HIGH COURT OF AUSTRALIA

FRENCH CJ,
GUMMOW, HAYNE, KIEFEL AND BELL JJ

KIEU THI BUI APPELLANT

AND

DIRECTOR OF PUBLIC PROSECUTIONS FOR THE COMMONWEALTH OF AUSTRALIA RESPONDENT

Bui v Director of Public Prosecutions (Cth) [2012] HCA 1
9 February 2012
M127/2011

ORDER

Appeal dismissed.

On appeal from the Supreme Court of Victoria

Representation

P F Tehan QC with G F Meredith for the appellant (instructed by Greg Thomas, Barrister & Solicitor)

W J Abraham QC with D D Gurvich for the respondent (instructed by Commonwealth Director of Public Prosecutions)

S G E McLeish SC, Solicitor-General for the State of Victoria with R J Orr intervening on behalf of the Attorney-General for the State of Victoria (instructed by Victorian Government Solicitor)

CATCHWORDS

Bui v Director of Public Prosecutions (Cth)

Criminal law – Appeal – Appeal against sentence – Prosecution appeal – Double jeopardy – Appellant pleaded guilty to importation of a marketable quantity of a border controlled drug contrary to s 307.2(1) of *Criminal Code* (Cth) – Appellant sentenced to three years' imprisonment to be released forthwith upon giving security to comply with a condition that appellant be of good behaviour for three years – Respondent appealed against sentence – Sections 289(2) and 290(3) of *Criminal Procedure Act* 2009 (Vic) ("Victorian provisions") provided that double jeopardy not to be taken into account in allowing appeal against sentence or imposing sentence – Whether ss 68(1) or 79(1) of *Judiciary Act* 1903 (Cth) ("Judiciary Act") rendered Victorian provisions applicable to prosecution appeal against sentence instituted by respondent – Whether a "common law principle against double jeopardy" picked up by s 80 of Judiciary Act – Whether ss 16A(1)-(2) of *Crimes Act* 1914 (Cth) required or permitted court determining sentence for federal offence to take into account double jeopardy.

Words and phrases – "double jeopardy".

Crimes Act 1914 (Cth), ss 16A(1)-(2).
Judiciary Act 1903 (Cth), ss 68(1)-(2), 79(1), 80.
Criminal Procedure Act 2009 (Vic), ss 289(2), 290(3).

1 FRENCH CJ, GUMMOW, HAYNE, KIEFEL AND BELL JJ. The appellant is an Australian citizen who was born in Vietnam. She agreed to carry drugs into Australia from Vietnam at the suggestion of one Quang Vo, also called Ho, a person from whom she had borrowed money. She was apprehended at Melbourne airport on 11 February 2009 and taken to a hospital where a computed tomography (or so-called "CT") scan identified four foreign objects concealed within her body. The objects were pellets containing heroin. The calculated total pure weight of heroin, found upon analysis, was 197.3 grams.

2 After the discovery of the drugs the appellant co-operated with the police. She gave a detailed account of her involvement, made a statement naming the person who provided her with two of the pellets and provided information as to the coded language used by that person and Ho. An undertaking by the appellant to co-operate with law enforcement agencies in future proceedings, made pursuant to s 21E of the *Crimes Act* 1914 (Cth) ("the Crimes Act"), was tendered at the hearing on sentence after the appellant's plea of guilty to one count of the importation of a marketable quantity of a border controlled drug, namely heroin, contrary to s 307.2(1) of the *Criminal Code* (Cth).

3 On 30 April 2010, the sentencing judge in the County Court of Victoria, Wilmoth J, decided not to impose an immediate term of imprisonment upon the appellant. Her Honour gave as reasons for that decision the assistance the appellant had already given to the authorities and her undertaking to assist the authorities in the future; the danger which attended that course of action; and the risk that hardship would be caused to the appellant's infant twins, born prematurely in December 2009, following her arrest. Her Honour sentenced the appellant to three years' imprisonment but ordered 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.

