Honour had in mind when he used those words. It may mean that he considered the weight of the narcotic to be a central consideration, if so, the criticism of the High Court applies. On the other hand he may have been referring to the range of sentences which have been imposed for similar criminal acts to be followed by consideration of factors peculiar to the case and the offender (see the reference by Gleeson CJ to what was said by McLachlin J in *R v McDonnell* (1997) 1 SCR 948 at 989. See also the reference to "starting point" in *R v Wurramara* (1999) 105 A Crim R 512 at 523. Notwithstanding the debate concerning the validity of the "two stage approach to sentencing" it does not offend the approach adopted in this jurisdiction.

[7] His Honour's approach to the task, as disclosed by his remarks, and all that fell from him in the process does not satisfy me that he attributed any particular weight to the weight of the narcotic such as to vitiate the sentence, or that he failed to pay proper regard and assign appropriate weight to any other relevant factor.

[8] I would also dismiss the appeal on this ground.

MILDREN J:

[9] The facts and circumstances giving rise to this appeal have been set out in the judgment of Riley J which I have had the advantage of reading.

[10] I am not satisfied that the learned Sentencing Judge applied the wrong standard of proof in arriving at the conclusion that the nature of the threat was something less than a threat to kill the appellant's wife. His Honour's findings were expressed as follows:

> I have reached the following findings of fact beyond reasonable doubt. I am satisfied that threats were made by the prisoner's drug supplier in relation to the prisoner's wife. I am not able to find beyond reasonable doubt the nature of those threats. I am however satisfied that the threats were to harm the prisoner's wife, not to kill her.

[11] It is not in dispute that the nature of the threat to the appellant's wife is a matter relevant to sentence as it is indicative of the level of the appellant's moral culpability. The alleged threat was a matter put in mitigation of punishment; as such it needed to be proven by the accused only on the balance of probabilities: see *R v Olbrich* (1999) 199 CLR 270.

[12] Whilst a finding beyond reasonable doubt that threats were made by the appellant's drug supplier favoured the appellant, the further finding limiting the threat to one of mere harm, clearly did not.

[13] The problem however is that the appellant was not a convincing witness. As the learned sentencing Judge pointed out, he changed his evidence as to the timing of the threat, particularly as to whether or not the threat was made

once or twice and as to whether or not it preceded or succeeded the first attempt to swallow the condoms. Mr Rowbottam submitted that there was no evidentiary basis for a finding of a threat of mere harm. However, such a finding was open on the evidence because after the appellant's arrest, the appellant telephoned his mother and asked her to arrange to have his wife brought to Italy because he was worried that "some harm" may come to her.

[14] In referring to those circumstances the learned sentencing Judge observed that he was satisfied that there was a threat to harm the wife because that threat was "much more likely than death". It appears to me that, although his Honour expressed himself as applying the standard of proof beyond reasonable doubt, the actual standard he employed was proof on the balance of probabilities, and that his Honour's reference to proof beyond reasonable doubt was a slip of the tongue. In addition, I agree with Riley J that even if his Honour did apply the wrong test, it is far from clear that any other finding was reasonably open had his Honour applied the correct test. Moreover, during submissions when the matter was raised by his Honour, his then counsel did not press the point but said (AB 153) that the appellant believed there "were threats or pressure in terms of his wife and her safety".

Reliance on *R v Wong*

[15] The learned sentencing Judge said that he had adopted as a starting point the guideline laid down by the Court of Criminal Appeal of New South Wales in *R v Wong; R v Leung* (1999) 48 NSWLR 340; (1999) 108 A Crim R 531.

That guideline was said to be based on existing sentencing patterns and intended to apply to couriers and persons low in the hierarchy of the importing organisation. The guideline indicated a range of six to nine years' imprisonment for "mid level trafficable quantity (200 grams to one kilogram)". The guideline was expressed to apply to cover the factors referred to in s 16A of the *Crimes Act*, (as well as the quantity of the drugs involved), which usually arise for determination and were intended to be encompassed by the range. Implicitly the range was arrived at having regard to s 16G as well. It apparently was intended to include both pleas of guilty and conviction after a trial. Spiegelman CJ did however say that there may be factors warranting a sentence outside of the range, for example where there had been a substantial degree of assistance to the authorities, or circumstances in which a plea of guilty was entitled to "such significant weight as to justify a sentence below the range".

[16] Subsequently, the High Court held by a majority (*Wong v The Queen* (2002) 185 ALR 233) that the Court of Criminal Appeal had erred in a number of material respects. For present purposes it is sufficient to note that the amount of the drugs involved is not the chief factor to be selected in fixing sentence: Gleeson CJ at [31]; Gaudron, Gummow and Hayne JJ at [67-71]; Kirby J at [132-135]. The provisions of the *Commonwealth Crimes Act* require the sentencer to take into account all of the factors referred to in s 16A. As Gaudron, Gummow and Hayne JJ said, at par [78]:

> Numerical guidelines either take account of only some of the relevant considerations or would have to be so complicated as to make their application difficult, if not impossible. Most importantly of all, numerical guidelines cannot address considerations of proportionality. Their application cannot avoid outcomes which fail to reflect the circumstances of the offence *and* the offender (with absurd and unforeseen results) if they do not articulate and reflect the principles which will lead to the just sentencing of offenders whose offending is every bit as diverse as is their personal history and circumstances.

