



## HIGH COURT OF AUSTRALIA

9 February 2012

### KIEU THI BUI v DIRECTOR OF PUBLIC PROSECUTIONS FOR THE COMMONWEALTH OF AUSTRALIA

[2012] HCA 1

Today the High Court dismissed an appeal from the Court of Appeal of the Supreme Court of Victoria, which held that "double jeopardy" was not to be considered upon an appeal by the Commonwealth Director of Public Prosecutions ("DPP") under the *Crimes Act* 1914 (Cth) ("Crimes Act").

The appellant, Kieu Thi Bui, is an Australian citizen who carried drugs into Australia from Vietnam, contrary to the *Criminal Code* (Cth). She was apprehended by the Australian Federal Police on 11 February 2009, and was subsequently found to be concealing four pellets containing heroin within her body. After the drugs were discovered, the appellant co-operated with the police and undertook to assist law enforcement agencies. She pleaded guilty to importing a marketable quantity of a border controlled drug. The sentencing judge did not order a term of immediate imprisonment, on the basis that the appellant had co-operated, and undertook to continue co-operating, with law enforcement agencies, the danger attending her co-operation, and the risk of hardship to the appellant's infant twins. Her Honour sentenced the appellant to three years' imprisonment with an immediate release, upon giving security of \$5000 to comply with the condition that the appellant be of good behaviour for three years. The DPP appealed against the sentence on the ground that it was manifestly inadequate.

On appeal, the Court of Appeal identified errors in the sentencing judge's reasons by reference to s 16A of the Crimes Act. Under s 16A(1) of the Crimes Act, a court must impose a sentence that is of an appropriate severity in all the circumstances of the offence. Section 16A(2) specifies matters which must be taken into account if relevant and known to the court, including the probable effect of any sentence on the person's family or dependants and the person's "mental condition". The Court of Appeal held that the provisions of the *Criminal Procedure Act* 2009 (Vic) ("Criminal Procedure Act") required it to not take into account any element of double jeopardy involved in the appellant being re-sentenced. The Court of Appeal ordered a new sentence of four years' imprisonment, with a non-parole period of two years. The appellant appealed, by special leave, to the High Court of Australia.

The High Court dismissed the appeal, with the result that the sentence ordered by the Court of Appeal stands. The High Court held that the provisions of the Criminal Procedure Act on which the Court of Appeal relied do not apply to appeals by the DPP for re-sentencing under the Crimes Act. The High Court rejected a submission that s 80 of the *Judiciary Act* 1903 (Cth) imported double jeopardy into the sentencing considerations under s 16A of the Crimes Act. There was no gap or omission in Commonwealth statute law such as to bring s 80 into operation. The High Court also

held that there was no warrant for interpreting s 16A of the Crimes Act as incorporating concepts addressed only to an appellate court, such as notions derived from the rule against double jeopardy. Further, the High Court held that s 16A(2) of the Crimes Act does not refer to the stress and anxiety presumed to be suffered by convicted persons facing re-sentencing, but to such a mental condition which is demonstrated to exist in fact.

- *This statement is not intended to be a substitute for the reasons of the High Court or to be used in any later consideration of the Court's reasons.*