HIGH COURT OF AUSTRALIA

FRENCH CJ,
BELL, GAGELER, KEANE AND NETTLE JJ

THE QUEEN (CTH) APPELLANT

AND

VU LANG PHAM RESPONDENT

The Queen v Pham
[2015] HCA 39
4 November 2015
M82/2015

ORDER

1. *Appeal allowed.*

2. *Set aside the orders of the Court of Appeal of the Supreme Court of Victoria made on 5 September 2014.*

3. *Remit the matter to the Court of Appeal for determination.*

On appeal from the Supreme Court of Victoria

Representation

R J Bromwich SC with D D Gurvich for the appellant (instructed by Commonwealth Director of Public Prosecutions)

G A Archer SC with M D Phillips for the respondent (instructed by Victoria Legal Aid)

CATCHWORDS

The Queen v Pham

Criminal law – Sentencing – Federal offences – Consistency – Current sentencing practices – Whether sentencing courts to have regard to current sentencing practices throughout Commonwealth.

Criminal law – Appeals against sentence – Manifest excess or inadequacy – Sentencing statistics – Drug importation offences – Whether permissible to assess current sentencing practices by statistical analysis of correlation between sentence and quantity of drug imported.

Precedent – Intermediate appellate courts – Use of sentencing decisions of intermediate appellate courts.

Words and phrases – "consistency", "courier", "current sentencing practices", "statistics", "yardstick".

Crimes Act 1914 (Cth), Pt IB.
Criminal Code (Cth), s 307.2.
Judiciary Act 1903 (Cth), s 68.
Sentencing Act 1991 (Vic), s 5(2)(b).

1 FRENCH CJ, KEANE AND NETTLE JJ. Upon pleading guilty before a judge of the County Court of Victoria (Judge Tinney) to one charge of importing a marketable quantity of a border controlled drug, namely, heroin, contrary to s 307.2(1) of the *Criminal Code* (Cth), the respondent was convicted and sentenced to eight years and six months' imprisonment with a non-parole period of six years.

2 On appeal to the Court of Appeal of the Supreme Court of Victoria (Maxwell P, Osborn and Kyrou JJA), the sentence was set aside and the respondent was re-sentenced to six years' imprisonment with a non-parole period of four years.

3 By special leave granted on 15 May 2015, the Commonwealth Director of Public Prosecutions appeals to this Court on grounds that the Court of Appeal erred in law by:

(1) determining that the respondent should be sentenced in accordance with current sentencing practices in Victorian courts, to the exclusion of sentencing practices throughout the Commonwealth; and

(2) adopting an impermissible statistical analysis of comparable cases to determine the objective seriousness of the subject offence.

The facts

4 The respondent was born in Vietnam and migrated to Australia with his parents when he was still a child. He left home after completing year 9 at high school and was introduced to illicit drugs. Thereafter he struggled with drug dependency issues up to the time of the subject offending.

5 At the time of sentencing, he had prior convictions for possession and use of drugs, and for offences of dishonesty. He also had a prior conviction for trafficking heroin, which dated back to 1996. On that occasion, he had been released on a community-based order for 12 months, on condition that he perform 40 hours of unpaid community work.

6 In February 2013, the Australian Federal Police began investigating drug importation activities connected with Anh Lan Vo. They believed that Vo was responsible for organising couriers to transport drugs from Vietnam to Australia and, subsequently, organising the trafficking of those imported drugs.

7 During the investigation, the police lawfully intercepted telephone conversations, to which Vo was a party, which disclosed that Vo had facilitated the purchase of airline tickets in the name of the respondent. Police believed that

Vo and her associates had recruited the respondent to bring drugs from Vietnam to Australia.

8 On 4 February 2013, the respondent was issued with an Australian passport by the Department of Foreign Affairs and Trade and, on 6 February 2013, a Vietnam Airlines ticket for return travel from Melbourne, departing Melbourne on 7 February 2013, was issued in the respondent's name. The respondent was originally set to return on 7 March 2013 but that was subsequently altered to 15 March 2013.

9 The Vietnam Airlines flight arrived at Melbourne Airport on Friday, 15 March 2013 with the respondent on board. Officers of the Australian Customs and Border Protection Service received information from the captain and crew that the respondent had required medical attention during the flight for a potential drug overdose, and that a crew member had found two clear plastic packages containing white powder in a bathroom that the respondent had used. Customs officers detained the respondent, who admitted under caution to having ingested heroin whilst on board the flight, that the packages were his and that he guessed that they contained heroin.

10 Subsequent testing established that the packages contained heroin mixed with caffeine and that the weight of pure heroin was 577.1 grams. A marketable quantity of heroin is between two grams and 1.5 kilograms[1].