See also the observations of Kirby J at [129] to [135].

[17] For the same reasons as the High Court determined that the Court of Criminal Appeal of New South Wales erred in its conclusions about the sentences imposed in *Wong*, the conclusion is inevitable that the learned sentencing Judge erred in giving any countenance to the guidelines. The error thus identified was to place too much weight on the amount of the drug being imported. It is to be noted that no submissions or findings were made as to the value of the drug (cocaine) and the likely impact that the importation may have on the welfare of the community, no doubt because under the guidelines it was thought that any such submissions or findings were unnecessary. Therefore, the sentence imposed lacked proportionality. This error was no fault of the learned sentencing Judge. Although, as his Honour recognised, the decision of the Court of Criminal Appeal was not binding upon him, judicial comity and the desirability of uniformity of approach when dealing with Federal offences required him to follow that decision unless, in his opinion, it was plainly wrong. It would be a brave

judge to hold that the opinion of a five Judge bench on a topic about which, as it turned out, the High Court was not unanimous, fell into that category.

[18] It was submitted that all that the learned sentencing Judge did was to have regard to the sentencing patterns in other jurisdictions as set out in the Court of Criminal Appeal's decision in *Wong*, which fully justified his Honour's starting point of six to nine years. His Honour described the Court of Criminal Appeal's decision as a "careful analysis of Australia wide sentencing patterns for offences against s 233B of the *Customs Act"* and his Honour referred to the desirability of uniformity of approach when dealing with Federal legislation.

[19] Two criticisms can be made of this submission. First, sentencing patterns in the past have been influenced by the Court of Criminal Appeal of New South Wales' decision in *R v Ferrer-Esis* (1991) 55 A Crim R 231. In that case, the Court of Criminal Appeal identified a pattern of sentencing for couriers of "substantial quantities of heroin" as producing head sentences between twelve and sixteen years with minimum terms of the order of 60% to 75% of the head sentence. Taking into account the adjustment required by s 16G of the *Crimes Act*, this produced the result of a range of eight and a half to fourteen years. The history of what flowed from *R v Ferrer-Esis* is dealt with by Spigelman CJ at pars [33] – [65] in *R v Wong*. However, that decision, and others which followed it, were arguably tainted with the same error identified by the High Court in *Wong v The Queen*, in that the pattern

was identified solely by reference to the quantity of the drug imported: see *R v Wong* at pars [40] and [134] in the judgment of Spigelman CJ.

[20] The second observation is that the "careful analysis" of sentencing patterns was itself criticised by the High Court. In *R v Wong* the statistical information set out in the schedules gives no information as to why or how the relevant sentences were arrived at. In *Wong v The Queen* Gaudron, Gummow and Hayne JJ observed (at par 59):

> ...recording what sentences have been imposed in other cases is useful if, but only if, it is accompanied by articulation of what are to be seen as the unifying principles which those disparate sentences may reveal. The production of bare statistics about sentences that have been passed tells the judge who is about to pass sentence on an offender very little that is useful if the sentencing judge is not also told *why* those sentences were fixed as they were.

[21] As their Honours later observed (at pars [65]-[66]):

> [65] To focus on the *result* of the sentencing task, to the exclusion of the reasons that support that result, is to depart from fundamental principles of equal justice. Equal justice requires identity of outcome in cases that are *relevantly* identical. It requires *different* outcomes in cases that are different in some relevant respect. Publishing a table of predicted or intended outcomes masks the task of identifying what are relevant differences.
>
> [66] Further, to attempt some statistical analysis of sentences for an offence which encompasses a very wide range of conduct and criminality (as the offence now under consideration does) is fraught with danger, especially if the number of examples is small. It pretends to mathematical accuracy of analysis where accuracy is not possible. It may be mathematically possible to say of twenty or thirty examples of an offence like being knowingly concerned in the importation of narcotics where the median or mean sentence lies. But to give any significance to the figure which is identified assumes a relationship between

> all members of the sample which cannot be assumed in so small a sample ... The task of the sentencer is not merely one of interpolation in a graphical representation of sentences imposed in the past. Yet that is the assumption which underlies the contention that sentencing statistics give useful guidance to the sentencer.

[22] None of the other Justices of the High Court in *Wong v The Queen* commented upon the statistics, but in my humble opinion the reasoning of Gaudron, Gummow and Hayne JJ on this topic is plainly right.

[23] Counsel for the Director of Public Prosecutions, Mr Strickland, sought to overcome this difficulty by supplying to this Court copies of the reported decisions of some of the decisions of the Court of Criminal Appeal of New South Wales to demonstrate that the sentences actually imposed were not such as to warrant a finding that some other sentence was warranted in law in this case. I have not found those decisions helpful as they have all been premised upon the kind of guideline judgments criticised in *Wong v The Queen*.

