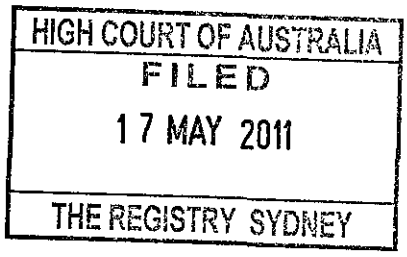
IN THE HIGH COURT OF AUSTRALIA **No. S137 of 2011**
SYDNEY OFFICE OF THE REGISTRY

BETWEEN:



JIHAD MAHMUD
Applicant
AND
THE QUEEN
Respondent

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RESPONDENT'S SUBMISSIONS

Part I: Publication

This submission is in a form suitable for publication on the internet.

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Part II: Concise statement of issues

2. 1 The question of whether the applicant's sentence was manifestly inadequate and the determination of a more appropriate sentence concerned the particular circumstances of this case and raises no issue of general importance warranting the grant of special leave.

Part III: Section 78B of the Judiciary Act

The applicant has filed notices under s78B of the *Judiciary Act 1903* (Cth).

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Part IV: Statement of contested material facts

4. 1 There was an agreed statement of facts (AB 86).

4. 2 The applicant was found in possession of a large commercial quantity of methylamphetamine (1.78kg of methylamphetamine) and a number of prohibited weapons.

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4. 3 The applicant was arrested on 15 January 2008 when police observed his car behaving erratically. When police stopped the applicant's car he was found to have a bullet in a plastic resealable bag between his thighs. Police also found a loaded pistol and a tazer gun in the boot of his car. Police searched the applicant's home and found 1.78kg of methylamphetamine in the freezer, $50,950 in cash, a pistol, two single shot firearms, bullets, knives (charges in respect of these prohibited weapons were on the Form 1), glucodin, plastic bags, and a police radio.

4. 4 The applicant was 26 at the time of the offences with prior convictions for assault, affray, AOABH and firearms offences. The applicant had previously been sentenced to 18 months HS with 12 months NPP for possession of a firearm in a public place, not keeping a firearm safely and possession of ammunition.

4. 5 The applicant was sentenced to a total term of 6 ½ years with 4 ½ years NPP. On appeal that was increased to 7½ years NPP with 2½ years balance of term.

PART V: Applicable Legislative provisions

The respondent agrees with the applicant's list of legislative provisions.

PART VI: Statement of Argument

Invalidity of Division 1A of Part 4

6. 1 The respondent submits that the correct construction of the provisions of Division 1A of Part 4 of the *Crimes (Sentencing Procedure) Act* 1999 is that proposed in the respondent's submissions in the matter of **Muldrock v The Queen** No s 121 of 2011.

6. 2 On the issue of the constitutional validity of those provisions, the respondent relies on the submissions of the Solicitor General for NSW.

Application for Special Leave to Appeal against sentence

6. 3 The applicant submits that the CCA applied the standard non-parole period as a "fixed anchor point" to increase the sentence where there was otherwise no justification to interfere with the original sentence (AWS at [52], [58]).

6. 4 Contrary to this submission, the CCA accepted that the sentencing judge's findings of fact and assessment of the objective seriousness of the offences were very much matters of judgment with which the court would be slow to interfere (CCA at [67] AB 158.50).

6. 5 In the event, despite considerable misgivings about some of his Honour's findings, the CCA did not disturb any of the findings of fact, nor his Honour's assessment that the offences fell below the middle of the range.

6. 6 However, the CCA found two errors in the sentencing judge's approach. Firstly, his Honour awarded a 20% discount for an early plea when the plea was not entered until arraignment in the District Court (CCA at [41] AB150.30). Secondly, the CCA found that the sentences for the firearms offence (CCA at [73] AB160.49) and the drug supply offence (CCA at [80] AB 162.60) were manifestly inadequate.

6. 7 Those findings were not made by a rigid adherence to the standard non-parole period but by a consideration of the particular features of the case.

6. 8 As the CCA noted, the maximum discount of 25% is reserved for pleas entered at the earliest possible opportunity in the Local Court (CCA at [41], AB 150.30). The timing of the applicant's plea did not warrant a discount of the order of 20% (CCA at [43], AB 151.28). Nor was there any greater utilitarian value to the plea because of any particular complexity about the matter or because a number of charges were resolved by inclusion on the Form 1. The CCA considered, as had the sentencing judge, that the facts were within an "relatively short compass" and the inclusion of the weapons charges on the Form 1 had its own benefits in terms of sentence and did not warrant a greater discount on the basis of the added utilitarian value of the plea (CCA at [44], AB 151.40).

6. 9 The CCA accepted that the drug supply offence was "substantially" below the middle of the range of objective seriousness (CCA at [58], AB 156.5) based on the quantity and purity of the drug and because it was accepted that the applicant was storing the drugs for another supplier to pay off his drug debts and to earn some free drugs for his own use. While those factors may have reduced the seriousness of the offence from what it might have been had it been found that he was trafficking in that quantity of drugs, it did not mean that his criminality was minimal or insignificant.

