BARBARO v THE QUEEN (M3/2013)

Court appealed from: Court of Appeal of the Supreme Court of Victoria
[2012] VSCA 288

Date of judgment: 30 November 2012

Date special leave referred: 16 August 2013

On 28 June 2007, 4.4 tonnes of ecstasy tablets, containing more than 1.4 tonnes of pure MDMA, were imported into Melbourne, concealed in a shipment of tinned tomatoes. The wholesale price of the shipment was estimated to be approximately $122 million. The applicant (together with others, including the applicant in matter M1/2013, *Zirilli v The Queen*) was involved in the conspiracy to import the tablets, his role being to possess, transport, store, prepare and distribute the drugs. The sentencing judge (King J) accepted the Crown submission that the applicant (Barbaro) was 'at the apex of the criminal group'. He pleaded guilty to one count of conspiracy to traffic in a commercial quantity of MDMA, one count of trafficking in a commercial quantity of MDMA, and one count of attempting to possess a commercial quantity of cocaine. He also admitted to three further offences, and asked that they be taken into account. In agreeing to plead guilty, Barbaro (and Zirilli) had each entered into an agreement with the Crown that the prosecution would make a particular submission to the court on the sentencing range. However, the sentencing judge made it clear at the outset and during the course of the hearing that she did not want to receive submissions as to range from anyone. Had the Crown been allowed to do so, the prosecutor would have submitted, in Barbaro's case, a sentencing range of 32 to 37 years, with a non-parole period of 24 to 28 years. The applicant was sentenced to life imprisonment, with a non-parole period of 30 years.

In his appeal to the Court of Appeal (Maxwell P, Harper JA, and T Forrest AJA) Barbaro contended that the sentencing judge's refusal to entertain a submission from the Crown on sentencing range constituted a breach of natural justice or a failure to take into account a relevant consideration. The Court found that the sentencing judge (King J) committed no error of law. The function of a Crown submission on range was to assist the sentencing judge. No authority suggested that a judge who declined such assistance should nevertheless be compelled to receive it, still less that the decision whether or not to entertain such a submission rested on considerations of procedural fairness. The Court considered that no sentencing judge is under an obligation to receive assistance on range if they do not wish to do so.

In this matter (and in *Zirilli*), the Director of Public Prosecutions for Victoria has filed a summons seeking leave to intervene or leave to appear as *amicus curiae*.

The questions of law said to justify the grant of special leave include:

- Does a judge's refusal to hear a prosecution submission as to sentencing range amount to a breach of procedural fairness or a failure on the judge's part to hear and consider 'a relevant consideration'?
- Does a judge's refusal to hear a prosecution submission as to sentencing range – in circumstances where the making of the submission formed part of an agreement between the Crown and the offender that predicated the offender's plea of guilty - amount to a breach of procedural fairness or a failure on the judge's part to hear and consider 'a relevant consideration'?