
JURISDICTION : SUPREME COURT OF WESTERN AUSTRALIA
IN CRIMINAL

CITATION : ARORA -v- COBERN [2015] WASC 440

CORAM : MITCHELL J

HEARD : 29 OCTOBER 2015

DELIVERED : 20 NOVEMBER 2015

FILE NO/S : SJA 1077 of 2015

BETWEEN : NOGENDER PAL ARORA
Appellant

AND

SCOTT COBERN
Respondent

ON APPEAL FROM:

Jurisdiction : MAGISTRATES COURT OF WESTERN
AUSTRALIA

Coram : DEPUTY CHIEF MAGISTRATE E A WOODS

File No : PE 23139 of 2015

Catchwords:

Criminal law - Appeal against sentence - Dealing in property reasonably suspected of being proceeds of crime - Elements of offence - Whether magistrate erred in finding facts which would constitute a more serious offence

Criminal law - Federal sentencing - Recognizance release order

Legislation:

Anti-Money Laundering and Counter-Terrorism Financing Act 2006 (Cth),
s 142

Crimes Act 1914 (Cth), s 16A, s 19AC

Criminal Code (Cth), s 400.9

Result:

Appeal allowed

Appellant resentenced to 8 months' imprisonment

Recognizance release order made

Category: B

Representation:

Counsel:

Appellant : Mr P D Yovich

Respondent : Mr L A Glenn

Solicitors:

Appellant : Paul Yovich

Respondent : Director of Public Prosecutions (Cth)

Case(s) referred to in judgment(s):

Almanda v The Queen [2015] NSWCCA 19

Ansari v The Queen [2010] HCA 18; (2010) 241 CLR 299

Assafiri v The Queen [2007] NSWCCA 159

Bugmy v The Queen (1990) 169 CLR 525

Cahyadi v The Queen [2007] NSWCCA 1; (2007) 168 A Crim R 41

Cairns v The State of Western Australia [2015] WASC 198

Commissioner of the Australian Federal Police v Fitzroy All Pty Ltd [2015]
WASC 320

Deakin v The Queen (1984) 58 ALJR 367; (1984) 54 ALR 765

Hili v The Queen [2010] HCA 45; (2010) 242 CLR 520

House v The King (1936) 55 CLR 499

Inge v The Queen [1999] HCA 55; (1999) 199 CLR 295
Lam v The Queen [2014] WASCA 114
Milne v The Queen [2014] HCA 4; (2014) 252 CLR 149
Munda v The State of Western Australia [2013] HCA 38; (2013) 249 CLR 600
Power v The Queen (1974) 131 CLR 623
R v De Simoni (1981) 147 CLR 383
R v Jiao [2015] NSWCCA 95
R v Yuan [2015] NSWCCA 198
Samuels v The State of Western Australia [2005] WASCA 193; (2005) 30
WAR 473
Shi v The Queen [2014] NSWCCA 276
SV v The State of Western Australia [2014] WASCA 123
Wilson v The State of Western Australia [2010] WASCA 82
Wong v The Queen [2013] VSCA 52

MITCHELL J:**Summary**

1 On 25 September 2015, the appellant was sentenced to 8 months' imprisonment, with no recognizance release order, for one 'money laundering' offence against s 400.9(1) of the *Criminal Code* (Cth).

2 The offending conduct involved the appellant receiving a total of approximately \$170,000 from two people at his house, and subsequently making a series of deposits of less than \$10,000 in various bank accounts. The offences were detected by a surveillance operation conducted by the Australian Federal Police. The appellant, who had no prior record and good antecedents, pleaded guilty to the offence at an early opportunity.

3 The appellant seeks leave to appeal against the sentence imposed by the Magistrates Court on two grounds.

4 The first ground alleges that the sentencing magistrate erred by finding and taking into account, as an aggravating feature of the offence, the fact that the appellant knew that the money received was the proceeds of crime or was reckless as to that fact. It was contended that this involved punishing the appellant for a more serious offence against s 400.4 of the Code, of which he had not been convicted.

5 I am not satisfied that the magistrate found that the appellant knew that the money was the proceeds of crime. The magistrate did find, in effect, that the appellant was reckless as to that fact. However, making and relying on that finding did not involve punishing the appellant for a more serious offence of which he had not been convicted. The finding, which was made in response to submissions the appellant's counsel advanced at the sentencing hearing, only identified a factor which increased the appellant's culpability for the offence against s 400.9(1) of the Code. The first ground of appeal is not established.

6 The second ground of appeal alleges that the sentence imposed was manifestly excessive. I am not prepared to infer that the sentencing magistrate erred in deciding that a sentence of immediate imprisonment was the only appropriate sentencing option. However, I do infer that there must have been some misapplication of principle in the decision not to make a recognizance release order at all. This requires me to resentence the appellant.