[24] Although not identified as a separate ground of appeal (because the High Court's decision was not available to counsel for the appellant at the time he prepared his submissions) the point was fully argued before us. I consider that the appellant is entitled to rely upon it.

[25] Because too much weight was given to the quantity of the drugs imported, I am satisfied that some other sentence other than the sentence imposed on Count 1 should now be imposed.

Re-sentencing

[26] The appellant was found guilty after a trial by jury on both Counts. The maximum penalties he faced were, in relation to Count 1 a fine not exceeding $500,000 or 25 years imprisonment, or both.

[27] As to the quantity of cocaine imported, there can be no doubt that the appellant was well aware that the drug he imported was cocaine. It was he who imported the drug into Australia. The reward he hoped to gain was the elimination of a debt of US$12,000 owed to his supplier and a little gift of heroin on his return to Bali. There is no evidence that the appellant knew the level of purity of the cocaine, but it must have been obvious to him that the cocaine was likely to have been of considerable value. The appellant clearly knew that the cocaine was to be delivered to a dealer in Sydney for commercial purposes. There is no evidence as to how many "deals" or "packages" the cocaine might have provided on the illegal market for that drug. The cocaine imported had a high level of purity (80%). Unless further diluted, it must have represented at least a moderate degree of potential damage to the community.

[28] The learned sentencing Judge found that the appellant was motivated partly by a threat to his wife's safety, as well as by his desire to clear his drug debt and to enable a continuing, albeit very small, supply of heroin to feed his addiction. Moreover, it is plain that the appellant was very much in the power of his dealer. Not only did he owe his dealer a large sum of money

he could not repay, he had already given his dealer his car and his passport. On the other hand, the appellant had begun taking heroin from the age of seventeen years. There is nothing to suggest that his addiction was other than the result of his own voluntary actions. He had given up heroin in the past on trips to India, but had voluntarily resumed taking the drug when he returned to Naples.

[29] There are a number of authorities which discuss the circumstances under which drug addiction can be a mitigating circumstance. Crime committed to feed an addiction is not itself a mitigating circumstance. However, addiction may still be relevant to moral culpability. For example, the age of an offender when he or she became addicted and the degree of judgment open to him or her is relevant in evaluating the extent to which the offender should be punished: see *Douglas v The Queen* (1995) 56 FCR 465; *R v Henry* (1999) 46 NSWLR 346 at 382-385. No submissions were made on the appellant's behalf to suggest that his addiction was a matter which should be taken into account in mitigation.

[30] Nevertheless the appellant was not solely motivated by money. As the learned sentencing Judge found, he was acting in part under some sort of duress. He had clearly put himself in the power of his dealer by creating a large debt he had no hope of repaying. He found himself unable to go to the authorities in Bali as he believed that his supplier had connections with corrupt police. However, the learned sentencing Judge felt, as perhaps did the jury, that he was not bereft of all help. I agree with Riley J that there

was no evidence to suggest that the appellant suffered from any mental health problems which had reduced his moral culpability for his offending, or affected him in such a way as to make him an inappropriate vehicle for general deterrence. Clearly in cases involving the importation of trafficable quantities of cocaine, general deterrence is a most important sentencing consideration. The appellant may have only been a courier, but he must bear a high degree of moral responsibility for this offending, albeit reduced somewhat given the fact that he was in part acting under duress.

[31] I have noted previously that the appellant was convicted after a trial. He cannot therefore claim the same leniency which is often allowed to those who plead guilty. He has, since his incarceration, expressed remorse for his offending and a desire to make up for what he has done. The learned sentencing Judge observed that his remorse and rehabilitation prospects were not such as to be "strong determinants" in fixing the head sentence. With this assessment, I generally agree. The remorse, such as it is, has come rather late. There is nothing to suggest that the appellant is likely to be able to stay off drugs once he is released.

[32] The appellant was 38 years of age at the time of sentencing. He married an Indonesian national in 1997 who has continued to be supportive of him. He has no children. The appellant usually resides in Bali, except for periods when he is required to leave Indonesia to renew his visa. His parents come from Naples where he was brought up. He does not appear to have had a settled work history. The only evidence relating to that topic is that he on

one occasion went to India to import some incense sticks and that he had at one stage a furniture importing business. He appears to have had only minimal education. He does not speak much English. He has no prior convictions either in Australia or elsewhere. As to that, there are authorities which suggest that good character and lack of prior convictions are of reduced significance when considering drug couriers. The rationale for this is said to be that those involved at a higher level in the business of drug importations, usually select such persons as couriers as they are likely to attract less attention with customs and immigration officers: see *Leroy* (1984) 2 NSWLR 441 at 446-7; *R v Warfield* (1994) 34 NSWLR 200 at 203; *R v Klein* [2001] NSWCCA 120 at par [24]. This may be a logical approach if one starts with sentencing parameters such as were introduced in *R v Wong*. However, in truth, such an approach may be misleading. Clearly, prior good character and lack of prior convictions is relevant, just as the fact that an accused who is a person of bad character and has previous convictions for the same type of offending is relevant. In my view, there is no basis for departing from the principles expressed in *Veen v The Queen (No 2)* (1987-88) 164 CLR 465 at 477-8 on this topic. That is not to say that lack of prior convictions or previous good character should be given such weight as to lead to a disproportionately inadequate sentence in circumstances where the level of criminality requires, as in this case, condign punishment.