11 The respondent was committed by way of straight hand-up brief on 10 July 2013, after which he entered a plea of guilty to the sole charge on the indictment.

The judgments delivered in the Court of Appeal

12 Each member of the Court of Appeal delivered separate reasons for judgment. Maxwell P gave the leading judgment. Near to the outset of his Honour's reasons, he said that "the [respondent] pleaded guilty in the reasonable expectation that he would be sentenced in accordance with current sentencing practices in Victorian courts"[2]. His Honour annexed a statistical analysis of the results of 32 sentencing decisions of Australian intermediate appellate courts for offences involving a marketable quantity of a border controlled drug in which the accused was a "courier", had pleaded guilty and had no relevant prior convictions. The presentation included a calculation of the quantity imported

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1 *Criminal Code*, s 314.4(1), item 76.

2 *Pham v The Queen* [2014] VSCA 204 at [10].

expressed as a percentage of the commercial quantity for each of the different drugs imported (without distinguishing between drugs and precursors) and ranked the cases according to the percentage of the commercial quantity for the given drug in each case.

13 In a further attachment, his Honour presented a graph which plotted what was described as the correlation between the head sentence imposed (in months) and the quantity of the drug imported as a percentage of the commercial quantity, with the results shown separately for Victoria alone and then by way of comparison for all other States taken together.

14 Based on those analyses, his Honour concluded that the sentences imposed in New South Wales, Queensland and Western Australia were substantially greater than sentences imposed in Victoria for offences involving similar quantities of drugs; that the sentence imposed on the respondent was "well outside the range indicated by Victorian practice"; and that, because the respondent would have pleaded guilty with the "reasonable expectation" that he would be sentenced in accordance with current sentencing practices of Victorian courts, the appeal had to be allowed[3].

15 Osborn JA observed in his reasons for judgment that an analysis of sentencing statistics by reference only to the weight of the drug imported is at risk of masking differences with respect to other aspects of the culpability of the offender, such as the role of the offender, the relative extent to which the offender stood to profit from the offending and the purpose of the importation. His Honour also noticed that such an analysis may mask significant differences between the personal circumstances of the analysed offenders and thus, as was observed in *Wong v The Queen*[4], a statistical analysis of sentences for an offence which encompasses a very wide range of conduct and criminality is fraught with problems, especially if the number of examples is small. Osborn JA was persuaded, however, that the analysis undertaken by Maxwell P was relevant. His Honour observed that "[i]f a sentence appears to be outside the range ordinarily imposed in generally similar circumstances, that fact invites very close scrutiny of the individual case. The analysis undertaken by the President demonstrates that this is such a case", albeit that "other sentences cannot be definitive of error"[5]. His Honour then turned to a detailed consideration of the

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3 *Pham* [2014] VSCA 204 at [10].

4 (2001) 207 CLR 584 at 608 [66] per Gaudron, Gummow and Hayne JJ; [2001] HCA 64.

5 *Pham* [2014] VSCA 204 at [73].

respondent's individual circumstances and concluded that, in view of the weight of the drug involved and the respondent's individual circumstances, the sentence imposed in the County Court was manifestly excessive.

16 Kyrou JA stated that the statistics set out in the attachments to Maxwell P's judgment established that the impugned sentence was out of line with current sentencing practices in Victoria. That factor, taken together with the other considerations to which Osborn JA referred, satisfied him that the subject sentence must have resulted from such a misapplication of principle as to warrant appellate intervention.

Current sentencing practices

17 The Director of Public Prosecutions submits that Maxwell P erred in holding that the respondent was entitled to expect that he would be sentenced in accordance with current sentencing practices in Victoria as opposed to the relevant range of sentences established across all States and Territories.

18 That contention should be accepted. As *Hili v The Queen*[6] made clear, where a State court is required to sentence an offender for a federal offence, the need for sentencing consistency throughout Australia requires the court to have regard to sentencing practices across the country and to follow decisions of intermediate appellate courts in other States and Territories unless convinced that they are plainly wrong.

19 It follows that to approach the sentencing task on the basis that an offender is entitled to assume that he or she will be sentenced in accordance with current sentencing practices in the State or Territory where the offender is sentenced is an error that is likely to result in just the kind of inconsistency that the Australia-wide approach mandated by *Hili* is calculated to avoid.

20 Of course, that is not to say that there are not differences between various State and Territory laws concerning trial and conviction, including sentencing laws, which may be picked up and applied to federal offences by s 68 of the *Judiciary Act* 1903 (Cth). The Australia-wide approach mandated in *Hili* recognises that, to some extent at least, the effect of s 68 of the *Judiciary Act* is

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6 (2010) 242 CLR 520 at 538 [57] per French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ; [2010] HCA 45.

