BUI v DIRECTOR OF PUBLIC PROSECUTIONS FOR THE COMMONWEALTH (M127/2011)

Court appealed from:	Court of Appeal, Supreme Court of Victoria [2011] VSCA 61
Date of judgment:	9 March 2011
Date special leave granted:	2 September 2011

In April 2010 the appellant pleaded guilty in the County Court to one count of importation of a marketable quantity of heroin contrary to s 307.2(1) of the *Criminal Code* (Cth). She was sentenced to 3 years' imprisonment to be released forthwith upon giving security by recognisance of $5,000.00 and to be of good behaviour for 3 years. At the plea hearing, the appellant relied on two major points in mitigation: that her immediate incarceration would cause exceptional hardship to her infant twin daughters; and that she had given an undertaking to cooperate with law enforcement agencies in future proceedings. The respondent (CDPP) appealed against sentence on the basis that it was manifestly inadequate. CDPP also contended that the sentencing judge fell into material error in finding "exceptional circumstances" relating to the appellant's family circumstances or alternatively giving too much weight to them. The Court of Appeal accepted that the sentencing judge had fallen into error and also accepted that, even giving full weight to the factors in mitigation, the sentence was manifestly inadequate.

At the time the appeal was heard, new provisions of the *Criminal Procedure Act* 2009 (Vic) had come into operation. Sections 289 and 290 in effect provide that issue of double jeopardy in relation to Crown appeals against sentence is not to be taken into account. The appellant submitted that "double jeopardy" ought to be interpreted as it had been interpreted by Spigelman CJ in *R v JW* [2010] NSWCCA 49 regarding similar NSW legislation, namely that "double jeopardy" precludes reliance upon the presumed distress and anxiety suffered by a respondent to a Crown appeal, as distinct from any wider meaning. The appellant also submitted that the new provisions were not picked up and applied pursuant to the *Judiciary Act* 1903 (Cth). Alternatively, it was submitted that those provisions were inconsistent with s 16A(1) and (2) of the *Crimes Act* 1914 (Cth) (the Crimes Act), as s 16A(1) encompasses the need to moderate Crown appeals due to double jeopardy. The Court of Appeal accepted the reasoning of Spigelman CJ and had regard to the unchallenged evidence of the appellant's anxiety and distress. However the Court did not accept that there was inconsistency between the new provisions and s 16A of the Crimes Act, nor that there was any impediment to these provisions being picked up and applied pursuant to the *Judiciary Act* in a Crown appeal against sentence for federal offences.

The Court of Appeal re-sentenced the appellant to 4 years' imprisonment, starting from the date of its judgment, with a 2 year non-parole period.

The ground of appeal is:

- That the Court of Appeal erred in holding that sections 289(2) and 290(3) of the *Criminal Procedure Act* 2009 (Vic) were picked up and applied pursuant to the *Judiciary Act* 1903 (Cth) in a Crown appeal against sentence instituted by the Commonwealth Director of Public Prosecutions.

The appellant has given notice that the appeal involves a matter under the Constitution within the meaning of s 78B of the *Judiciary Act* 1903 (Cth). The Attorney-General for the State of Victoria has intervened in the appeal.