[33] There was evidence that the appellant had mental problems shortly after his arrest. He was subsequently diagnosed as suffering from a psychotic disorder described as "prison psychosis" caused by the combination of poor English skills, prison adjustment disorder and drug withdrawal. On this topic and on the related topic of the appellant's other health concerns, I agree with Riley J. There was no evidence that those conditions were unable to be controlled or that the appellant's imprisonment would be a greater burden to him by reason of his state of health, or that imprisonment was likely to have a gravely adverse effect on his health. I also agree with the conclusions which Riley J has reached on the topic of the appellant's dislocation and the period spent on remand.

[34] There was evidence that the appellant had cooperated with the prosecuting authorities by making very significant admissions which had very considerably shortened the appellant's trial and saved much expense and inconvenience for witnesses. The learned sentencing Judge considered that this was a matter which should be taken into account in the appellant's favour and I respectfully agree.

[35] There are no other relevant matters required to be taken into account in this case by virtue of s 16A of the *Crimes Act (Com)*, although regard must be had to the fact that whatever sentence is imposed will not earn remissions.

[36] I see no reason to depart from the approach adopted by the learned sentencing Judge on the fixing of the non-parole period. His Honour was of

the opinion that there were factors warranting fixing a non-parole period at less than what is usual and I agree.

Conclusions

[37] In my opinion the appeal should be allowed and the sentence imposed should be set aside and the appellant should be resentenced. I would propose that on Count 1 the prisoner should be sentenced to imprisonment for six years to be served concurrently with the sentence imposed in relation to Count 2 by the learned sentencing Judge. I would fix a non-parole period of three years and two months, the sentences and non-parole period to be deemed to have commenced from 22 October 1999 to take into account time in custody.

RILEY J:

[38] On 22 February 2001, following a four day trial, a Supreme Court jury found the appellant guilty of having imported into Australia a trafficable quantity of cocaine and a quantity of heroin being less than the trafficable quantity of heroin provided for in s 233B(1)(b) of the *Customs Act* 1901. On 1 March 2001 the appellant was sentenced to imprisonment for a period of seven years in respect of count 1 and imprisonment for a period of two months in respect of count 2. The sentences were directed to be served concurrently and a non-parole period of three years and nine months was set.

The sentence was backdated to 22 October 1999 to take into account time served by the appellant in custody awaiting disposition of the matter.

[39] The appellant appeals against the sentence imposed upon him on various grounds including that the sentence was manifestly excessive.

[40] There was not a great deal of dispute between prosecution and defence at the trial. The issue upon which most attention was focused was whether the appellant acted voluntarily in knowingly importing the cocaine and heroin into Australia. At the trial he did not dispute that he had been involved in the importation but asserted that the offences were committed under duress, compulsion or coercion. The offending came to light when the appellant arrived at the Darwin Airport on a flight from Denpassar, Bali, Indonesia in the early hours of the morning of 22 October 1999. He was spoken to by customs officers who became suspicious of him. Tests were conducted on various personal items found in his possession and they indicated traces of heroin and/or cocaine. The appellant was then subjected to a body search and subsequently underwent an X-ray procedure. That procedure revealed the presence of foreign objects in his colon and rectum. He was transferred to Royal Darwin Hospital and over the following 24 hours he evacuated 92 drug filled condoms from his body. Analysis of the contents of the condoms showed the content of 91 condoms to be a total of 557.6 grams of powder which included 449.4 grams of pure cocaine. That was the subject of count 1. The other condom contained 3 grams of powder which included 1.4 grams of pure heroin. That was the subject of count 2.

[41] The evidence revealed that the drug filled condoms had been swallowed by the appellant in a hotel room in Kuta in Bali prior to his departure for Australia. There was no dispute that he had full knowledge of the contents of the condoms and that it was an offence to import such drugs into Australia. He intended to deliver the cocaine to a person who was unknown to him but who was to meet him at the Sydney Airport. The cocaine was to be provided to that person and the heroin was intended to be used by the appellant to feed his own addiction whilst in Australia.