7 Having regard to all of the circumstances of the case, I have concluded that the appropriate sentence is a sentence of 8 months' imprisonment with release on recognizance after serving 5 months of that term.

8 My more detailed reasons for this conclusion follow.

Statutory background

9 Before turning to consider the facts of the case, I will identify the statutory context in which those facts must be considered.

Money laundering offences under div 400 of the Code

10 Division 400 of the Code provides for two kinds of offences relating to proceeds of crime.¹ The first is provided for by s 400.3 - s 400.8 of the Code, and concerns dealing with money or other property which is the proceeds of crime. The offences created by those sections are defined according to the value of the money or property. Within each section, different offences are created depending on whether the offender believed the money or property to be proceeds of crime, or was reckless or negligent as to that circumstance.

11 Section 400.9 creates the second kind of offence, which does not require proof that the money or property is proceeds of crime.

12 Section 400.9(1) of the Code provides:

A person commits an offence if:

- (a) the person deals with money or other property; and
- (b) it is reasonable to suspect that the money or property is proceeds of crime; and
- (c) at the time of the dealing, the value of the money and other property is \$100,000 or more.

13 The first element of this offence, namely dealing, is a physical element consisting only of conduct.² As s 400.9 does not specify fault elements for that physical element, intention is the fault element for that

¹ The division also creates offences relating to instruments of crime. For ease of reference I shall only refer to the provisions concerned with proceeds.

² Section 4.1(a) of the Code.

physical element.³ That is, it is necessary that the person engaging in the dealing means to engage in that conduct.⁴

14 Section 400.2 of the Code provides:

A person *deals with money or other property* if the person does any of the following:

- (a) receives, possesses, conceals or disposes of money or other property;
- (b) imports money or other property into Australia;
- (c) exports money or other property from Australia;
- (d) engages in a banking transaction relating to money or other property.

15 The second and third physical elements of the offence, specified in s 400.9(1)(b) and s 400.9(1)(c), are each elements of a circumstance in which the conduct specified in s 400.9(1)(a) occurs. Section 400.9(4) provides that absolute liability applies to s 400.9(1)(b) and s 400.9(1)(c). This means that there are no fault elements for those physical elements and the defence of mistake of fact under s 9.2 of the Code is unavailable.⁵

16 Section 400.9(2)(aa) relevantly provides that s 400.9(1)(b) is taken to be satisfied if the conduct involves a number of transactions that are structured or arranged to avoid the reporting requirements of the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (Cth) (AML Act) that would otherwise apply to the transactions.

17 Section 43 of the AML Act, in effect, relevantly requires banks to report 'threshold transactions' which, in the case of the transfer of physical currency, involve transfers of not less than \$10,000. A transaction which is not a threshold transaction is a 'non-reportable transaction'.⁶

18 As I explained in *Fitzroy All*,⁷ the effect of s 400.9(2)(aa) is not to remove the need for a suspected offence committed prior to the time of the relevant dealing. Rather, it provides that the dealings undertaken to avoid the reporting requirements of the AML Act constitute reasonable

³ Section 5.6(1) of the Code; see *Ansari v The Queen* [2010] HCA 18; (2010) 241 CLR 299 [49]; *Milne v The Queen* [2014] HCA 4; (2014) 252 CLR 149 [13]; *Shi v The Queen* [2014] NSWCCA 276 [35].

⁴ Section 5.1(1) of the Code.

⁵ Section 6.2(2) of the Code.

⁶ Section 5 of the AML Act (definition of 'non-reportable transaction').

⁷ *Commissioner of the Australian Federal Police v Fitzroy All Pty Ltd* [2015] WASC 320 [53] - [62].

grounds for suspecting that the money or property is derived or realised from an offence committed prior to the dealing.

19 Section 400.9(5) of the Code provides for a defence as follows:

This Section does not apply if the defendant proves that he or she had no reasonable grounds for suspecting that the money or property was derived or realised, directly or indirectly, from some form of unlawful activity.

Commonwealth sentencing considerations

20 Section 16A(1) of the *Crimes Act 1914* (Cth) requires that, in determining the sentence to be passed for a federal offence, the court must impose a sentence that is of a severity appropriate in all the circumstances of the offence.

21 Section 16A(2) of the *Crimes Act* provides that the court must take into account a number of matters so far as they are relevant and known to the court. Presently relevant considerations include:

- the nature and circumstances of the offence;
- the degree to which the appellant had shown contrition for the offence;
- the fact that the appellant has pleaded guilty to the offence;
- the deterrent effect that any sentence may have on the appellant;
- the need to ensure that the appellant is adequately punished;
- the character, antecedents, age, means and physical and mental condition of the appellant;
- the prospects of rehabilitation of the appellant; and
- the probable effect that any sentence or order under consideration would have on any of the appellant's family or dependants.

