CASE NOTE ON *BUI V DPP (CTH)* - THE HIGH COURT CONSIDERS DOUBLE JEOPARDY IN SENTENCING APPEALS

DR GREGOR URBAS*

I INTRODUCTION

In its first decision of the year, handed down on 9 February 2012, the High Court of Australia in *Bui v Director of Public Prosecutions (Cth)*[1] considered the application of State legislation and common law principles to sentencing appeals involving federal offences. As criminal trial and sentencing proceedings for offences against laws of the Commonwealth are almost invariably heard in State and Territory courts, questions arise about the interaction between Commonwealth and State or Territory procedural provisions, and the relationship between these and the common law. In this case, the High Court unanimously held that any common law principle according to which prosecution appeals against sentence involve a form of double jeopardy does not apply to appeals involving federal offences. However, neither did Victorian legislation abrogating the common law.

II THE FACTS

The appellant, Bui, an Australian citizen who was born in Vietnam, agreed to carry drugs hidden in internally concealed pellets into Australia for another person to whom she owed money.[2] She was to be paid $8,000 per pellet. On arrival at Melbourne airport in early 2009, she was apprehended and taken to a hospital, where a body scan revealed the presence of foreign objects in her body. These turned out to be four pellets containing a total pure weight of 197.3 grams of heroin, estimated to have a street value of over $320,000 if sold at 10 per cent purity level. After this, the appellant co-operated with investigating police, providing information about the other person and the drug importation operation. She pleaded guilty to one count

---

* Senior Lecturer in Law, Australian National University.

1 244 CLR 638; [2012] HCA 1.

2 These facts are taken from the unanimous High Court judgment of French CJ, Gummow, Hayne, Kiefel and Bell JJ : *Bui v Director of Public Prosecutions (Cth)* 244 CLR 638, 644 [1]-[2]; and the Victorian Court of Appeal judgment of Ross AJA (with Nettle and Hansen JJA agreeing): *DPP (Cth) v Bui* [2011] VSCA 61 (9 March 2011), [3]-[11].

of importation of a marketable quantity of a border controlled drug, being heroin, contrary to s 307.2(1) of the *Criminal Code Act 1995* (Cth). This offence carried a penalty of imprisonment for 25 years or 5,000 penalty units, or both. At her sentencing hearing, an undertaking by the appellant to co-operate with law enforcement authorities, made pursuant to s 21E of the *Crimes Act 1914* (Cth), was tendered.[3]

III The Sentence Imposed At First Instance

Bui was sentenced in the Victorian County Court on 30 April 2010.[4] Her Honour, Wilmoth J, considered the factors that must be taken into account in sentencing for federal offences as set out in s 16A(2) of the *Crimes Act 1914* (Cth), and in particular the following, the plea of guilty, Bui's co-operation with law enforcement authorities, and the probable effect that imprisonment would have on any of the offender's family or dependants.[5] In this case, Bui had given birth to premature twins in December 2009, following her arrest on the heroin importation charge. In view of these factors, as well as the danger entailed by her co-operation with police in providing information about the drug importation operation, Wilmoth J decided against imposing an immediate custodial sentence, instead sentencing Bui to three years' imprisonment, but ordering that she be released forthwith upon giving security by recognisance of $5,000 to comply with a condition that she be of good behaviour for three years.

3 Under the *Crimes Act 1914* (Cth), s 4AA, one penalty unit equals $110. Under s 21E(1), where a federal sentence is reduced because of a defendant's undertaking to co-operate with law enforcement authorities, the sentencing court must state the amount by which the sentence and non-parole period are thereby reduced; under subsection (2), the Director of Public prosecutions can appeal if the promised co-operation does not eventuate; and under subsection (3), the appeal court can in whole or in part remove the sentencing discount that would have applied.

4 See, *Bui v Director of Public Prosecutions (Cth)* 244 CLR 638, 645 [3]; *DPP (Cth) v Bui* [2011] VSCA 61 [3].

5 The *Crimes Act 1914* (Cth), s 16A(1) stated that in determining the sentence to be passed or the order to be made in respect of any person for a federal offence, a court must impose a sentence or make an order that was of a severity appropriate in all the circumstances of the offence. Section 16A(2) set out a list of matters which, in addition to any other matters, the court must take into account if they were 'relevant and known to the court'. The particular factors which the court referred to above were set out in s 16A(2), (g), (h) and (p) respectively.

