

33/06; [2006] VSCA 185

**SUPREME COURT OF VICTORIA — COURT OF APPEAL**

***R v PIDOTO & O'DEA***

**Maxwell P, Callaway, Buchanan, Vincent and Eames JJ A**

**31 January, 8 June, 8 September 2006 — (2006) 14 VR 269; (2006) 165 A Crim R 61**

**SENTENCING – TRAFFICKING IN A DRUG OF DEPENDENCE – WHETHER HARMFULNESS OF DRUG IN QUESTION A RELEVANT SENTENCING CONSIDERATION – WHETHER SENTENCER CAN EVALUATE RELATIVE HARMFULNESS OF A DRUG OF DEPENDENCE: *DRUGS, POISONS AND CONTROLLED SUBSTANCES ACT 1981*, S71AA, sched 11.**

1. When a person is being sentenced for the offence of trafficking in a drug of dependence, it is not relevant for the Court to consider the nature and extent of the harm which the particular drug causes, both directly to users of the drug and indirectly to the community as a whole. If Parliament intended to adopt a harm-based classification of trafficking offences, a very different legislative scheme would have been required.

2. Without a comprehensive harm-based classification of drugs of the kind established in other jurisdictions, no individual judge or magistrate can evaluate the relative harmfulness of any particular drug, however common its use. Such assessments require specialist expertise, involve detailed investigation and must be based on extensive information on a range of issues. Parliament cannot have intended that courts should even attempt the task.

**MAXWELL P, BUCHANAN, VINCENT and EAMES JJ A:**

1. These appeals raise an issue of general importance about sentencing for offences of trafficking in a drug of dependence, contrary to the provisions of the *Drugs, Poisons and Controlled Substances Act 1981* (Vic) ("the DPCS Act"). Put shortly, the issue is as follows: is it relevant for the sentencing Judge to consider the harm(s) associated with the drug the subject of the trafficking charge?

2. There are two related questions which need to be addressed, as follows:

A. When a person is being sentenced for the offence of trafficking in a drug of dependence, is it relevant for the Court to consider –

- (i) the nature and extent of the harm which the particular drug causes, both directly to users of the drug and indirectly to the community as a whole; and
- (ii) whether the particular drug of dependence is, by those measures, more or less harmful than another drug of dependence?

B. If so, on what information is the Court entitled to act in assessing the harmfulness of the particular drug?

***Summary of conclusions***

3. In our view, the first question should be answered in the negative. As a matter of statutory construction, the harmfulness of the drug is irrelevant to the exercise of the sentencing discretion. The second question accordingly does not arise. (When we refer to "the harmfulness of the drug", we mean the general characteristics of the drug in question, not the harm which may be proved to have been caused by the particular offender's trafficking in that drug.)

4. It is clear, we think, that Parliament did not intend the sentencing court to make any judgment about the (relative) harmfulness of the drug in question. This conclusion is based both on what the DPCS Act says, and on what it does not say.

5. Under the DPCS Act, trafficking offences are classified by quantity. The maximum penalties are set accordingly. Had Parliament intended to adopt a harm-based classification of trafficking offences, a very different legislative scheme would have been required, along the lines of the scheme then (and now) in force in the United Kingdom and New Zealand.

6. Without a comprehensive harm-based classification of drugs, of the kind established in those other jurisdictions, no individual judge or magistrate can evaluate the relative harmfulness of any particular drug, however common its use. Such assessments require specialist expertise, involve detailed investigation and must be based on extensive information on a range of issues. Parliament cannot have intended that courts should even attempt the task. *[The Court then gave detailed reasons which are not set out in this Report.]*

**APPEARANCES:** For the Crown: Mr PA Coghlan QC with Mrs C Quin, counsel. Mr S Carisbrooke, Acting Solicitor for Public Prosecutions. For the appellant Pidoto: Mr PG Priest QC with Mr TE Wraight, counsel. Camerons, solicitors. For the appellant O'Dea: Mr DA Dann, counsel. Balmer & Associates, solicitors. For the Fitzroy Legal Service (*amicus curiae*): Mr PF Tehan QC with Mr JP Wheelahan, counsel. Holding Redlich, solicitors.

---