4 The Commonwealth Director of Public Prosecutions ("the respondent") appealed against the sentence imposed on the ground that it was manifestly inadequate. Neither the appellant nor the Attorney-General for Victoria, who intervened in the appeal to this Court, disputed that the respondent was entitled to appeal against sentence. That entitlement was explained by this Court in *Rohde v Director of Public Prosecutions*[1] applying the reasoning of Gibbs J in *Peel v The*

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1 (1986) 161 CLR 119 at 123-125 per Gibbs CJ, Mason and Wilson JJ, 127-128 per Brennan J, 130 per Deane J; [1986] HCA 50.

Queen[2]. Section 287 of the *Criminal Procedure Act* 2009 (Vic), like its predecessor s 567A of the *Crimes Act* 1958 (Vic) which was considered in *Rohde*, gave a right of appeal against a sentence imposed by an originating court, to the Director of Public Prosecutions of Victoria. Section 68(2) of the *Judiciary Act* 1903 (Cth), when applied to s 287, has the effect of conferring a right of appeal on the Attorney-General of the Commonwealth. By way of analogy with the Director of Public Prosecutions of Victoria, the Attorney-General is the proper officer to represent the Commonwealth. The stage is then set for s 9(7) of the *Director of Public Prosecutions Act* 1983 (Cth) to operate so as to vest the right of appeal in the respondent.

5 The reasons for judgment of the Court of Appeal of the Supreme Court of Victoria (Nettle, Hansen JJA and Ross AJA) identified two errors in the sentencing judge's approach and did so by reference to s 16A of the Crimes Act, which appears in Div 2 of Pt 1B of that Act. Part 1B relevantly governs the sentencing of offenders against Commonwealth laws. Section 16A(1) provides:

> "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 is of a severity appropriate in all the circumstances of the offence."

Sub-section (2) of s 16A provides a list of matters which "[i]n addition to any other matters, the court must take into account" if they are "relevant and known to the court". Ross AJA, with whom the other members of the Court of Appeal agreed, identified as relevant to the circumstances of the appellant's case, the matter referred to in s 16A(2)(p), namely "the probable effect that any sentence or order under consideration would have on any of the person's family or dependants." His Honour observed that this provision has been construed as being subject to a requirement that the family hardship be adjudged to constitute exceptional circumstances[3].

6 The first error identified by the Court of Appeal in the reasoning of the sentencing judge was her Honour's conflation of the consideration of family hardship, which might be caused by the appellant's imprisonment, with the

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2 (1971) 125 CLR 447; [1971] HCA 59.

3 *Director of Public Prosecutions for the Commonwealth of Australia v Bui* [2011] VSCA 61 at [20].

circumstance that the appellant had co-operated with the authorities. It was held that in determining whether family hardship amounts to exceptional circumstances, the effect of hardship must be assessed on its own[4]. The second error related to the sentencing judge's finding that the evidence disclosed a risk of hardship, whereas s 16A(2)(p) requires that hardship be shown to be a probable effect[5].

7 The Court of Appeal agreed with the submission of the respondent that, taking into consideration all relevant matters, the sentence imposed upon the appellant was inadequate. The factors to be taken into account included general deterrence, the nature of the offence, the significance of the appellant's role in drug trafficking, the significant quantity of heroin imported and her motivation, namely financial reward[6]. After also taking into account the assistance which the appellant undertook to provide law enforcement agencies, the Court re-sentenced the appellant to four years' imprisonment and fixed a non-parole period of two years[7].

8 In reasoning to this conclusion the Court of Appeal had regard to ss 289 and 290 of the *Criminal Procedure Act* which came into effect in Victoria on 1 January 2010[8]. Section 289 provides:

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4 *Director of Public Prosecutions for the Commonwealth of Australia v Bui* [2011] VSCA 61 at [27].

5 *Director of Public Prosecutions for the Commonwealth of Australia v Bui* [2011] VSCA 61 at [28].