22 Section 17A(1) of the *Crimes Act* provides that a court shall not pass a sentence of imprisonment on any person for a federal offence unless the court, having considered all other available sentences, is satisfied that no other sentence is appropriate in all the circumstances of the case.

Recognizance release orders

23 Section 19AC(1) of the *Crimes Act* relevantly required a court
sentencing the appellant to a term of less than 3 years' imprisonment to
make a recognizance release order in respect of that sentence.

24 That requirement is subject to two qualifications.

25 The first, not applicable in the present case, is provided by s 19AC(3)
of the *Crimes Act*. Under s 19AC(3), the court is not required to make a
recognizance release order if the sentence does not exceed 6 months.

26 The second qualification is provided by s 19AC(4) of the *Crimes Act*.
That Section provides the court may decline to make a recognizance
release order if:

 having regard to the nature and circumstances of the offence or offences
concerned and to the antecedents of the person, the court is satisfied that
such an order is not appropriate.

27 Section 19AC(5) of the *Crimes Act* requires a court which decides
that a recognizance release order is not appropriate to state its reasons for
so deciding.

28 Section 20(1)(b) of the *Crimes Act* provides that a court sentencing a
person convicted of a federal offence may, if it thinks fit:

 sentence the person to imprisonment in respect of the offence or each
offence but direct, by order, that the person be released, upon giving
security of the kind referred to in paragraph (a) either forthwith or after he
or she has served a specified period of imprisonment in respect of that
offence or those offences that is calculated in accordance with
subsection 19AF(1).

29 Section 19AF(1) requires that the court fix a recognizance release
order such that the pre-release period ends not later than the end of the
sentence.

Facts

30 In May and September 2014, Australian Federal Police conducted an
investigation into money laundering offences, which involved
surveillance of the appellant. The appellant's offences were discovered as
a result of that surveillance and a subsequent search of the appellant's
home.

31 At about 11.35 pm on 23 May 2014, a male person (referred to in the statement of facts as Male 1) stopped his vehicle outside the appellant's home. The appellant walked out of his house and had a brief conversation with Male 1. Male 1 gave the appellant \$40,000 in cash.

32 Between 26 May 2014 and 30 May 2014, the appellant deposited \$39,700 of the money he had received in six bank accounts, held in two banks, in amounts of less than \$10,000.

33 At about 11.40 am on 31 May 2014, the appellant spoke by telephone with a male person (referred to in the statement of facts as Male 2). He arranged to meet Male 2 at the appellant's home at between 2.30 pm and 3.00 pm that day. The appellant agreed to send his address to Male 2 in a text message.

34 Male 2 stopped his car outside the appellant's home at about 3.20 pm that day, and retrieved a soft blue esky bag from his boot. The appellant walked outside his house, and the two men went inside the appellant's garage. Male 2 gave the appellant \$132,800 in cash. They left the garage, and Male 2 returned to his car and drove away.

35 At 1.45 pm on 1 June 2014, the appellant spoke on the telephone with Male 2. The conversation included the following:

Appellant: The problem was in one packet of hundreds. There are two notes less.

Male 2: So that's 200 less?

Appellant: The problem is, I have to confirm this with India.

Male 2: If we can just leave it at 200 short and I will tell my side now as well.

36 Between 3 June 2014 and 6 June 2014, the appellant deposited \$129,790 in various bank accounts in amounts of less than \$10,000. On one occasion amounts of \$9,000 and \$8,375 were deposited into the same account on consecutive days. On another occasion, amounts of \$9,800, \$9,500 and \$9,700 were deposited into the same account on the same day.

37 On 25 September 2014, police executed a search warrant of the appellant's home and located a notebook, which contained records of the above transactions. The appellant did take part in a recorded interview, but was in a distressed state and did not provide any useful information.

38 The appellant was initially charged with three offences against s 400.9 of the Code, including one related to \$73,000 in cash that police had located during the search of his house. The appellant subsequently provided an innocent explanation for possession of the \$73,000 and offered to plead guilty to a single charge covering all of the money received on 23 and 31 May 2014. The prosecution accepted this offer, and the appellant pleaded guilty to one count against s 400.9 of the Code.

39 The appellant is a 42-year-old man who migrated to Australia from India, and was at the time of sentencing gainfully employed in a number of unskilled jobs. He was the main financial support for his family, including his parents. The appellant did not have a prior criminal record or any history of contact with the police. He supplied a number of positive references.

40 Submissions made for the appellant indicated that his actions must be seen in the context of his state of ignorance about the source of the money and legislative provisions relating to the reporting of large cash transactions. It was submitted that the transfer of large sums of money from India to Australia was commonplace and not associated with criminal activity of any kind.

The sentencing magistrate's approach

41 The appellant was sentenced on 25 September 2015. After hearing submissions, reciting the facts and referring to the appellant's personal circumstances, the sentencing magistrate accepted that the plea of guilty was entered at an early opportunity. The magistrate made certain findings about the appellant's state of knowledge, to which I will come in dealing with ground 1.