[42] The case for the appellant was that he had accumulated a debt of US$12,000 for heroin supplied on credit by a Balinese drug dealer named Andy. He was unable to pay the monies owing and agreed to deliver the drugs to Sydney as a means of attending to payment. The appellant tried unsuccessfully to swallow the drug filled condoms and was involved in an argument with Andy. Andy then issued a threat that the appellant's wife would be killed if he did not take the cocaine to Australia. The case for the appellant was that he capitulated in the face of this threat. A few days before his departure he swallowed the drug filled condoms and was provided with an air ticket and US$750 for expenses and accommodation. He was supplied with heroin for his own use prior to his date of departure. The appellant maintained that he was not to be paid for bringing the cocaine to Australia other than having his debt settled. He did indicate that he expected to receive "a little gift of heroin" from Andy on his return to Bali. The appellant stated that he acted because of the threat to the life of his

wife. He claimed that the threat was real because Andy was a member of a long established gang and worked with "some corrupt local policemen". The appellant had no money to remove himself or his wife from Bali. As was noted by the learned sentencing Judge it was clear that the jury rejected the appellant's version of events but the basis upon which they did so was not clear.

[43] In proceeding to sentence the appellant his Honour identified the differing possibilities that arose out of the verdict reached by the jury. He went on to say:

> "I have given anxious consideration to the level of criminality which should be assigned to the prisoner for his actions. The prisoner is entitled to the benefit of any reasonable doubt, but this does not require that the most lenient view of the facts consistent with the jury's verdict, is to be adopted as a matter of course.
>
> In reaching a conclusion as to the level of the prisoner's criminality, I have had regard to the whole of the evidence and a number of particular matters impressed me as of significance in the present context. Firstly, the prisoner initially gave evidence in chief that he had attempted to swallow drug filled condoms and failed, before any threat was made by Andy.
>
> Secondly, the prisoner also initially gave evidence in chief that he was to receive, maybe, $1,000 from Andy on his return to Bali. The prisoner changed his evidence as to these matters when cross-examined by Mr Strickland. He changed the order of events in relation to the threat and he explained the $1,000 he was referring to was in fact the $750 given to him by Andy for expenses and accommodation. Albeit he did expect a little gift of heroin upon his return to Bali.
>
> I have also had regard to the prisoner's conduct after his apprehension. In particular, a phone call to his mother shortly after

his arrest, in which he urged her to arrange for his wife to go to Italy, but without explaining why he was insistent that this should be done.

I have reached the following findings of fact beyond reasonable doubt. I am satisfied that threats were made by the prisoner's drug supplier in relation to the prisoner's wife. I am not able to find beyond reasonable doubt, the nature of those threats. I am however satisfied that the threats were to harm the prisoner's wife, not to kill her. It makes little sense for a drug dealer to kill his customers or their close relatives. Drug dealers are motivated by profit.

The much more likely threat than death, was a threat to force the prisoner's wife into prostitution to pay his debts. I am unable on the evidence, to find that such a threat was made, but I am satisfied that there was a threat of harm to the prisoner's wife, rather than a threat to kill her.

I am also satisfied that the prisoner was not motivated solely by the threat to his wife, but also by the desire to clear his drug debt and to ensure a continuing supply of heroin from his dealer to feed his addiction. I am also satisfied that this latter factor encouraged him to attempt to swallow drug-filled condoms and when he did not succeed, his drug dealer increased pressure upon him by threats in relation to his wife.

I am further satisfied that there is no reasonable possibility that a person of ordinary firmness of mind and will may have acted as the prisoner did. Such a person would have at least sought assistance from the authorities, either here or in Indonesia, while emphasising the risk of corrupt police officers alerting the prisoner's drug dealer."

[44] In sentencing the appellant the learned sentencing Judge accepted that he was a courier rather than a person who either organised the importation or who expected to participate to any great extent in the profits which may have been generated from the exercise. His Honour acknowledged the previously clear record of the appellant, the co-operation that the appellant

had provided to the authorities and that the threat of harm to the wife of the appellant was part of the motivation for him committing the offences.

The Standard of Proof

[45] The first ground of appeal of the appellant is that the learned sentencing Judge erred in applying the wrong standard of proof in relation to the threats made to the appellant's wife. The complaint of the appellant is that in considering the nature of the threats made his Honour firstly observed that he was satisfied, beyond reasonable doubt, that threats were made to the wife of the appellant but then went on to observe: "I am not able to find beyond reasonable doubt, the nature of those threats" and that he was "satisfied that the threats were to harm the prisoner's wife, not to kill her".

[46] There is no dispute as to the standard of proof that should be applied in circumstances such as this. In *R v Olbrich* (1999) 199 CLR 270 Gleeson CJ, Gaudron, Hayne and Callinan JJ adopted what was said by the majority in *R v Storey* (1998) 1 VR 359 (at 369) that a sentencing Judge:

> "may not take facts into account in a way that is *adverse* to the interests of the accused unless those facts have been established beyond reasonable doubt. On the other hand, if there are circumstances which the judge proposes to take into account *in favour* of the accused, it is enough if those circumstances are proved on the balance of probabilities."

[47] It was conceded by the respondent that when his Honour remarked: "I am not able to find beyond reasonable doubt, the nature of those threats", his Honour applied the wrong standard of proof. It was acknowledged that

findings of fact in relation to "duress" are matters to be taken into account in favour of the appellant on sentence and need only be established on the balance of probabilities.