"to place the administration of the criminal law of the Commonwealth in each State upon the same footing as that of the State"[7].

21 So, for example, a State or Territory aggregate sentence law may be picked up and applied in a manner which results in a different sentence structure in one State or Territory from that which would be imposed for the same federal offence in another State or Territory[8]. The parole system in one State or Territory may also be so much different from the system in another as to warrant a significant difference between the non-parole period imposed in respect of a federal offence and the non-parole period which would be imposed for the same offence in the other State or Territory[9]. It might be, too, that the particular difficulties faced by a class of offender in one State or Territory would warrant a significant difference between the sentences imposed for the same offence in other States or Territories[10].

22 Nevertheless, such State and Territory sentencing laws as are picked up and applied by s 68 of the *Judiciary Act* operate only so far as they are applicable and the laws of the Commonwealth do not otherwise provide. They are excluded where applicable Commonwealth sentencing laws leave no room for their application[11]. To the extent that Pt IB of the *Crimes Act* 1914 (Cth) specifically or impliedly provides for sentencing considerations which are different from otherwise applicable State and Territory sentencing considerations, the *Crimes Act* is exclusive.

23 Part IB of the *Crimes Act* does not specifically provide for sentencing judges to take current sentencing practices into account. Apart from the application of such relevant State or Territory legislation as may be picked up and applied by s 68 of the *Judiciary Act*, the obligation of a judge to take current sentencing practices into account when sentencing an offender for a federal offence arises as a matter of common law. Section 5(2)(b) of the *Sentencing Act* 1991 (Vic) provides for a sentencing judge to take current sentencing practices

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7 *Williams v The King [No 2]* (1934) 50 CLR 551 at 560 per Dixon J; [1934] HCA 19, quoted in *Leeth v The Commonwealth* (1992) 174 CLR 455 at 467 per Mason CJ, Dawson and McHugh JJ; [1992] HCA 29.

8 *Putland v The Queen* (2004) 218 CLR 174; [2004] HCA 8.

9 *Leeth* (1992) 174 CLR 455.

10 *Neal v The Queen* (1982) 149 CLR 305 at 324-326 per Brennan J; [1982] HCA 55.

11 *Putland* (2004) 218 CLR 174 at 179-180 [7] per Gleeson CJ.

into account, and to some extent it is capable of operating consistently with Pt IB of the *Crimes Act*. But, whereas in its application to State offences s 5(2)(b) necessarily directs attention to current sentencing practices in Victoria (albeit not necessarily to the exclusion of current sentencing practices elsewhere in the Commonwealth), in the case of federal offences it is implicit in Pt IB of the *Crimes Act* that a sentencing judge must have regard to current sentencing practices throughout the Commonwealth.

24 As Kirby J observed in *Putland v The Queen*[12], a federal offence is, in effect, an offence against the whole Australian community and so the offence is the same for every offender throughout the Commonwealth. Hence, in the absence of a clear statutory indication of a different purpose or other justification, the approach to the sentencing of offenders convicted of such a crime needs to be largely the same throughout the Commonwealth. Further, as Gleeson CJ stated in *Wong*[13], the administration of criminal justice functions as a system which is intended to be fair, and systematic fairness necessitates reasonable consistency. And, as was observed by the plurality in *Hili*[14], the search for consistency requires that sentencing judges have regard to what has been done in comparable cases throughout the Commonwealth.

25 Counsel for the respondent submitted that, allowing that the Court of Appeal was bound to have regard to sentencing practices throughout the Commonwealth, it was not, however, incumbent on the Court of Appeal to follow sentencing practices in other States. Having had regard to current sentencing practices in other States, it was open to the Court of Appeal to prefer Victorian current sentencing practices and, in view of current sentencing practices in Victoria, to conclude that the sentence imposed was excessive.

26 That submission should be rejected. As was explained in *Hili*, the point of sentencing judges and intermediate appellate courts having regard to what has been done in other comparable cases throughout the Commonwealth is twofold: first, it can and should provide guidance as to the identification and application of relevant sentencing principles[15]; and, secondly, the analysis of comparable

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12 (2004) 218 CLR 174 at 202-203 [81]-[82].

13 (2001) 207 CLR 584 at 591 [6].

14 (2010) 242 CLR 520 at 536 [53] per French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ.

15 (2010) 242 CLR 520 at 535 [49], 538 [57].

cases may yield discernible sentencing patterns and possibly a range of sentences against which to examine a proposed or impugned sentence[16].