IV In The Court Of Appeal

A *Appeal against the Sentence*

The Commonwealth Director of Public Prosecutions ('DPP') appealed against the sentence on the ground of manifest inadequacy.[6] The DPP argued in the Court of Appeal of the Supreme Court of Victoria that the non-custodial sentence imposed at first instance was manifestly inadequate and that the sentencing judge had fallen into material error of fact or law. The three members of the Court of Appeal, Ross AJA with Nettle and Hansen JJA agreeing, found that Wilmoth J had indeed erred in considering the application of paragraph (p) of s 16A(2) of the *Crimes Act 1914* (Cth), which required the court to consider 'the probable effect that any sentence or order under consideration would have on any of the person's family or dependants'. The Court of Appeal affirmed the approach taken under the common law and in federal sentencing, which limited the consideration of family hardship in sentencing an offender to those cases in which the circumstances were 'exceptional'.[7] The Court of Appeal accepted the DPP's argument that the sentencing judge had erroneously conflated her consideration of family hardship with the consequences of the assistance that Bui had provided to the authorities, rather than assessing independently whether the family hardship arising from a custodial sentence would on its own constitute an exceptional circumstance. Secondly, Her Honour had failed to consider this factor on the balance of probabilities, implicit in the words 'probable effect', instead averting to 'sufficient evidence … to draw the inference that the risk exists'.[8]

In view of these errors, as well as the manifest inadequacy of the non-custodial sentence imposed, considered against Bui's significant involvement for financial reward in a serious drug importation scheme, the Court of Appeal allowed the appeal brought by the DPP and re-

6 See, *Bui v Director of Public Prosecutions (Cth)* 244 CLR 638, 645 [4]; *DPP (Cth) v Bui* [2011] VSCA 61 [16]. Under s 287 of the *Criminal Procedure Act 2009* (Vic), the DPP may appeal to the Court of Appeal against a sentence imposed in a Victorian court if the DPP considers that there is an error in the sentence imposed and that a different sentence should be imposed, and is satisfied that an appeal should be brought in the public interest. This provision applies in its terms to the Victorian DPP, but s 68(2) of the *Judiciary Act 1902* (Cth) has the effect of conferring this right of appeal on the Commonwealth Attorney-General, and s 9(7) of the *Director of Public Prosecutions Act 1983* (Cth) then operates to vest the right of appeal on the Commonwealth DPP, later to be the respondent in the High Court appeal.

7 *DPP (Cth) v Bui* [2011] VSCA 61 [19]-[23], citing *Markovic v R; Pantelic v R* [2010] VSCA 105 [2] (Maxwell P, Nettle, Neave, Redlich and Weinberg JJA) and *R v Togias* [2001] NSWCCA 522; (2001) 127 A Crim R 23, 25–6 (Spigelman CJ).

8 *DPP (Cth) v Bui* [2011] VSCA 61 [28]. See also [26]-[29].

sentenced Bui to a term of imprisonment of four years with a non-parole period of two years.[9] However, before arriving at this conclusion, the Court of Appeal had to deal with the argument that re-sentencing following a prosecution appeal against an inadequate sentence is affected by considerations of double jeopardy.

B *Double Jeopardy in Sentencing - at Common Law and its Statutory Modification*

At common law, it has been held that an appellate court has a residual discretion to refuse to intervene in a sentence imposed by a lower court, or to do so reluctantly, even where an error in arriving at the sentence has been demonstrated. This is said to be because exposing a convicted defendant to the imposition of a more severe punishment on appeal constitutes a form of double jeopardy, with the consequence that Crown appeals against sentence should be 'comparatively rare' or 'rare and exceptional'.[10] Further, even when re-sentencing an offender after a finding of manifest inadequacy, appeal courts tend to impose a lower sentence than would otherwise be warranted in the circumstances.[11] Arguably, considerations of double jeopardy in sentencing appeals stem more from historic judicial practice than any clear jurisprudential principle. Interestingly, the High Court's unanimous judgment referred to the 'principle' sought to be introduced by the appellant as a 'judge-made rule'.[12]

Sentencing reforms in a number of Australian jurisdictions have sought to modify the common law approach. In particular, Victorian legislation introduced in 2009, s 290(3) of the *Criminal Procedure Act 2009* (Vic) provides that, where the Court of Appeal allows an appeal by the DPP against an inadequate sentence, in re-sentencing,

> the Court of Appeal must not take into account the element of double jeopardy involved in the respondent being sentenced again, in order to impose a less severe sentence than the court would otherwise consider appropriate.[13]

---

9 Ibid [97].

10 See Nicholas Cowdery, 'Prosecution Appeals in New South Wales: New Rights, Roles and Challenges for the Court of Criminal Appeal and the DPP' (2008) 26(1) *Law in Context* 75, Special Issue - Criminal Appeals 1907 – 2007, citing obiter dicta of Barwick CJ *in Griffiths v R* (1977) 137 CLR 293. However the obvious counter-argument that such appeals should only be as rare as the sentencing errors that they are designed to redress is not dealt with in these dicta.