[48] Accepting that his Honour applied the wrong standard of proof to the question whether there was in fact a threat to kill the wife of the appellant or some other threat, it is necessary to determine what, if any, impact that had upon the sentence imposed.

[49] In his sentencing remarks his Honour found that it was "much more likely" that a threat other than a threat to kill was made and he concluded that "the threats were to harm the prisoner's wife, not to kill her". In so concluding his Honour appears to have proceeded on the balance of probabilities. His Honour reviewed the evidence and made various findings in favour of the appellant including that the threats of harm were made in relation to his wife and, although the threat was not the sole motivating factor for the commission of the offences, it was a motivating factor. These conclusions are supported by the evidence. His Honour referred to the fact that the appellant acknowledged having attempted to swallow the drug-filled condoms for the purposes of taking them to Australia before any threat was made. The appellant said he was unable to swallow the condoms and refused to do it. The threats against his wife were then made. He later contradicted that evidence by suggesting that the threats were made on an earlier occasion. The review of the evidence conducted by his Honour makes it clear that he was not satisfied by the later evidence in this regard.

His Honour also referred to the failure of the appellant to seek assistance from authorities, the conversation the appellant had with his mother in which the threat to kill was not mentioned and the evidence of the appellant as to the order of events from which the appellant sought to resile at a later time. As noted above his Honour concluded:

> "I am satisfied that there was a threat of harm to the prisoner's wife, rather than a threat to kill her. I am also satisfied that the prisoner was not motivated solely by the threat to his wife, but also by the desire to clear his drug debt and to ensure a continuing supply of heroin from his dealer to feed his addiction. I am also satisfied that this latter factor encouraged him to attempt to swallow drug filled condoms and when he did not succeed, his drug dealer increased pressure upon him by threats in relation to his wife."

[50] In my view it is far from clear that his Honour would have reached any different conclusion had he correctly identified the applicable test. I will return to this ground of appeal later in these reasons.

The Mental Condition of the Appellant

[51] The appellant complains that the learned sentencing Judge erred in failing to give sufficient weight to his mental condition both at the time of the commission of the offence and during his incarceration. Reference was made to medical reports received from a forensic psychiatrist, Dr Todorovic, and a general practitioner, Dr Wake. Further reference was made to the evidence of Sister Anna Molinari, a Catholic nun who visited the appellant whilst he was on remand.

[52] The appellant complained that the learned sentencing Judge had described the prisoner's mental problems as carrying "little weight as mitigating factors" and had gone on to observe that the appellant's "mental condition, while deserving of sympathy, can count for little if anything by way of mitigation, unless it can be shown to be a contributing factor in the commission of the offence."

[53] In order to consider this ground of appeal the mental condition of the appellant at the relevant times needs to be identified. The evidence of the psychiatrist, Dr Todorovic, was that when he examined the appellant on 1 November 1999 (ie shortly after his arrest) he was "a bit anxious at the beginning of the assessment, but co-operative, polite and cheerful". It was observed at that time that there were "no signs or symptoms of mental illness, psychosis or major depression". The psychiatrist went on to conclude that the appellant "can be assessed as a person not having psychiatric or psychological problems, at this stage."

[54] The evidence of Sister Molinari was that she visited the appellant from the end of October 1999 and that she interpreted for Dr Todorovic on a few occasions. She said that when she visited the appellant he was "very confused and agitated" for the first few months and he suffered from hallucinations. She said that "over the last six to seven months he has gradually improved the condition and he seems to me now to be a different person altogether". She was told by someone from the Drug and Alcohol Service that the hallucinations were related to his drug taking.

[55] The only other evidence as to the medical condition of the appellant came from Dr Wake a visiting medical officer at the Darwin Correctional Centre. He suggested that the appellant had "prison psychosis" which related to his "poor English skills, prison adjustment disorder and alleged drug withdrawal". It was said that this led to feelings of paranoia and isolation and Dr Wake suggested that "a psychotic condition arises". The appellant was treated and Dr Wake concluded that at the time of the report he "is well without evidence of psychotic illness". As the respondent submitted the expertise of Dr Wake to make the diagnoses referred to was not revealed.

[56] The mental condition of an offender is a matter that must be taken into account in determining the sentence to be passed (s 16A(2)(m) *Crimes Act (Cth)*). Reference was made on behalf of the appellant to *Waye v The Queen* (2000) 3 NTJ 1567 and *R v Tsiaras* (1996) 1 VR 398 at 400. Those cases dealt with offenders who suffered from a "serious psychiatric illness". It was accepted in those cases that a serious psychiatric illness not amounting to insanity was relevant to sentencing. In *R v Tsiaras* the Victorian Court of Appeal said (at 400):

> "Serious psychiatric illness not amounting to insanity is relevant to sentencing in at least five ways. First, it may reduce the moral culpability of the offence, as distinct from the prisoner's legal responsibility. Where that is so, it affects the punishment that is just in all the circumstances and denunciation of the type of conduct in which the offender engaged is less likely to be a relevant sentencing objective. Second, the prisoner's illness may have a bearing on the kind of sentence that is imposed and the conditions in which it should be served. Third, a prisoner suffering from serious psychiatric illness is not an appropriate vehicle for general deterrence, whether or not the illness played a part in the commission

> of the offence. The illness may have supervened since that time. Fourth, specific deterrence may be more difficult to achieve and is often not worth pursuing as such. Finally, psychiatric illness may mean that a given sentence will weigh more heavily on the prisoner than it would on a person in normal health."