42 The sentencing magistrate then concluded that a term of immediate imprisonment was appropriate as a means of specific and general deterrence. The magistrate said:

It is my view that a term of imprisonment - immediate term is appropriate, and it is my view that that is appropriate as a means of general and specific deterrence. These sorts of offences are very hard to detect. People who want to deal with money in this way do so hoping that people would not speak out, they will not ask questions and they will do as they are told just as you did. But that can be no excuse for your behaviour.

There does need to be a term of imprisonment. It does need to be immediate. And it is my view it needs to reflect an appropriate term by way of general deterrence for other people like-minded as yourself to assist people in these nefarious and illegal activities. In my view it's

appropriate for there to be a term of imprisonment imposed and that term will be a period of eight months. I will require you to serve the term of eight months.

- 43 The sentencing magistrate then asked counsel whether she needed to make a recognizance release order. The conclusion was that she did not need to do so if the appellant was to serve the entire term of 8 months' imprisonment. The magistrate said she intended for the appellant to serve the entire term, and concluded by saying:

Mr Arora, then there will be a prison term that will be eight months. I do not intend to do the release order for any lesser period. It is my view that that's an appropriate sentence in relation to the offence before the court, the circumstances of it notwithstanding the lack of record prior, your employment and your antecedents.

- 44 The appellant appeals against this sentence, and was granted bail pending resolution of the appeal.

Grounds of appeal

- 45 The appellant appeals on two grounds:

1. The learned sentencing magistrate erred in law and fact by finding, and taking into account as an aggravating feature of his offence, that the appellant knew that the money was the proceeds of crime or was reckless as to that fact.
2. The learned sentencing magistrate imposed a sentence that was manifestly excessive, having regard to the maximum penalty applicable to the offence, the circumstances in which the offence was committed, the appellant's plea of guilty and the appellant's lack of criminal record and highly favourable personal circumstances.

Leave to appeal

- 46 Section 7(1) of the *Criminal Appeals Act 2004* (WA) provides that a person who is aggrieved by a decision of a court of summary jurisdiction may appeal to this court against that decision. Section 6 of that Act defines a 'decision' to include a sentence imposed as a result of a conviction.

- 47 Section 7 and associated provisions of the *Criminal Appeals Act* are applied to the appellant's sentence by s 68(1) of the *Judiciary Act 1903* (Cth). This court has federal jurisdiction to hear and determine an appeal from the magistrate's sentence conferred by s 68(2) of the *Judiciary Act*.

48 The appellant requires leave to appeal for each ground of appeal. Leave must not be granted unless the court is satisfied that the ground has a reasonable prospect of succeeding.⁸ Unless leave to appeal is granted on one or more grounds, the appeal is taken to be dismissed.⁹

49 In this case, the application for leave was heard with the appeal.

Ground 1: aggravating factors

Appellant's submissions

50 The appellant submits that the sentencing magistrate in effect found that he knew that the money he was handling was proceeds of crime, or that he was at least reckless of that fact. It is submitted that such a finding would make the appellant guilty of a more serious offence, most likely against s 400.4 of the Code. The appellant submits that, by making that finding and taking it into account as an aggravating feature of the offence, the magistrate committed an express error of the same kind as was made at first instance in *Shi v The Queen*.

51 In *Shi*, the sentencing judge had found that the offender knew that the money was the proceeds of crime. The New South Wales Court of Appeal concluded that, in doing so, the sentencing judge in effect found that Ms Shi had exhibited subjective criminality which was not an element of the offence with which she was charged.¹⁰ The court said that the general principle that the sentence imposed on an offender should take into account all of the circumstances of the offence is subject to a more fundamental and important principle that no person should be punished for an offence of which he or she has not been convicted.¹¹ The court found the sentencing judge to have breached that principle by treating Ms Shi's state of mind as an aggravating factor, so as to punish her for a more serious offence than that with which she was charged.¹²

The magistrate's findings

52 In order to understand the magistrate's findings as to the appellant's state of mind, it is necessary to consider the submissions to which those findings responded.

⁸ See *Samuels v The State of Western Australia* [2005] WASCA 193; (2005) 30 WAR 473.

⁹ See s 9 of the *Criminal Appeals Act*.

¹⁰ *Shi* [45].

¹¹ *Shi* [47], relying on *R v De Simoni* (1981) 147 CLR 383, 389.

¹² *Shi* [48]; see also *R v Jiao* [2015] NSWCCA 95 [33].