11 See for eg, *R v Hayes* (1987) 29 A Crim R 452; *R v Clarke* (1996) 2 VR 520; *Dinsdale v The Queen* (2000) 202 CLR 321 [62] (Kirby J), citing *Griffiths v The Queen* (1977) 137 CLR 293 [310].

12 *Bui v Director of Public Prosecutions (Cth)* 244 CLR 638, 649 [12], 651 [19], 652 [25], 653 [29].

13 *Criminal Procedure Act 2009* (Vic) s 290(3) came into force from 1 January 2010. Similar

The Victorian Court of Appeal in this case was apparently bound by this provision not to apply double jeopardy considerations in its re-sentencing. Against this, Bui submitted that because s 16A(1) of the *Crimes Act 1914* (Cth) required the courts when sentencing federal offenders to 'impose a sentence or make an order that is of a severity appropriate in all the circumstances of the offence', this encompassed a need to moderate prosecution appeals due to double jeopardy, and indeed, meant that there was inconsistency between the Commonwealth and Victorian provisions.[14]

However, the Court of Appeal disagreed, holding that State laws cannot on their own affect the exercise by State courts of federal jurisdiction. Prior to the enactment of the Victorian restrictions on double jeopardy, the common law applied in Commonwealth Crown appeals against sentence heard in Victoria, through the operation of s 80 of the *Judiciary Act 1903* (Cth). This was because of the legislative 'gap' left by the silence of s 16A of the *Crimes Act 1914* (Cth) on the issue, allowing s 80 of the *Judiciary Act 1903* (Cth) to import the 'common law in Australia as modified by the Constitution and by the statute law in force in the State or Territory in which the Court in which the jurisdiction is exercised is held'. Therefore, the Victorian provisions operated to modify the common law, meaning that it no longer applied through s 80 to Crown appeals involving Commonwealth offences.[15]

---

legislative provisions are found in s 68A *Crimes (Appeal and Review) Act 2001* (NSW); s 402(4A)(b) *Criminal Code Act 1924* (Tas); s 177 *Justices Act* (NT) and s 414 *Criminal Code* (NT) as amended by the *Criminal law Amendment (Sentencing Appeals) Act 2011* (NT). This reform is not to be confused with the abrogation of double jeopardy rules relating to verdicts so as to allow Crown appeals against acquittals in specified circumstances, for example, under the *Crimes (Appeal and Review) Amendment (Double Jeopardy) Act 2006* (NSW); *Criminal Code (Double Jeopardy) Amendment Act 2007 (Qld)*; *Criminal Law Consolidation (Double Jeopardy) Amendment Act 2008* (SA); *Criminal Procedure Amendment (Double Jeopardy and Other Matters) Act 2011* (Vic) and *Criminal Appeals Amendment (Double Jeopardy) Act 2012* (WA).

14 *DPP (Cth) v Bui* [2011] VSCA 61 [62]. This submission relied on a Tasmanian case, involving similar statutory amendment of double jeopardy principles, in which the Full Court of the Supreme Court of Tasmania had accepted that there was an inconsistency between the Commonwealth and State provisions, and that therefore double jeopardy continued to apply in Crown appeals involving Commonwealth offences: *R v Talbot* [2009] TASSC 107 [19] (Blow J).

15 *DPP (Cth) v Bui* [2011] VSCA 61 [65]-[70]. An alternative argument, to the effect that the Victorian provisions were not 'picked up' by s 80 of the *Judiciary Act 1903* (Cth), was also rejected on the authority of the five-member New South Wales Court of Criminal Appeal's decision in *DPP (Cth) v De La Rosa* (2010) 273 ALR 324; [2010] NSWCCA 194.