6 *Director of Public Prosecutions for the Commonwealth of Australia v Bui* [2011] VSCA 61 at [31]-[46].

7 *Director of Public Prosecutions for the Commonwealth of Australia v Bui* [2011] VSCA 61 at [97].

8 These provisions are similar to those adopted in other States: see *Crimes (Appeal and Review) Act* 2001 (NSW), s 68A; *Criminal Law Consolidation Act* 1935 (SA), s 340; *Criminal Appeals Act* 2004 (WA), s 41; *Criminal Code* (Tas), s 402(4A); *Criminal Code* (NT), s 414(1A). The impetus for the introduction of these provisions was a meeting of the Council of Australian Governments (COAG), which agreed to implement the recommendations of the Double Jeopardy Law Reform COAG Working Group: see *Director of Public Prosecutions (Vic) v Karazisis* (2010) 206 A Crim R 14 at 36 [83].

"(1) On an appeal under section 287, the Court of Appeal must allow the appeal if the DPP[9] satisfies the court that–

(a) there is an error in the sentence first imposed; and

(b) a different sentence should be imposed.

(2) In considering whether an appeal should be allowed, the Court of Appeal must not take into account any element of double jeopardy involved in the respondent being sentenced again, if the appeal is allowed.

(3) In any other case, the Court of Appeal must dismiss an appeal under section 287."

And s 290 provides:

"(1) If the Court of Appeal allows an appeal under section 287, it must set aside the sentence imposed by the originating court and impose the sentence, whether more or less severe, that it considers appropriate.

(2) If the Court of Appeal imposes a sentence under subsection (1), it may make any other order that it considers ought to be made.

(3) In imposing a sentence under subsection (1), 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."

9 The Court of Appeal correctly observed that Victorian legislative provisions concerning considerations relevant to sentencing cannot of their own force have anything to say about sentencing with respect to a federal offence[10].

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9 This term is defined by s 3 of the *Criminal Procedure Act* 2009 (Vic) to mean "the Director of Public Prosecutions for Victoria", but see the discussion at [4] regarding the position of the respondent.

10 *Director of Public Prosecutions for the Commonwealth of Australia v Bui* [2011] VSCA 61 at [66], referring to *R v LK* (2010) 241 CLR 177 at 193; [2010] HCA 17.

However, s 80 of the *Judiciary Act*[11] provides for the application, by courts exercising federal jurisdiction, of the common law of Australia as modified "by the statute law in force in the State … in which the Court in which the jurisdiction is exercised is held". The Court of Appeal held that ss 289(2) and 290(3) of the *Criminal Procedure Act* ("the Victorian provisions") relevantly modify the judge-made rule of double jeopardy and are effective to exclude the rule on Commonwealth appeals relating to sentencing of federal offences[12]. The weight of authority of intermediate appellate courts was said to support that conclusion[13].

10 This appeal is limited, by the terms of the grant of special leave to appeal given by Gummow, Hayne and Bell JJ, to the question whether the Victorian provisions apply to a Crown appeal against sentence instituted by the respondent. The appellant contends that the Court of Appeal was wrong to hold that those provisions, which in effect forbid the Court of Appeal taking into account the element of double jeopardy involved in the prisoner being sentenced again, apply in the exercise of federal jurisdiction by a State court of appeal when it determines appeals against sentences for federal offences. The appellant argues that, in deciding the respondent's appeal, the Court of Appeal should (but did not) have had regard to what the appellant described as "the principle" of "double jeopardy", a "principle" which required the Court of Appeal to take account of

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11 Section 80 provides in full:

> "So far as the laws of the Commonwealth are not applicable or so far as their provisions are insufficient to carry them into effect, or to provide adequate remedies or punishment, 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 shall, so far as it is applicable and not inconsistent with the Constitution and the laws of the Commonwealth, govern all Courts exercising federal jurisdiction in the exercise of their jurisdiction in civil and criminal matters."