53 In his plea in mitigation, the appellant's counsel indicated that the appellant's plea was based on an acceptance that he could not show that it was not objectively reasonable for him to suspect that the money was the proceeds of crime. Counsel submitted that the appellant's conduct was subjectively innocent, as he had no awareness of any illegality. Counsel submitted that:

Mr Arora had no idea of the origins of the money or of the fact that he was involved with people who were, in fact, engaged in criminality. As far as he knew, he was helping a legitimate money transaction or series of money transactions on behalf of a friend. He had no idea, although objectively he ought to have, that there was suspicion. He wasn't familiar with the provisions of the Commonwealth Code or of the Financial Transactions Reporting Act and that sort of thing, so the fact that the transactions were multiple and in smaller sums - including some multiple transactions to the same account - meant nothing to him.

So the offence and the circumstances of its commission, we respectfully submit, is at the low end of the scale for an offence of its type.

54 Prosecuting counsel accepted that it could not be established that the appellant had any knowledge of dealings in drugs and may not, at one level, have been aware that he was money laundering. However, the prosecution submitted that the appellant's conduct would allow the court to infer that he was wilfully blind towards the conduct and his criminality.

55 The magistrate said that there was nothing to associate the appellant with any drug offences or other offences that may have seen the money come into his possession. She then noted the prosecution submission about wilful blindness. The magistrate said that she wondered how the appellant could receive approximately \$180,000 from strangers with instructions to bank it in amounts of less than \$10,000, without making his own inquiries as to how this would come to be. The magistrate said:

It does not seem that you asked any questions of these people *as to the source of the money*, what the purpose of these transactions were. (emphasis added)

56 Referring to the manner in which deposits were made, she said:

If this money was money that the people legitimately had in their account and were dealing with then it surely must have aroused some suspicion in yourself as to the source of it and/or the purpose of these seemingly meaningless transactions. (emphasis added)

57 The magistrate inferred that the appellant chose not to ask these questions, which a reasonable person would have asked. She then said:

I do draw the inference that you could not possibly have embarked on these transactions without having some knowledge or formed some view that this was not above board and that *there was some matter which was illegal going on here that meant that this is how you had to deal with the money.*

If it was from the sale of a business or if it was from a legitimate source then how - and you never seem to have asked that, and you certainly didn't address it with the police in the opportunity you had with the interview as to explain your behaviour in dealing with the money as the way you did. In those circumstances it is my view that did have some knowledge.

Whilst you may not, formally, have understood the ramifications of the law or, non-specifically, the provisions or been fully aware of the 10,000 no obligation reporting in terms of financial transactions you certainly would have been aware, is my view and the inference I draw from the circumstances of this, that there was something not quite right with this manner of dealing with the money and that you involved yourself and chose not to make those full inquiries and not to be fully informed. (emphasis added)

58 There are two distinct findings in the passages which I have quoted above. The first is that there was reason for the appellant to suspect that he was engaged in some illegal activity, even though he may not have been aware of the structuring offence. The inference that something illegal was involved in his conduct could be drawn from the circumstance that he was being given large sums of cash from strangers with instructions to deal with the cash in a peculiar way. The appellant was wilfully blind as to the legality of his own conduct in dealing with the money. That finding responds to submissions advanced by counsel for the appellant and reflects the answer provided by the prosecutor.

59 Second, the passages emphasised in the above quotes indicate that the magistrate also made a finding as to the appellant's state of mind as to the source of the funds. The appellant was found to have failed to ask questions about the source of the money, and the circumstances must have aroused suspicion in him as to the source of the money. The statement that 'some matter which was illegal going on here that meant that this is how you had to deal with the money' implies that the money might have been dealt with in that manner because it was illegally obtained.

60 The effect of this second finding is that the appellant was reckless as to whether the money was the proceeds of crime. The finding is that the appellant appreciated the risk that the money was derived from illegal activity and deliberately chose not to ask questions about the source. It was expressly a finding that the appellant was aware of a substantial risk

that the circumstance - that the money was the proceeds of crime - existed. The magistrate also found that the appellant failed to ask questions which reasonable people would have asked. Inherent in that conclusion is a finding that, having regard to all of the circumstances known to the appellant, it was unjustifiable to take that risk. That is a finding of recklessness as to a circumstance within the meaning of s 5.4(1) of the Code.

61 However, the sentencing magistrate did not find that the appellant knew that the money he received was the proceeds of crime. Nor did she find that the money was in fact the proceeds of crime.

Did the magistrate err in referring to the appellant's recklessness as to the source of the money?

62 The appellant's complaint is that a finding to the effect that the appellant was reckless as to whether the money was the proceeds of crime was a finding that he committed the more serious offence against s 400.4(2) of the Code. The relevant physical elements of that offence are that:

1. the appellant dealt with the money by receiving it and engaging in a banking transaction relating to the money;
2. the money was proceeds of crime; and
3. at the time of the dealing, the value of the money was \$100,000 or more.