6. 10 The applicant was in possession of almost double the large commercial quantity of methylamphetamine. This was an offence which carried a maximum penalty of life imprisonment.

6. 11 The Crown had sought to establish that the finding of guns, the large amount of cash, plastic bags, glucodin and other items was indicative of the applicant conducting a business of suppling drugs. Even if such factors were considered not to be indicia of actual supply they remained relevant to the applicant's role as warehouseman. It seemed to have been thought that if they were not indicia of supply they ceased to be relevant on the assessment of his role in storing large quantities of drugs.

6. 12 The fact that the premises were barred and under surveillance, the presence of guns, bags, glucodin and other items were relevant to understanding the nature of his role as a warehouser for the unnamed dealer or dealers. The applicant's level of drug use was also relevant to this issue.

6. 13 The appellant said he stored the drugs for the unnamed dealer or dealers to pay drug debts and to get free drugs for his own use. He did not specify what level of debt he had accrued or the extent to which it was offset by his provision of this service (CCA at [28] AB147.20), but as he was a heavy user and had no other significant source of income, the clear inference was that his warehousing duties would need to be of a degree that covered that high level of debt. Just how high was indicated by his admissions to the Probation Officer and to his psychologist that his habit cost between $40,000 - $182,000 per year.

6. 14 The applicant told the parole officer that he had a $40,000 per year habit. He said he supported this habit by "doing stupid things to get his drugs for free" (Pre-sentence report dated 20.4.09 at p2.7 (AB92.49). In his evidence at sentence the applicant acknowledged that the $40,000 estimate may be correct: "May be, who knows...." (AB 26.50). He said he gave the probation officer estimates and she probably calculated it out but he did not actually say $40,000 per year (AB 27.16). The applicant told his psychologist, Professor Woods, that at the time of his arrest he had a $500 a day habit (Report of Professor S Woods dated 15.10.08 at p4[1.4]), which would have meant an annual cost in the order of $182,000. He told Professor Woods he supported that addiction by obtaining money where he could, selling personal property, incurring debt and storing drugs "for certain

people" who in turn supplied him. That level of expense suggested that must have offered a high level of storage services to "certain people" to finance that level of use. As the CCA found, the provision of such services is not an insignificant contribution to the business of drug distribution (CCA at [58] AB 155.50).

6. 15 Similarly, in relation to the firearms offence, as it was accepted that the applicant was not in the business of dealing, his possession of the guns was a separate offence not related to that dealing. The CCA accepted that, while the objective seriousness was "appreciably below the mid-point" (CCA at [67] AB158.55), it remained objectively serious (CCA at [70] AB159.58). The offence carried a 20 year maximum penalty. The applicant had a number of weapons in his possession, he was carrying one of the pistols in public, it was loaded, it had a bullet in the chamber and was set to fire (CCA at [7] AB132.50). The applicant had a prior conviction for firearms offences and had served a term of imprisonment for those offences (CCA at [62-63] AB157.20).

6. 16 The applicant said he liked guns: "There's no explanation why I had it except I just had a fetish for them. I liked – I like guns." (AB 17.43). The CCA was correct to find that even if the guns were not used for the purpose of drug trafficking, the objective criminality remained serious (CCA at [64] AB 157.50). A liking for guns was no mitigation for the offence of possession of loaded weapons, particularly as one of them was carried loaded in public by a person affected by drugs. The applicant said he was taking "ice" at the time and had not slept in 3 days (AB18.60). He did not remember where he got the pistol he had in the car and did not "have a clue" how it came to be loaded (AB28.59). He gave a similar explanation to the probation officer. He explained that "he rarely removes these weapons from his room when not under the influence of substances." (Pre-sentence report dated 20.4.09 at p3.8, AB 93.50), however, as the applicant had a heavy daily habit, that meant it was likely he regularly removed the weapons from his room.

6. 17 As the probation officer noted, the applicant's rationalisation for his possession of the firearms on the basis of his interest in weapons tended to normalise his behaviour and indicated that he had "no awareness or recognition of the danger he presented to his family or the community at large" (AB 93.55 – 94.5). The

probation officer considered this demonstrated "a severe lack of awareness" of the effect of his behaviours on the wider community. The probation officer expressed particular concern over the applicant mixing crystal amphetamine and loaded weapons while in public (AB 94.55).

6. 18 Far from applying a rigid quantitative approach, the CCA took these matters into account and approached the matter on the express basis that the finding of manifest inadequacy did not automatically lead to a resentence, that Crown appeals should be rare and the Court should only interfere where there is demonstrated error of principle (CCA at [82] AB163.30). In the result, the sentence imposed by the CCA was well below the standard non-parole period prescribed for both offences and properly reflected the seriousness of the offences and the relevant subjective considerations.

6. 19 The determination of the appropriate sentence in all the circumstances was a matter confined to the particular features of this case. It raises no issue of general importance warranting the grant of special leave.

C. Maxwell

Dated: 17 May 2011

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