12 *Director of Public Prosecutions for the Commonwealth of Australia v Bui* [2011] VSCA 61 at [69].

13 *Director of Public Prosecutions for the Commonwealth of Australia v Bui* [2011] VSCA 61 at [71], referring to *R v Baldock* (2010) 269 ALR 674 (Court of Appeal of the Supreme Court of Western Australia); *Director of Public Prosecutions (Cth) v De La Rosa* (2010) 273 ALR 324 (Court of Criminal Appeal of the Supreme Court of New South Wales); contra *R v Talbot* [2009] TASSC 107 (Court of Criminal Appeal of the Supreme Court of Tasmania).

the presumed distress and anxiety of the appellant occasioned by having to stand for sentence again.

11 The appellant's argument concerning the relevance of double jeopardy to the determination of a prosecution appeal against inadequacy of sentence necessarily recognised the need to begin examination of the issue by consideration of s 16A of the Crimes Act. The argument depended upon the concept of double jeopardy being one of the matters to be taken into account under that section. And on that footing, the question would be whether s 16A would prevent the Victorian provisions being picked up by ss 68, 79 or 80 of the *Judiciary Act*. If s 16A does incorporate considerations of double jeopardy, it may be that the Victorian provisions are not "applicable" so that s 68(1)[14] cannot apply[15]; or that s 16A may be said to provide "otherwise" than the Victorian provisions so that s 79(1)[16] cannot apply; or that the Victorian provisions are

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14 Section 68(1) provides:

> "The laws of a State or Territory respecting the arrest and custody of offenders or persons charged with offences, and the procedure for:
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> (a) their summary conviction; and
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> (b) their examination and commitment for trial on indictment; and
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> (c) their trial and conviction on indictment; and
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> (d) the hearing and determination of appeals arising out of any such trial or conviction or out of any proceedings connected therewith;
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> and for holding accused persons to bail, shall, subject to this section, apply and be applied so far as they are applicable to persons who are charged with offences against the laws of the Commonwealth in respect of whom jurisdiction is conferred on the several courts of that State or Territory by this section."

15 *Putland v The Queen* (2004) 218 CLR 174 at 179-180 [7] per Gleeson CJ, 189 [41] per Gummow and Heydon JJ, 215 [121] per Callinan J; [2004] HCA 8.

16 Section 79(1) provides:

> "The laws of each State or Territory, including the laws relating to procedure, evidence, and the competency of witnesses, shall, except as otherwise provided by the Constitution or the laws of the Commonwealth, be binding on all Courts exercising federal jurisdiction in that State or Territory in all cases to which they are applicable."

"inconsistent" with s 16A within the meaning of s 80[17]. Because the Victorian provisions are expressed to modify the common law, it may be considered appropriate to direct attention, in the first place, to s 80. Before doing so it is necessary to consider the appellant's contention concerning s 16A.

12 The appellant submitted that double jeopardy is a principle of judge-made law which informs the content that is to be given to several elements of the statutory provisions governing the sentencing of federal offenders set out in Pt 1B of the Crimes Act. In particular it was said that the words of s 16A(1) "a severity appropriate in all the circumstances of the offence" and the words of s 16A(2) "[i]n addition to any other matters" are sufficiently broad to encompass "double jeopardy". The appellant further submits that the "mental condition" of the person to be sentenced, which condition s 16A(2)(m) requires to be taken into account, is broad enough to refer to the anxiety and distress to which it may be presumed that person will suffer on re-sentencing.

13 It has been explained that what is referred to as the rule against double jeopardy is a manifestation of the principles expressed in the maxim *nemo debet bis vexari pro una et eadem causa* (a person shall not be twice vexed for one and the same cause), which is the foundation of the pleas of autrefois acquit and autrefois convict[18]. In *Pearce v The Queen*[19], reference was made to the rationale which had been offered for the rule by Black J in *Green v United States*[20], that "[t]he underlying idea" is that the State should not be allowed to make repeated attempts to convict an individual "thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity as well as enhancing the possibility that even though innocent he may be found guilty." The rule is properly understood as a *value* which underpins the criminal law[21].