63 The fault element for the first physical element is intention.¹³ The fault element for the second physical element, specified in s 400.4(2)(c), is recklessness. Absolute liability applies in relation to the third physical element.¹⁴

64 The difference between the offences created by s 400.4(2) and s 400.9(1) of the Code concerns the second physical element.

65 To prove an offence against s 400.4(2) of the Code the prosecution must establish the physical element that the money is in fact the proceeds of crime. It must also establish recklessness as the fault element for that physical element.

¹³ Section 5.6(1) of the Code.

¹⁴ Section 400.4(4) of the Code.

66 By contrast, to prove an offence against s 400.9(1), the prosecution does not have to establish that the money was proceeds of crime. It is enough to establish that it is objectively reasonable to suspect that the money was the proceeds of crime. The onus is then on the accused to prove that he or she had no reasonable grounds for suspecting the money was derived from some form of unlawful activity, under s 400.9(5) of the Code.

67 The magistrate's finding that the appellant was reckless as to whether the money was proceeds of crime was a finding as to the fault element for the second physical element of the offence against s 400.4(2) of the Code. However, that finding, together with the other findings the magistrate made, did not constitute a finding of facts which would constitute an offence against s 400.4(2) of the Code. That was because there was no finding as to the physical element of that offence, ie that the money was in fact proceeds of crime.

68 The magistrate did not, therefore, sentence the appellant on the basis that he engaged in conduct which would have constituted a more serious offence of which he had not been convicted. Nor did she sentence the appellant on a basis inconsistent with the elements of the offence of which he had been convicted.¹⁵ The offence under s 400.9 did not involve any subjective mental element in relation to the source of the funds.

69 In my view, in making the finding of recklessness the magistrate was simply responding to the appellant's submission that the offence was towards the lower end of the scale of seriousness because he did not subjectively appreciate that he was doing anything unlawful. It was proper for the appellant's counsel to make that submission, and it was appropriate for the sentencing magistrate to deal with it, for the following reasons.

70 A person may commit an offence against s 400.9(1) of the Code without subjectively suspecting that the money is proceeds of crime. It is enough that it is objectively reasonable to suspect that the money is proceeds of crime, and the person objectively has reasonable grounds for so suspecting. The offence against s 400.9(1) may also be committed by a person who subjectively suspects that the money is proceeds of crime. In the second example, the person will not have committed an offence against s 400.3 - s 400.8 of the Code because it has not been established that the money was in fact proceeds of crime. A person who engages in conduct proscribed by s 400.9(1) while subjectively holding the relevant

¹⁵ See *SV v The State of Western Australia* [2014] WASCA 123 [137].

suspicion may fairly be regarded as being more blameworthy than a person who does not hold any subjective suspicion. However, the person does not commit an offence against s 400.4(2) merely because the money is both subjectively and objectively suspected to be proceeds of crime.

71 Therefore, in assessing the relative seriousness of this offence against s 400.9(1) of the Code, it was relevant to consider the appellant's subjective state of mind. If the appellant did not subjectively suspect that the money was proceeds of crime then it would, as his counsel submitted to the magistrate, have been a less serious example of the offence. The corollary to that proposition is that it would be a more serious example of an offence against s 400.9 of the Code (but not an offence against s 400.4(2) of the Code) if the appellant did subjectively suspect that the money might have been the proceeds of crime.

72 Once the appellant made the submission that this offence was in the less serious category identified above, it was incumbent on the magistrate to consider the submission. The rejection of the appellant's submission involved the magistrate concluding, in effect, that the appellant did subjectively suspect the money to be proceeds of crime. The sentencing magistrate was not precluded from doing so by the fact such a finding could also be characterised as a finding that the appellant was reckless about whether the money was proceeds of crime. The finding was not inconsistent with the charge, and did not involve a finding that the appellant had committed a more serious offence of which he had not been convicted.

73 The present case is distinguishable from *Shi* on the facts. The sentencing judge found that Ms Shi knew that the money was unlawfully obtained or criminally sourced.¹⁶ That finding (in which the finding of the money being illegally obtained was implicit) did amount to a finding that Ms Shi had committed a more serious offence against s 400.3 of the Code. When the Court of Criminal Appeal came to resentence Ms Shi, it said that she 'must be sentenced on the basis that she held a reasonable suspicion that the money was the proceeds of crime, not on the basis that she knew or believed this to be the case'.¹⁷ This shows that the court in *Shi* perceived the distinction which I draw.

¹⁶ *Shi* [19], [21], [48].

¹⁷ *Shi* [112].

74 In the present case there was no finding that the money was in fact proceeds of crime, and no finding that the appellant knew that to be the position. There was, in substance, no more than a finding of the kind which the court in *Shi* adopted in re-sentencing the offender in that case.