Finally, the Court of Appeal considered whether there was a 'residual discretion', not abrogated by the statutory provisions, which would allow a reduction in sentence on the grounds of matters such as delay or actual anxiety or distress occasioned by the fact that Bui may be re-sentenced.[16] Even assuming the existence of such a continuing discretion, the Court of Appeal, however, held that this did not constitute a material mitigating factor in the case.[17]

V The High Court's Decision

The High Court, in a unanimous decision (of French CJ, Gummow, Hayne, Kiefel and Bell JJ), dismissed the appellant's (Bui's) appeal against the Victorian Court of Appeal's decision upholding the DPP's appeal against Bui's inadequate sentence. This meant that the sentence ordered by the Court of Appeal remained in place.

The High Court stated that s 16A of the *Crimes Act 1914* (Cth) must be considered in its terms, and that it 'applie[d] of its own force to the sentencing of persons convicted of offences against Commonwealth laws'.[18] Notwithstanding, it has been held to accommodate some common law principles of sentencing, including general deterrence, proportionality and totality.[19] Such principles give content to the statutory expression 'of a severity appropriate in all the circumstances of the offence' found in s 16A(1), as well as expressions, such as 'the need to ensure that the person is adequately punished for the offence' found in s 16A(2)(k). The same, however, cannot be said for the supposed 'principle' of double jeopardy in sentencing advanced by the appellant. The High Court pointed out that s 16A 'does not accommodate' such 'principle'.[20]

---

16 *DPP (Cth) v Bui* [2011] VSCA 61 [81]: The deposition on anxiety and distress suffered by Bui as a result of the institution of the appeal proceedings included the following - 'When I was sentenced on 30 April 2010 and realised I did not have to go to prison I felt like I had been given a new life. I was very happy and grateful with the Court for giving me this chance … When I found out that the prosecution had appealed against my sentence and want me to go to prison I felt sick and very scared … I am very worried about the future for my children if I go to prison. I cannot sleep properly at night'.

17 Ibid [90] (Ross AJA): 'I am not persuaded that the considerations to which I have referred warrant the exercise of the Court's residual discretion to decline to intervene. Indeed if such considerations were sufficient to invoke the residual discretion then almost every offender faced with a Crown appeal against sentence would be entitled to a favourable exercise of that discretion'.

18 *Bui v Director of Public Prosecutions (Cth)* 244 CLR 638, 650 [18].

19 Ibid, citing *Johnson v The Queen* (2004) 205 ALR 346, 353; and *Hili v The Queen* (2010) 242 CLR 520, 528 [25].

20 *Bui v Director of Public Prosecutions (Cth)* 244 CLR 638, 651 [19].

As to the appellant's contention that this principle fell within the expression '[i]n addition to any other matters, the court must take into account' prefacing s 16A(2), and that this operated to yield an automatic discount on re-sentencing, the High Court provided the following explanation:

> Application of an automatic discount would not be consistent with the requirement of s 16A(1) that a sentence be appropriate in its severity in all the circumstances of the case. And to read s 16A in the manner submitted by the appellant would be to gloss the text impermissibly by introducing a notion for which there is no textual foundation. It would go well beyond giving relevant content to any of the expressions found in the section.[21]

Further, the High Court pointed out that s 16A and its list of required considerations in subsection (2) applied to all courts exercising federal jurisdiction in sentencing, and there was nothing in the terms of the section that drew a distinction between sentencing courts at first instance and appellate courts. Because the sentencing form of the double jeopardy principle applied only in appeals, the High Court therefore stated that it cannot be read into s 16A:

> No warrant is therefore provided for interpreting s 16A as encompassing concepts addressed only to an appellate court, such as notions derived from the rule against double jeopardy.[22]

Finally, the High Court dealt with the contention, that s 16A(2)(m), which refers to the 'mental condition' of the person being sentenced as a relevant factor, should be interpreted widely to encompass the distress and anxiety occasioned by re-sentencing in an appellate court.[23] The High Court took a narrower view, noting that the opening words of s 16A(2) refer to 'such of the following matters as are relevant *and known* to the court'. As the appellant's actual mental state had been the subject of evidence at sentencing, and the Court of Appeal had also considered it at the re-sentencing stage, but decided that it did not warrant a reduction, this part of the appellant's argument also failed.[24]

---

21 Ibid.

22 Ibid 651 [20].

23 Ibid 652 [23]. Three members of the five-member bench of the New South Wales Court of Criminal Appeal in *DPP (Cth) v De La Rosa* (2010) 79 NSWLR 1, 17 [54] had considered this argument, with Allsop P and Basten J allowing that the paragraph might be understood to include distress and anxiety not proved by evidence but rather 'reflecting the reality of what a person facing re-sentencing would experience', while Simpson J considered that paragraph (m) must refer to the actual mental condition of a person rather than a presumed condition, and that any condition of distress or anxiety must be demonstrated before the provision applies.