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17 Set out above at fn 11.

18 *Davern v Messel* (1984) 155 CLR 21 at 29-30; [1984] HCA 34; see also *Pearce v The Queen* (1998) 194 CLR 610 at 614 [9]-[10], 625 [53]-[54]; [1998] HCA 57.

19 (1998) 194 CLR 610 at 614 [9]-[10].

20 355 US 184 at 187-188 (1957).

21 *Pearce v The Queen* (1998) 194 CLR 610 at 614 [10], 626 [56]; see also *R v Carroll* (2002) 213 CLR 635 at 660-661 [84]; [2002] HCA 55.

14 It was also explained in *Pearce v The Queen*[22] that the term "double jeopardy" is not always used with a single meaning and is employed in relation to different stages of the criminal justice process, including that of punishment[23]. In this context, and taking up what was said in *Green v United States*, the term has been used to describe the distress and anxiety that a convicted person may feel when faced with the prospect of re-sentencing by an appeal court[24].

15 The first mention of double jeopardy in connection with a Crown appeal against sentence by an Australian court would appear to be by a Full Court of the Federal Court of Australia (Brennan, Deane and Gallop JJ) in 1979 in *R v Tait and Bartley*[25]. The Court was sitting in that case on a Crown appeal against a sentence imposed by the Supreme Court of the Northern Territory, jurisdiction to hear which was conferred by ss 24(1)(b) and 28(5) of the *Federal Court of Australia Act* 1976 (Cth).

16 The Full Court confirmed that settled principles relating to the review of a discretionary act of sentencing required that some reason must be shown for regarding the discretion confided in the Court as having been improperly exercised. An error affecting the sentence must appear before an appellate court will intervene, whether the appeal be brought by a person convicted of a crime or by the Crown[26]. However, the Court considered that a Crown appeal raises considerations which are not present in an appeal by a convicted person[27]. In *Peel v The Queen*[28] Barwick CJ had said that Crown appeals cut across "time-honoured concepts of criminal administration". Isaacs J said in *Whittaker v The*

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22 *Pearce v The Queen* (1998) 194 CLR 610 at 614 [9].

23 See also *Rohde v Director of Public Prosecutions* (1986) 161 CLR 119 at 129.

24 *R v JW* (2010) 77 NSWLR 7 at 19 [54]; see also *Director of Public Prosecutions (Vic) v Karazisis* (2010) 206 A Crim R 14; *Director of Public Prosecutions (Cth) v De La Rosa* (2010) 273 ALR 324.

25 (1979) 24 ALR 473.

26 *R v Tait and Bartley* (1979) 24 ALR 473 at 476.

27 *R v Tait and Bartley* (1979) 24 ALR 473 at 476.

28 (1971) 125 CLR 447 at 452.

King[29] that a Crown appeal puts in jeopardy "the vested interest that a man has to the freedom which is his, subject to the sentence of the primary tribunal." The Full Court observed in *R v Tait and Bartley* that the freedom of the person was first in jeopardy when the person was before the sentencing court and it was put in jeopardy again on a Crown appeal against sentence[30].

17 What was said in *R v Tait and Bartley* concerning the application of the principle of double jeopardy in connection with sentencing was said by reference to a very different statutory context from that which is here relevant, namely Pt 1B of the Crimes Act. The provisions in question in *R v Tait and Bartley* were those which provided the Federal Court with a general appellate jurisdiction. The appeals in *R v Tait and Bartley* were the first instituted by the Crown under the *Federal Court of Australia Act*. The Full Court was therefore concerned to state the principles to be observed by the Federal Court in the exercise of that jurisdiction[31] but it did so in the absence of any statutory provision dealing with sentencing principles, such as Pt 1B.