Conclusion as to ground 1

75 For the above reasons, ground 1 (while arguable) has not been made out.

Ground 2: manifest excess

General principles

76 It is well established that sentencing involves the exercise of discretion. An appellate court can only intervene if the appellant demonstrates that the sentencing court erred in exercising the discretion in one of two ways. The first is called express error and it involves acting on a wrong principle (for example, by mistaking the law), mistaking the facts, taking into account an irrelevant matter or failing to take into account a relevant consideration. The second is referred to as implied or inferred error. It arises where, although it is not possible to discover the exact nature of the error, the end result is so unreasonable or unjust that the court must conclude that a substantial wrong has occurred.¹⁸

77 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.¹⁹

78 In most instances a challenge based on implied error will involve the contention that an individual sentence is manifestly excessive (or inadequate) or that the total effective term imposed for all charges offends the totality principle. It follows that the appeal court will not intervene simply because the members of the court, had they been sentencing the offender at the original hearing, might have imposed a different sentence.²⁰

¹⁸ *House v The King* (1936) 55 CLR 499, 505.

¹⁹ *R v Pham* [2015] HCA 39 [28].

²⁰ *Wilson v The State of Western Australia* [2010] WASCA 82 [2].

79 To determine if a sentence is manifestly excessive it is necessary to view it in light of the maximum penalty prescribed by law for the offence, the standards of sentencing customarily observed for that type of offence, the level of seriousness of the circumstances of the offending and the personal circumstances of the offender.²¹

Maximum penalty

80 The maximum penalty for an offence against s 400.9(1) of the Code is 3 years' imprisonment, a fine of \$30,600²² or both. Although it is an indicatable offence, an offence against s 400.9 of the Code may, with the consent of the prosecutor and defendant, be heard and determined by a court of summary jurisdiction. On summary prosecution, the court may impose a sentence of imprisonment not exceeding 12 months or a fine of \$10,200.²³

81 Counsel for the appellant accepted that the summary conviction penalty was a jurisdictional limit, rather than a maximum penalty.

Customary sentencing standards

82 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. The point of 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; and, secondly, the analysis of comparable cases may yield discernible sentencing patterns and possibly a range of sentences against which to examine an impugned sentence.²⁴

83 There have been a limited number of appellate cases considering the sentences for an offence against s 400.9 of the Code.

84 In *Shi*, the offender was convicted of 10 offences contrary to s 400.9(1) of the Code, over a two month period. The total amount involved was over \$35 million. Ms Shi's role, described as significant but low-level, involved receiving large sums of cash and depositing them in a 'Super Forex' account at a bank. It was not established that she received

²¹ *Cairns v The State of Western Australia* [2015] WASCA 198 [25].

²² The value of a penalty unit at the time of the appellant's offending (\$170), multiplied by 180 penalty units.

²³ Section 4J of the *Crimes Act*.

²⁴ *Pham* [18], [26].

any significant reward or gain from the exercise. Ms Shi pleaded guilty to the offences, was of prior good character and cooperated with law enforcement authorities. The total effective sentence imposed on appeal was 4 years and 9 months' imprisonment, with a non-parole period of 2 years and 7 months.

85 In *Jiao*, the offender was convicted after trial of one offence against s 400.9(1) of the Code. In that case, the offending occurred over two days. The offender received \$624,530 from a man who she did not know at a casino, using a \$5 note with a prearranged serial number to identify herself. She deposited the amount in her casino account, and on the following day withdrew \$300,000 and took it to a bank where she was arrested. The sentence of 6 months' imprisonment imposed by the trial judge was set aside as manifestly inadequate. A sentence of 16 months' imprisonment was imposed, with release on recognizance after 12 months.

86 In *Assafiri v The Queen*,²⁵ an offender of prior good character pleaded guilty to one count under s 400.9(1) of the Code. The amount involved was \$290,000, the offence was possession at a single point in time and the maximum penalty at the time was 2 years' imprisonment. A sentence of 9 months' imprisonment was reduced to 6 months on appeal.

87 In *Cahyadi v The Queen*,²⁶ the offender pleaded guilty to a single offence under s 400.9(1) involving possession of \$155,000, when the maximum penalty was 2 years' imprisonment. He had a criminal record with offences of dishonesty, and was sentenced to 12 months' imprisonment.

88 In *Almanda v The Queen*,²⁷ the offender pleaded guilty to one offence contrary to s 400.9(1) of the Code involving approximately \$200,000. He had a relatively minor prior record, although he was on a good behaviour bond at the time of the offence. His sentence of 18 months' imprisonment, with release after 9 months on recognizance to be of good behaviour for 3 years, was held not to be manifestly excessive.

89 In *Wong v The Queen*,²⁸ the offender was sentenced to 20 months' imprisonment on each of five counts involving approximately \$6.3 million. The total effective sentence on those and other counts was 5 years and 9 months with a non-parole period of 4 years. The circumstances of that offence were very different to the present.

²⁵ *Assafiri v The Queen* [2007] NSWCCA 159.