27 It does not mean that the range of sentences so disclosed is necessarily the correct range or otherwise determinative of the upper and lower limits of sentencing discretion. As was emphasised in *Hili*[17], and again more recently in *Barbaro v The Queen*[18], the sentencing task is inherently and inevitably more complex than that. But it does mean that to prefer one State's sentencing practices to sentencing practices elsewhere in the Commonwealth, or at least to prefer them for no more reason than that they are different, is contrary to principle, tends to exacerbate inconsistency and so ultimately is unfair.

28 Previous decisions of this Court have laid down in detail the way in which the assessment of sentences in other cases is to be approached. It is neither necessary, therefore, nor of assistance to repeat all of what has previously been said. But, in view of the way in which the Court of Appeal approached the task in this case, it is appropriate to re-emphasise the following:

(1) Consistency in sentencing means that like cases are to be treated alike and different cases are to be treated differently[19].

(2) The consistency that is sought is consistency in the application of the relevant legal principles[20].

(3) Consistency in sentencing for federal offenders is to be achieved through the work of intermediate appellate courts[21].

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16 (2010) 242 CLR 520 at 537 [54]; see also *Director of Public Prosecutions (Cth) v De La Rosa* (2010) 79 NSWLR 1 at 70-71 [303]-[305] per Simpson J.

17 (2010) 242 CLR 520 at 537 [54], 539 [60].

18 (2014) 253 CLR 58 at 70-71 [24]-[28], 74 [41] per French CJ, Hayne, Kiefel and Bell JJ; [2014] HCA 2.

19 *Wong* (2001) 207 CLR 584 at 591 [6] per Gleeson CJ, 608 [65] per Gaudron, Gummow and Hayne JJ; *Hili* (2010) 242 CLR 520 at 535 [49].

20 *Hili* (2010) 242 CLR 520 at 535 [49].

21 *Hili* (2010) 242 CLR 520 at 537-538 [56].

(4) Such consistency is not synonymous with numerical equivalence and it is incapable of mathematical expression or expression in tabular form[22].

(5) For that and other reasons, presentation in the form of numerical tables, bar charts and graphs of sentences passed on federal offenders in other cases is unhelpful and should be avoided[23].

(6) When considering the sufficiency of a sentence imposed on a federal offender at first instance, an intermediate appellate court should follow the decisions of other intermediate appellate courts unless convinced that there is a compelling reason not to do so[24].

(7) Appellate intervention on the ground of manifest excessiveness or inadequacy is not warranted unless, having regard to all of the relevant sentencing factors, including the degree to which the impugned sentence differs from sentences that have been imposed in comparable cases, the appellate court is driven to conclude that there must have been some misapplication of principle[25].

29 It should also be recorded that, during the hearing of this appeal, there was some discussion as to what it means for intermediate appellate courts to "follow" sentencing decisions of other intermediate appellate courts. It is settled that, in the absence of binding authority from this Court, an intermediate appellate court must follow a statement of legal principle by another intermediate appellate court unless persuaded that it is plainly wrong. It is also settled that a "sentence itself gives rise to no binding precedent"[26]. Where, however, decisions of other courts in sentencing appeals are referred to in the context of determining whether a given sentence is manifestly excessive or inadequate, it should now be accepted that intermediate appellate courts must have regard to sentencing decisions of other intermediate appellate courts in comparable cases as "yardsticks" that may serve to illustrate (although not define) the possible range of sentences

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22 *Wong* (2001) 207 CLR 584 at 608 [66]; *Hili* (2010) 242 CLR 520 at 535 [48].

23 *Wong* (2001) 207 CLR 584 at 608 [66].

24 *Hili* (2010) 242 CLR 520 at 538 [57].

25 *Wong* (2001) 207 CLR 584 at 605 [58]; *Barbaro* (2014) 253 CLR 58 at 79 [61].

26 *Wong* (2001) 207 CLR 584 at 605 [57] per Gaudron, Gummow and Hayne JJ; *Lacey v Attorney-General (Qld)* (2011) 242 CLR 573 at 596 [55] per French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ; [2011] HCA 10.

available[27]. A court must have regard to such a decision in this way unless there is a compelling reason not to do so, which might include where the objective circumstances of the crime or subjective circumstances of the offender are so distinguishable as to render the decision irrelevant, or where the court is persuaded that the outcome itself in the other court was manifestly excessive or inadequate.

Error in the use of current sentencing practices

30 Maxwell P was not correct in stating that the respondent was entitled to assume that he would be sentenced in accordance with current sentencing practices in Victoria as opposed to current sentencing practices throughout the Commonwealth. It is apparent from Kyrou JA's reasons for judgment that Kyrou JA was also significantly influenced by the fact of what Maxwell P identified as a considerable difference between Victorian and other States' current sentencing practices with respect to the offence of importation of a marketable quantity of a border controlled drug. Osborn JA's reasons show that he was less concerned with sentences imposed in comparable cases than the range of legitimate sentencing considerations which he identified, but nevertheless that he too considered the identified disparity to be in itself a relevant sentencing consideration and thus that, to some extent, the fact of the disparity informed his conclusion that the sentence was manifestly excessive.