24 *Bui v Director of Public Prosecutions (Cth)* 244 CLR 638, 652 [23]-[24] (emphasis in the judgment).

In concluding, the High Court succinctly summarised the interaction between s 16A, the common law, and s 80 of the *Judiciary Act 1903* (Cth):

> The punishment of which s 16A(1) speaks is a sentence 'of a severity appropriate in all the circumstances of the offence.' Presumed anxiety and distress on re-sentencing is not one of the matters to which the Court is to have regard under sub-s (2), for the reasons earlier given. That does not mean that there is a gap or omission in Commonwealth statute law such as to bring s 80 into play. Re-sentencing is able to occur and will occur according to s 16A without reference to that presumed state of affairs.[25]

The appeal was therefore dismissed.

VI Comment

The High Court's analysis brings a much needed clarification to the interaction in federal sentencing proceedings between Commonwealth and State or Territory laws, and common law principles. It puts beyond doubt that the so-called judge-made principle of double jeopardy in sentencing is not accommodated by the statutory provisions of s 16A of the *Crimes Act 1914* (Cth), which courts when sentencing offenders for offences against Commonwealth laws, are required to apply. Further, State provisions abrogating the common law, such as that enacted in Victoria in 2009, do not operate with respect to s 16A as the latter operates on its own terms in federal sentencing without distinction between proceedings at first instance and appellate proceedings. The decision also makes clear that, insofar as s 16A refers to matters such as a person's 'mental condition', this does not extend to any presumed distress and anxiety generally occasioned by the process of re-sentencing, but may encompass actual distress and anxiety in the particular case, as proved by evidence.[26]

However, the High Court's analysis leaves unresolved some more general questions about double jeopardy in sentencing. The first is whether the 'judge-made rule' of double jeopardy in sentencing, as the High Court referred to it, really is part of the common law of Australia, and if so, what is its precise formulation. Judicial exhortations that prosecution appeals against inadequate sentences should be 'rare and exceptional' may be criticised as lacking coherent justification and

---

25 Ibid 653 [28] (footnotes omitted). The High Court's decision has since been applied in two reported cases: *R v Boughen; R v Cameron* [2012] NSWCCA 17; and *R v V, AJ* [2012] SASCFC 10.

26 It may be noted that Australian Courts of Criminal Appeal are empowered to receive fresh evidence on appeal, and an appellant's actual mental state at the time of re-sentencing may arguably fall into this category as part of the evidence required to be considered alongside the statutory matters enumerated in s 16A: see, for example, *Criminal Appeal Act 1912* (NSW), s 12; and *Criminal Procedure Act 2009* (Vic), s 317.

precision of application, not to mention community support, and are understandably met with the kinds of statutory reform seen in New South Wales and Victoria seeking to abrogate any such principle. As stated in the Explanatory Memorandum for the 2008 Bill introducing the Victorian reforms:

> Consideration of double jeopardy is removed because it interferes with a central function of DPP appeals which is to provide guidance for lower courts on sentencing. Further, the inconvenience and trauma of re-sentencing a person is not the only matter relevant to such policy issues. Rather, the interests of the community in seeing adequate punishment given for criminal offences is an overriding policy consideration.[27]

This legislative approach reflects a more modern approach to criminal justice policy than the bipolar focus of the criminal trial solely on the Crown and the defendant. It must be remembered that criminal justice involves not only these formal parties to criminal proceedings, but also victims and the community more widely. In this regard, discussions of the 'distress and anxiety' experienced by re-sentencing of offenders should extend to consider the same emotions felt by others affected by the process, including victims, who are too often distressed at the outcomes of proceedings in which they are involved.[28] However, given that the offence at issue in this particular case was drug importation rather than an offence of violence against an individual victim, the Court did not have occasion in this appeal to consider such a balance of interests. Perhaps it will be able to do so in a future case.

---

27 Explanatory Memorandum, Criminal Appeals Bill 2008 (Vic).

28 A defect of traditional adversarial models sought to be overcome through the introduction of restorative justice alternatives: see, for example, Heather Strang and Lawrence W Sherman, 'Repairing the Harm: Victims and Restorative Justice' (2003) *Utah Law Review* 15.