18 Section 16A applies of its own force to the sentencing of persons convicted of offences against Commonwealth laws. In *Johnson v The Queen*[32] and in *Hili v The Queen*[33] it was observed that, on its proper construction, s 16A accommodates the application of some common law principles of sentencing. The section has been held to accommodate principles of general deterrence[34], proportionality[35], and totality[36]. It is able to accommodate some judicially-

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29 (1928) 41 CLR 230 at 248; [1928] HCA 28.

30 *R v Tait and Bartley* (1979) 24 ALR 473 at 476.

31 *R v Tait and Bartley* (1979) 24 ALR 473 at 475.

32 (2004) 78 ALJR 616 at 622 [15]; 205 ALR 346 at 353; [2004] HCA 15.

33 (2010) 242 CLR 520 at 528 [25]; [2010] HCA 45.

34 *Director of Public Prosecutions (Cth) v Said Khodor El Karhani* (1990) 21 NSWLR 370 at 378.

35 *Wong v The Queen* (2001) 207 CLR 584 at 597 [31], 609-610 [71]; [2001] HCA 64.

36 *Johnson v The Queen* (2004) 78 ALJR 616 at 624-625 [25]-[34]; 205 ALR 346 at 356-358.

developed sentencing principles where such principles give relevant content to the statutory expression in s 16A(1) "of a severity appropriate in all the circumstances of the offence"[37], as well as expressions such as "the need to ensure that the person is adequately punished for the offence", which appears in s 16A(2)(k).

19 Section 16A does not accommodate the "principle" which the appellant seeks to introduce. The appellant submitted that this principle was one of the "other matters" which "the court must take into account" in determining sentence[38] and that it was a matter that operated as an automatic "discount" on the sentence that would otherwise be imposed. 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.

20 Moreover, the terms of s 16A, in particular those of sub-s (2), are addressed to matters affecting sentencing which are to be applied by all courts exercising federal jurisdiction upon sentencing. Those terms draw no distinction between the matters to be taken into account by a sentencing court at first instance or by a court on appeal. It has nothing to say about particular matters which an appeal court alone may take into account when considering re-sentencing. 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.

21 In *Director of Public Prosecutions (Cth) v De La Rosa*[39] three out of five members of the New South Wales Court of Appeal were agreed that the reference in s 16A(2)(m) to the "mental condition" of the person to be sentenced

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37 *Hili v The Queen* (2010) 242 CLR 520 at 528 [25]; *Johnson v The Queen* (2004) 78 ALJR 616 at 622 [15]; 205 ALR 346 at 353.

38 *Crimes Act* 1914 (Cth), s 16A(2).

39 (2010) 273 ALR 324.

is apt to refer to a state of distress or anxiety[40]. However, a difference in approach is evident as to the question whether s 16A(2)(m) refers to a mental condition which is to be presumed, as the "principle" drawn from the rule against double jeopardy does, or a condition which is proved by evidence.

22 Allsop P and Basten JA did not consider that s 16A(2)(m) was limited to a condition of distress and anxiety which was the subject of proof. Allsop P referred to the presumption as reflecting the reality of what a person facing re-sentencing would experience[41]. Basten JA was of a similar view, that the presumption was of a fact to be inferred from common experience and that it was not to be expected that s 16A(2) would require proof of such a fact[42]. Simpson J, however, considered that par (m) referred to the actual mental condition of a person, not his or her presumed condition and that a condition of distress or anxiety must be demonstrated before the provision applies. In her Honour's view the weight to be accorded to such evidence would vary from case to case[43].

23 Allsop P and Basten JA were influenced in their assessment by their understanding of the width of the intended operation of s 16A(2). Nevertheless, the opening words of that sub-section bear out the view expressed by Simpson J. There it is said that the court must take into account "such of the following matters as are relevant *and known* to the court" (emphasis added).