31 Accordingly, the first ground of appeal should be upheld.

Error in the use of statistical analyses

32 Reference has already been made to the inutility of the presentation of the sentences imposed on federal offenders by means of numerical tables, bar charts and graphs. As the plurality in *Hili* explained, it is unhelpful because[28]:

> "Presentation in any of these forms suggests, wrongly, that the task of a sentencing judge is to interpolate the result of the instant case on a graph that depicts the available outcomes. But not only is the number of federal offenders sentenced each year very small, the offences for which they are sentenced, the circumstances attending their offending, and their personal circumstances are so varied that it is not possible to make any useful statistical analysis or graphical depiction of the results."

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27 *Hili* (2010) 242 CLR 520 at 537 [54]; *Barbaro* (2014) 253 CLR 58 at 74 [41].

28 (2010) 242 CLR 520 at 535 [48] per French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ.

33 This case illustrates the point. As was earlier noticed, the first of the two attachments to Maxwell P's reasons was a tabular presentation of sentences imposed in a number of previous cases of "couriers" who pleaded guilty to offences of importation of various kinds of border controlled drugs and had no relevant prior convictions. The second was a graph – although it might more accurately be described as two of several possible lines of best fit – of the correlation between the head sentences imposed (in months) and quantities imported as a percentage of the commercial quantity, separately for Victoria and by way of comparison with all other States taken together. In his reasons for judgment, Maxwell P stated that the table and graph were so constructed because cases involving an offender who has performed the role of courier, pleaded guilty and had no relevant prior convictions were so prevalent that "a large number of sentencing decisions can be assembled – for the purposes of comparison – in which the only variable factor affecting offence seriousness is the quantity imported"[29].

34 As was emphasised in *R v Olbrich*, however, characterising an importer of a border controlled drug as a "courier" must not be allowed to obscure the assessment of what the offender and prior offenders have done[30]:

> "[I]t is always necessary, whether one or several offenders are to be dealt with in connection with a single importation of drugs, to bear steadily in mind the offence for which the offender is to be sentenced. Characterising the offender as a 'courier' or a 'principal' must not obscure the assessment of what the offender did."

35 Equally, as was made plain in *Wong*, it is an error to attribute chief importance to the weight of the drug in fixing sentence and distinguishing between offenders[31]:

> "[T]here will be many cases in which a sentencing judge will be more concerned to identify the level of the offender's criminality by looking to the state of the offender's knowledge about the importation in which he or she was involved. Often enough, information about the kind and size of reward given or promised to the offender for involvement in the

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29 *Pham* [2014] VSCA 204 at [3].

30 (1999) 199 CLR 270 at 279 [19] per Gleeson CJ, Gaudron, Hayne and Callinan JJ; [1999] HCA 54.

31 (2001) 207 CLR 584 at 609 [69]-[70] per Gaudron, Gummow and Hayne JJ.

> importation will be seen as important in fixing a sentence and distinguishing between offenders.
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> ... The selection of weight of narcotic as the chief factor to be taken into account in fixing a sentence represents a departure from fundamental principle."

36 Certainly, in *Adams v The Queen*[32], this Court rejected any idea of a judicially constructed assessment of the relative harmfulness of the different kinds of narcotic substances. As the joint judgment observed, amongst other difficulties, such an approach would cut across the legislative scheme for a quantity-based system[33]:

> "This legislative approach, which recognises the financial rewards available from dealing in illicit drugs ... differentiates between various narcotic substances in designating the trafficable and commercial quantities, but applies the same penalty regime to the quantities so designated. It may be contrasted with legislation in New Zealand and Canada, which grades drugs according to a legislative perception of their harmfulness, and prescribes penalties based on harmfulness rather than quantities."

Nothing said in *Adams*, however, displaced the holding in *Wong* that to treat the weight of the narcotic as the chief factor in fixing sentence, without taking into account the many conflicting and contradictory elements which bear upon sentencing an offender, represents a departure from fundamental sentencing principle.

37 It follows that by assuming that the "courier" status of the respondent and each of the prior offenders was of uniform significance, and treating the weight of the drug imported in each case as "the only variable factor affecting offence seriousness"[34], Maxwell P, in effect, deployed two departures from fundamental principle as if they were correct statements of principle indicative of error in the sentence passed below. And, as has been seen, those errors played at least some part in each of the other judges' conclusions.