The Northern Territory Court of Criminal Appeal adopted those views in *Waye v The Queen* although it expressed reservations regarding the third proposition.

[57] In the present case the evidence does not establish that there was a "serious psychiatric illness" suffered by the appellant at any relevant time. There is no evidence that, at the time of committing the offence, the appellant suffered any mental health problem at all. There is evidence to suggest that during the period immediately after he was incarcerated the appellant suffered distress and hallucinations apparently as a result of going through the withdrawal process. There was also evidence from Dr Wake that for a period the appellant suffered a prison adjustment disorder but, whatever the true nature of that disorder might be, it was well controlled and he was without evidence of any psychotic illness.

[58] In the sentencing process the learned sentencing Judge made reference to the mental health problems of the appellant and concluded that it carried "little weight" as a mitigating factor. I am unable to see that his Honour erred in so concluding.

Other Health Concerns

[59] The appellant complained that the learned sentencing Judge failed to give sufficient weight to other health difficulties of the applicant. These difficulties were identified in the evidence of Dr Wake that the appellant suffered from "hepatitis C positivity, blood stained bowel motions plus foot and dental problems at various times". The need for dental work and the foot problem were noted by Dr Wake to be "no longer active problems". The submission of the appellant was that hepatitis C is a condition which has "serious continuing effects on the health of the appellant" and was required to be taken into account by virtue of s 16A(2)(m) of the *Crimes Act (Cth)*. Reference to the medical report of Dr Wake does not reveal any basis upon which the submission of the appellant could be based. The only effect on health noted in the report was that the applicant's liver function test varied from "normal to mildly deranged" and that he had bleeding from the rectum.

[60] In *R v Smith* (1987) 44 SASR 587 King CJ (with whom Cox and O'Loughlin JJ agreed) said (589):

> "Generally speaking ill health will be a factor tending to mitigate punishment only when it appears that imprisonment will be a greater burden on the offender by reason of his state of health or when there is a serious risk of imprisonment having a gravely adverse effect on the offender's health".

In this case there was no evidence before the Court that imprisonment would be a greater burden for the appellant because of his condition or that imprisonment would have any adverse effect on his health.

[61] The learned sentencing Judge specifically referred to the report of Dr Wake and its contents and, in my view, it cannot be said that he overlooked or did not take account of such matters. In the circumstances of this matter the health difficulties of the appellant were of very little significance in the sentencing process.

The Dislocation of the Appellant

[62] The appellant next complains that the learned sentencing Judge failed to accord sufficient weight to the fact that the appellant's sentence will be, and has been, particularly harsh by reason of unfamiliarity with the English language, Australian culture and his dislocation from home and family. In this regard his Honour referred to those matters and went on to observe:

> "Those who come from overseas specifically and deliberately to commit a very serious crime by importing drugs which have the potential to kill or very seriously harm people's lives, can have no cause for complaint when they are obliged to remain in what to them is a foreign prison."

[63] The approach adopted by his Honour is unexceptional and is consistent with that adopted in other cases: *R v Ferrer-Esis* (1991) 55 A Crim R 231 at 239; *R v Su & Ors* (1997) 1 VR 1 at 75; *Ngui & Tiong* (2000) 111 A Crim R 593 at 596; *Huang* (2000) 113 A Crim R 386 at 391.

Moral Culpability

[64] The next complaint of the appellant is that his Honour failed to accord appropriate weight to the level of the appellant's moral culpability in the commission of the offence. It was submitted that the learned sentencing Judge erred in failing to have found that the threats to the appellant's wife were threats to kill and also in failing to recognise that the commission of the offence was not on the basis of greed but rather came about by virtue of the drug addiction of the appellant. The issue of the threat to kill has been dealt with above. In relation to the addiction of the appellant his Honour observed:

> "However, the desperation of drug addicts cannot be used as a licence for crime. There is nothing in the present case to indicate that the prisoner did not appreciate the evil of what he was doing, or that his mental condition was such that it undermined his capacity to form the intent required to constitute his actions an offence. Drug addiction and the desperation engendered by it may be relevant in other circumstances, but it cannot be accepted as significant mitigation in a crime of the nature and seriousness of count 1."