24 In this case there was evidence of actual anxiety and distress which the appellant suffered as a result of the institution of the appeal by the respondent. That evidence was unchallenged and it was considered by the Court of Appeal in determining whether to intervene and in re-sentencing, although Ross AJA was

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40 *Director of Public Prosecutions (Cth) v De La Rosa* (2010) 273 ALR 324 at 335 [52] per Allsop P, 345 [104] per Basten JA agreeing, 385 [280] per Simpson J.

41 *Director of Public Prosecutions (Cth) v De La Rosa* (2010) 273 ALR 324 at 335 [54].

42 *Director of Public Prosecutions (Cth) v De La Rosa* (2010) 273 ALR 324 at 345 [106].

43 *Director of Public Prosecutions (Cth) v De La Rosa* (2010) 273 ALR 324 at 385 [279]-[280].

unpersuaded that the hardship to the appellant was sufficient to warrant a reduction in the appellant's sentence[44].

25 Whilst s 16A, on its proper construction, is able to accommodate some judge-made sentencing principles, for the reasons outlined above it leaves no room to accommodate the "principle" for which the appellant contends. It was pointed out in *R v Gee*[45], by reference to *Deputy Commissioner of Taxation v Moorebank Pty Ltd*[46] and other cases[47], that "[p]rovisions such as ss 64, 68(2) and 79 of the *Judiciary Act* do not operate to insert a provision of State law into a Commonwealth legislative scheme which is 'complete upon its face' where, on their proper construction, those federal provisions can 'be seen to have left no room' for the picking up of State law" (footnote omitted).

26 The "principle" relied upon by the appellant is judge-made law. If it were to be picked up it would be via s 80 of the *Judiciary Act*, which allows the common law of Australia to apply in a case in certain circumstances. Even then the terms of s 80 refer to the common law "as modified … by the statute law in force in the State … in which the Court in which the jurisdiction is exercised is held".

27 Submissions on this appeal concerning s 80 focused upon whether there was any disconformity between the Victorian provisions and s 16A, being a "law of the Commonwealth". However, the opening words of s 80 provide that the common law (as modified) applies if the laws of the Commonwealth "are not applicable or so far as their provisions are insufficient to carry them into effect, or to provide adequate remedies or punishment". The words are apt to speak of a gap in Commonwealth statute laws. Thus in *Blunden v The Commonwealth*[48] the plurality held that the exercise of the necessary federal jurisdiction was by s 80

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44 *Director of Public Prosecutions for the Commonwealth of Australia v Bui* [2011] VSCA 61 at [81], [87]-[90].

45 (2003) 212 CLR 230 at 254 [62] per McHugh and Gummow JJ; [2003] HCA 12.

46 (1988) 165 CLR 55 at 64; [1988] HCA 29.

47 *Northern Territory v GPAO* (1999) 196 CLR 553 at 576 [38]; [1999] HCA 8; *Bass v Permanent Trustee Co Ltd* (1999) 198 CLR 334 at 351 [30]; [1999] HCA 9.

48 (2003) 218 CLR 330 at 343-344 [35] per Gleeson CJ, Gummow, Hayne and Heydon JJ; [2003] HCA 73.

directed to be the common law in Australia, as modified by the statute law in force in the relevant Territory. The plurality held that the provisions of the federal statute law, apart from s 80 would be insufficient to provide the appellant with any adequate remedy. Kirby J, in expressing agreement with the view of the plurality, said that the common law, modified by the statute law of the Territory, "applies to fill the gaps in the written law."[49]

28 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[50]. 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.

Conclusion and orders

29 The "principle" of double jeopardy relied upon by the appellant is not accommodated by the sentencing provisions of s 16A. No question of picking up the Victorian provisions arises. There is no need to resort to the Victorian provisions because the judge-made rule does not apply in the context of s 16A.

30 The appeal should be dismissed.

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49 *Blunden v The Commonwealth* (2003) 218 CLR 330 at 360 [91].

50 At [21]-[23].