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32 (2008) 234 CLR 143; [2008] HCA 15.

33 (2008) 234 CLR 143 at 146 [3] per Gleeson CJ, Hayne, Crennan and Kiefel JJ (footnotes omitted); see also at 148 [10].

34 *Pham* [2014] VSCA 204 at [3].

38 It follows that the second ground of appeal should also be upheld.

Conclusion and orders

39 In the result, the reasoning of all three judges was to some extent affected by error. The appeal should therefore be allowed and the orders of the Court of Appeal should be set aside. Consistently with the usual practice in appeals against sentence, the matter should be remitted to the Court of Appeal for redetermination according to law.

40 BELL AND GAGELER JJ. The facts and procedural history are set out in the reasons of French CJ, Keane and Nettle JJ and need not be repeated in order to explain our reasons.

41 This appeal is brought on two grounds. The first ground complains that the Court of Appeal of the Supreme Court of Victoria erred by taking into account current sentencing practice in Victoria to the exclusion of the sentencing practice in other jurisdictions. We agree with French CJ, Keane and Nettle JJ that this ground succeeds for the reasons that their Honours give.

42 We prefer to express our own reasons with respect to the second ground, which is said by the appellant to raise consideration of "the scope" of the decisions in *Hili v The Queen*[35] and *Barbaro v The Queen*[36]. In particular, the second ground is said to raise the question of whether those decisions are concerned not only with the consistent application of sentencing principles but also with reasonable consistency of sentencing outcomes[37].

43 The second ground, in terms, contends that the Court of Appeal "adopted an impermissible statistical analysis of comparable cases to determine the objective seriousness of the offence." The reference is to the table, "Attachment A" ("the Table"), and the graph, "Attachment B", in Maxwell P's reasons. The impermissible feature of the statistical analysis which the appellant identifies is the inclusion in the Table of a column setting out the weight of the imported drug with the inclusion of a further column expressing that weight as a percentage of the commercial quantity applicable to that drug.

44 The *Criminal Code* (Cth) ("the Code") prescribes the same maximum penalty for the importation of a marketable quantity of any border controlled drug and the same maximum penalty for the importation of a commercial quantity of any border controlled drug[38]. Differing quantities of those drugs are specified as the marketable quantity and the commercial quantity, as the case may be[39]. The purpose of expressing the weight of a drug as a percentage of the

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35 (2010) 242 CLR 520; [2010] HCA 45.

36 (2014) 253 CLR 58; [2014] HCA 2.

37 See *Hili v The Queen* (2010) 242 CLR 520 at 535-538 [47]-[57] per French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ.

38 The Code, ss 307.1(1), 307.2(1).

39 The Code, s 314.4(1). This provision now appears in Criminal Code Regulations 2002 (Cth), reg 5D, Sched 4.

commercial quantity prescribed for that drug is to provide a common denominator allowing comparison between, say, the importation of a quantity of heroin, for which the commercial quantity is 1.5kg, and the importation of a quantity of methamphetamine, for which the commercial quantity is 0.75kg[40].

45 It is well settled that the quantity of the drug is not the controlling factor when it comes to the assessment of the seriousness of an importation offence (or other drug offence)[41]. The quantity of the drug imported (or trafficked or possessed) will usually be relevant to assessment of the seriousness of the offence. In some cases it will be the most significant consideration in this regard and in other cases it may be of little moment[42]. If, as the appellant asserts, the Court of Appeal used the Table in order to determine the objective seriousness of the respondent's offence it would be an error[43]. However, misuse of the Table would not demonstrate that presentation of material of this kind as an aid in sentencing is impermissible.

46 The appellant is right to submit that the "reasonable consistency" to which the joint reasons in *Hili* refer is with respect to sentencing outcomes[44]. The qualifier "reasonable" in this context is an acknowledgment both that sentencing is a discretionary judgment and that the mix of factors that must be weighed in determining the appropriate sentence will never be precisely the same as in a past case or cases. It is in this connection that the joint reasons in *Hili* state[45]:

> "Consistency is not demonstrated by, and does not require, numerical equivalence. Presentation of the sentences that have been passed on federal offenders in numerical tables, bar charts or graphs is not useful to a sentencing judge. It is not useful because referring *only* to the

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40 The Code, s 314.4(1).

41 *Wong v The Queen* (2001) 207 CLR 584 at 609 [67] per Gaudron, Gummow and Hayne JJ; [2001] HCA 64.

42 *Markarian v The Queen* (2005) 228 CLR 357 at 373 [33] per Gleeson CJ, Gummow, Hayne and Callinan JJ; [2005] HCA 25.

43 *Hili v The Queen* (2010) 242 CLR 520 at 536-537 [53]-[54] per French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ.