[65] The approach to be taken to the addiction of an offender was the subject of detailed consideration in *R v Henry & Ors* (1999) 46 NSWLR 346. In that case the Court considered sentencing in relation to the crime of armed robbery and the impact of drug addiction upon the sentence to be imposed. The observations made in the course of the judgments are relevant to this matter. In that case it was held that the need to acquire funds to support a drug habit, even a severe drug habit, is not an excuse to commit a serious offence and of itself is not a matter of mitigation. Drug addiction may be a

matter of mitigation in special circumstances but those circumstances do not apply here. In this case the appellant committed the offence in order to pay a debt incurred in supporting his drug habit and, it would seem, in the hope of obtaining either further drugs or money that would permit the purchase of further drugs. In my view the approach adopted by his Honour was appropriate in the circumstances.

The Period on Remand

[66] The appellant submitted that his Honour failed to give sufficient weight to the long period of incarceration spent on remand. The appellant was taken into custody on 22 October 1999 and remained in custody, on remand, until sentenced on 1 March 2001. He had remained on remand for a period of over 16 months. For some of that period the appellant's mental state was as described by Sister Molinari and Dr Wake. However for much of the period his condition was medically controlled. That situation continued at the time of sentencing. In sentencing the learned Judge acknowledged the period that the appellant had served on remand and backdated the commencement of the sentence to 22 October 1999 on that account. No submission had been made to his Honour suggesting that special consideration should be provided in this case by virtue of the period on remand. His Honour is an experienced Judge, familiar with the conditions on remand in Northern Territory prisons and must be assumed to have been aware of those at the time of sentencing.

Manifestly Excessive

[67] The final ground of appeal presented on behalf of the appellant was that the sentence was manifestly excessive. In the absence of identified error an appellant seeking to establish that a sentence was manifestly excessive must show that the sentence was not just arguably excessive but that it was so "very obviously" excessive that it was "unreasonable or plainly unjust": *Raggett, Douglas & Miller* (1990) 50 A Crim R 41 at 47; *Salmon v Chute & Anr* (1994) 94 NTR 1. It is not enough that members of this Court would have imposed a less or different sentence. There must be some reason for regarding the sentencing discretion as having been improperly exercised: *Cranssen v The King* (1936) 55 CLR 509 at 519-520.

[68] In developing the argument under this ground of appeal the appellant noted that the learned sentencing Judge had been referred to the sentencing patterns identified in New South Wales and other States and Territories in the case of *Wong & Leung* (1999) 108 A Crim R 531. That matter went on appeal to the High Court *(Wong v R* (2002) 185 ALR 233) where Gaudron, Gummow and Hayne JJ held that the Court of Criminal Appeal in New South Wales had no power or jurisdiction to publish "a table of future punishments". The joint judgment in the High Court also recognised that error occurred in the Court below in attaching primary importance to the weight of the narcotic involved in fixing sentences for such offences. The judgment was delivered after the sentence which is now the subject of appeal had been handed down.

[69] The analysis of the decided cases undertaken by the Court of Criminal Appeal in *Wong & Leung* and the schedule of cases attached to the judgment provided his Honour in this case with useful historical information insofar as it went. The learned sentencing Judge correctly noted that the judgment of the Court of Appeal in New South Wales was not binding on him but he had regard to the "careful analysis of Australia-wide sentencing patterns for offences against s 233B of the *Customs Act*". His Honour did not expressly limit himself to the range of sentences set out in that case. He had regard to the analysis and then went on to consider and accord appropriate weight to the many other factors relevant to the offences, the offender and the appropriate sentence in this matter.

[70] His Honour did not adopt the so called sentencing guidelines in a manner that suggested he had constrained the exercise of his sentencing discretion. He did not accord "chief importance" to the weight of the narcotic. His Honour articulated the matters relevant to the sentencing exercise including the weight of the narcotic, the level of the appellant's participation, his knowledge of the undertaking and the extent and nature of the reward he was to receive. He also considered matters personal to the appellant and those matters referred to in Part 1B of the *Crimes Act (Cth)*.

[71] Assuming his Honour did make an inappropriate reference to the guidelines in *Wong & Leung* it does not follow that the sentence was manifestly excessive: *Wong v R* per Gleeson CJ at par 25. It is necessary to consider the sentence in light of all of the relevant information. Having reviewed the

circumstances of this matter I regard the sentences imposed by his Honour as being comfortably within the proper sentencing range for such offences. I reject the submission that the sentences were manifestly excessive.

[72] The only error established by the appellant was the apparent incorrect observation regarding the onus of proof referred to at par 10 above. Even if his Honour did adopt an incorrect approach to this aspect of the matter or, if it be thought that his Honour incorrectly placed reliance upon *Wong & Leung*, it does not follow that this Court will interfere with the sentence he imposed. This Court will only interfere with the sentence "if it is of the opinion that some other sentence, whether more or less severe, is warranted in law and should have been passed": s 411(4) of the *Criminal Code*. In my view the sentences imposed on the appellant were appropriate in all the circumstances and the Court ought not interfere.

[73] I would dismiss the appeal.

———————————————