44 (2010) 242 CLR 520 at 535 [49] per French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ.

45 (2010) 242 CLR 520 at 535 [48] per French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ.

> lengths of sentences passed says nothing about why sentences were fixed as they were." (emphasis added)

47 This is not to deny that statistical material showing the pattern of past sentences for an offence may serve as a yardstick by which the sentencer assesses a proposed sentence and the appellate court assesses a challenge of manifest inadequacy or excess[46]. The joint reasons in *Barbaro* put it this way[47]:

> "As the plurality pointed out in *Hili v The Queen*, in seeking consistency sentencing judges must have regard to what has been done in other cases. Those other cases may well establish a range of sentences which have been imposed. But that history does not establish that the sentences which have been imposed mark the outer bounds of the permissible discretion. This history stands as a yardstick against which to examine a proposed sentence."

48 Their Honours, having earlier distinguished the "proper and ordinary" use of sentencing statistics and material indicating sentences imposed in comparable cases, went on to identify these aids as part of the material which the sentencer must take into account[48].

49 It will be recalled that in *Wong v The Queen* Gleeson CJ commented on the challenge to consistent sentencing that is presented by the increasing size of the judiciary and the legal profession[49]. Specialisation in legal practice is now the norm and, as a consequence, sentencing and appellate judges may not have the knowledge that judges a generation ago possessed of the range of likely penalties for common offences[50]. The Commonwealth Director of Public Prosecutions supplies the Judicial Commission of New South Wales with the details of sentences imposed on federal offenders in all the Australian jurisdictions. The National Judicial College makes this material available to all Australian judicial officers. This is a source of potentially relevant information about the pattern of sentencing for federal offences. Statistics have a role to play

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46 *Hili v The Queen* (2010) 242 CLR 520 at 536-537 [53]-[54] per French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ.

47 (2014) 253 CLR 58 at 74 [41] per French CJ, Hayne, Kiefel and Bell JJ.

48 *Barbaro v The Queen* (2014) 253 CLR 58 at 74 [40]-[41] per French CJ, Hayne, Kiefel and Bell JJ.

49 (2001) 207 CLR 584 at 592-593 [10].

50 *Wong v The Queen* (2001) 207 CLR 584 at 592-593 [10] per Gleeson CJ.

in fostering consistency in sentencing, and in appellate review, provided care is taken to understand the basis upon which they have been compiled[51] and provided the limitations explained in the extract from *Barbaro* above are observed. The value of sentencing statistics will vary between offences. It is not meaningful to speak of a pattern of past sentences in the case of offences which are not frequently prosecuted and where a relatively small number of sentences make up the set.

50 The appellant correctly submits that comparable cases decided by the intermediate courts of appeal provide the most useful guidance to a sentencing judge. An appellate court's reasons reveal the mix of factors that were taken into account and will usually involve consideration of the appropriateness of the sentence imposed at first instance.

51 Osborn JA commented that the material in the Table was significantly more helpful than the material commonly presented to the Court[52]. His Honour did not expand on this observation but it is likely to have reflected that each of the 32 cases in the Table was identified by name and citation and that each had been decided by an appellate court. The Table was confined to sentences imposed for importing (or attempting to possess) a marketable quantity of a border controlled drug by persons who had pleaded guilty to the offence, had no (or no relevant) prior convictions and performed the role of courier (or recipient) in the enterprise[53]. The criteria for the exclusion of "relevant" prior convictions are not stated. This is a deficiency in this case. The respondent had a number of prior convictions and had served "a handful of prison sentences". His most recent convictions, for arson and assault, had resulted in sentences of imprisonment. The sentence imposed by Judge Tinney was expressed to reflect the need for specific deterrence among other purposes. In the circumstances, the Table recording the sentences imposed on persons who pleaded guilty to importing drugs as a courier, and who had no (or no relevant) prior convictions, was a yardstick of limited utility by which to gauge the respondent's sentence.

52 It was an error to reason, as Maxwell P did, that in the case of drug importation by "couriers" the only variable affecting the seriousness of the offence is the quantity of the drug imported[54]. By contrast, Osborn JA (with

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51 See *Knight v The Queen* [2015] NSWCCA 222 at [3]-[13] per R A Hulme J.

52 *Pham v The Queen* [2014] VSCA 204 at [63] per Osborn JA (Kyrou JA agreeing at [82]).

53 *Pham v The Queen* [2014] VSCA 204 at [37] per Maxwell P.

54 *Pham v The Queen* [2014] VSCA 204 at [1]-[3].

whose reasons Kyrou JA agreed) correctly observed that consideration of the quantity of the drug imported may mask other relevant considerations that bear on the seriousness of the offending[55].

53 The respondent acknowledges that the courts must take into account sentencing practice throughout Australia in sentencing federal offenders and that it is an error to determine the objective seriousness of his offence solely by reference to the weight of the drug or solely by comparison of comparable cases. He does not seek to support Maxwell P's analysis. The respondent submits that the majority in the Court of Appeal rested their conclusion of manifest excess upon reasons that are not tainted by either error of which the appellant complains. Moreover, the respondent submits that the cases in the Table do not support Maxwell P's conclusion that in New South Wales, Queensland and Western Australia substantially higher sentences have been imposed for drug importation offences than in Victoria[56]. Correctly understood, the respondent submits that the statistical material supports Osborn JA's conclusion that the sentence imposed on him is "heavy" by comparison with comparable cases throughout Australia.

54 The respondent's submissions which seek to insulate the majority's holding from error in the use of the Table must be rejected. At the commencement of his reasons, Osborn JA said that the Table "demonstrates that the sentence imposed was on its face a heavy one if assessed against sentencing practice in Victoria"[57]. When his Honour came to set out the factors that in combination led him to conclude that the sentence was manifestly excessive he did not, in terms, only refer to what the Table demonstrated about Victorian sentencing practice. His Honour described the sentence as "very heavy when compared with the class of broadly comparable cases identified by the President"[58]. It will be recalled that the Table included decisions from other jurisdictions. In light of the earlier reference to Victorian sentencing practice, if his Honour was making a different, wider point about the pattern of sentencing across the jurisdictions, it might be expected that he would have said so. In any event, it is apparent that his Honour wrongly treated the pattern of past sentences

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55 *Pham v The Queen* [2014] VSCA 204 at [66]-[68] per Osborn JA (Kyrou JA agreeing at [81]).

56 *Pham v The Queen* [2014] VSCA 204 at [8].

57 *Pham v The Queen* [2014] VSCA 204 at [63] per Osborn JA (Kyrou JA agreeing at [83]).

58 *Pham v The Queen* [2014] VSCA 204 at [77(f)] per Osborn JA (Kyrou JA agreeing at [81]).

as defining the boundaries of the proper exercise of the sentencing judge's discretion.

55 Osborn JA's conclusion of manifest excess was based on the combined effect of the six matters set out at [77] of his reasons. The respondent points out that the first five matters address the applicable factors that a sentencing court is required to take into account under s 16A(2) of the *Crimes Act* 1914 (Cth), save for specific deterrence. As to this factor, the respondent submits it was unnecessary for Osborn JA to refer to it given that the original and the substituted sentence involve lengthy imprisonment. The submissions overlook the need for the appellate court to find error before it exercises the sentencing discretion afresh.

56 The only issue raised by the respondent's appeal to the Court of Appeal, as Osborn JA acknowledged at the outset, was whether the sentence arrived at by Judge Tinney was reasonably open to him[59]. The circumstance that Osborn JA (and Kyrou JA) would have given greater weight to the respondent's (a) limited role and financial interest in the enterprise; (b) medical condition; (c) plea of guilty and cooperation with the authorities; (d) prospects of rehabilitation; and (e) likelihood of being shunned within the prison community[60] does not establish that Judge Tinney's weighting of these same factors was wrong. The exercise of the discretion that the law reposed in Judge Tinney did not yield a single correct sentence[61]. It is only if the sentence is found to be "unreasonable or plainly unjust" that the challenge of manifest excess succeeds[62]. Manifest excess is a conclusion, relevantly in the context of sentencing for this offence, that the sentence is manifestly too long[63]. To observe that a sentence is "very heavy" when compared with other sentences is not, without more, to conclude that it exceeded the bounds of the sentencer's discretion.

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59 *Pham v The Queen* [2014] VSCA 204 at [62] per Osborn JA (Kyrou JA agreeing at [81]).

60 *Pham v The Queen* [2014] VSCA 204 at [77] per Osborn JA (Kyrou JA agreeing at [81]).

61 *Pearce v The Queen* (1998) 194 CLR 610 at 624 [46] per McHugh, Hayne and Callinan JJ; [1998] HCA 57; *Markarian v The Queen* (2005) 228 CLR 357 at 371 [27] per Gleeson CJ, Gummow, Hayne and Callinan JJ.

62 *House v The King* (1936) 55 CLR 499 at 505 per Dixon, Evatt and McTiernan JJ; [1936] HCA 40.

63 *Dinsdale v The Queen* (2000) 202 CLR 321 at 325 [6] per Gleeson CJ and Hayne J; [2000] HCA 54.

57 The appeal must be allowed and the orders proposed by French CJ, Keane and Nettle JJ made.