²⁶ *Cahyadi v The Queen* [2007] NSWCCA 1; (2007) 168 A Crim R 41.

²⁷ *Almanda v The Queen* [2015] NSWCCA 19.

²⁸ *Wong v The Queen* [2013] VSCA 52.

90 Of course, it is necessary to bear in mind that previous sentences may be used to establish a range of sentences that have been imposed but not that the range is correct. In particular, the range of sentences that have been imposed in the past does not fix the boundaries within which future judges must, or even ought, to sentence.²⁹

91 The respondent also referred to statistics published by the Judicial Commission of New South Wales for sentences imposed in summary courts in that State in 21 cases between 1 October 2010 and 30 September 2015. Those statistics show that eight offenders were sentenced to between 3 and 12 months' imprisonment while 11 received sentences with immediate release on recognizance. There is some authority in New South Wales for the receipt of statistical information of this kind on a sentencing appeal for a Commonwealth offence.³⁰ However, its utility is considerably limited by the lack of information as to the circumstances of the offences and offenders with which the courts were dealing. The limited utility of statistical information, particularly when presented by means of numerical tables, bar charts and graphs, was recently emphasised in *Pham*. That is particularly so when the sample size is so small.³¹

Seriousness of offending

92 It is clear from the structure of the offences created by div 400 of the Code that the amount of money involved in the offence is a significant factor in assessing the relative seriousness of the offence. In the case of s 400.9 the statutory division is above or below \$100,000. The amount of approximately \$170,000 is significantly above the limit at which s 400.9(1) is engaged, but not at the level of millions of dollars involved in some of the other cases. However, it should also be noted that the offence provided for by s 400.9(1A) of the Code, proscribing the same conduct for money of less than \$100,000 in value, is 2 years' imprisonment and a fine of \$20,400.

93 The appellant's conduct did not involve a single isolated incident. The offence was not constituted simply by possession of the funds but involved banking the amounts. The conduct occurred over two weeks and involved making a number of structured deposits. While the appellant's involvement appears to be relatively low level, it was sustained and relatively well organised.

²⁹ *Munda v The State of Western Australia* [2013] HCA 38; (2013) 249 CLR 600 [39]; *Pham* [27].

³⁰ *R v Yuan* [2015] NSWCCA 198 [60] - [62].

³¹ *Pham* [32], [49].

94 The magistrate found, in effect, that the appellant subjectively suspected the money to be proceeds of crime.

95 While the appellant's conduct is not of the most serious kind which may attract s 400.9(1) of the Code, it is a significant and serious example of the offence.

Circumstances of the offender

96 The appellant is of prior good character and has no previous convictions. While that significant mitigating factor must be recognised, it does not appear uncommon for the offenders in these types of cases to be of prior good character. It would be understandable that those planning money laundering operations would choose persons without significant criminal histories to carry out the plan.

97 The appellant's prospects of rehabilitation also appear good. He has family in Western Australia and has a good employment history. The appellant's family depend on him for financial support.

98 The appellant's remorse and acceptance of responsibility for the offence is reflected in his early plea of guilty to the charge.

Conclusion as to ground 2

99 Taking all of the above matters into consideration, I am not prepared to infer that the sentencing magistrate erred in deciding that a sentence of immediate imprisonment was the only appropriate sentencing option. The offence is serious, and hard to detect. General deterrence appropriately plays a more significant role in the sentencing process for this kind of offence than matters personal to the particular offender. In my view, it was open to the magistrate to exercise her discretion to impose a sentence of 8 months' imprisonment in all the circumstances of this case, and to require the appellant to immediately serve part of that sentence.

100 However, I do consider the sentence to be manifestly excessive so far as it fails to provide for any release on recognizance. I agree with the magistrate that the seriousness of the offending was such that it was not appropriate that he immediately be released on recognizance. However, I can see no basis for the decision not to make a recognizance release order at all.

101 As I have noted, s 19AC of the *Crimes Act* required the court to make a recognizance release order unless, having regard to the nature and circumstances of the offence and the appellant's antecedents, the court is

satisfied that such an order is not appropriate. I can see nothing in either the offence or the offender in the present case which would make a recognizance release order inappropriate. The sentencing magistrate did not, in her reasons, explain why a recognizance release order was inappropriate, other than to say:

that's an appropriate sentence in relation to the offence before the court, the circumstances of it notwithstanding the lack of record prior, your employment and your antecedents (ts 19).

The magistrate does not appear to have considered the appellant's antecedents to make a recognizance release order inappropriate. Her conclusion must have been based on the nature and circumstances of the offence.

102 However, the cases to which I have referred illustrate that the nature of the offence created by s 400.9(1) of the Code is not generally such as to make a recognizance release order inappropriate. Nor do the circumstances of this mid-range offence provide grounds for that conclusion.

103 In *Hili v The Queen*,³² the High Court held that there is no judicially determined norm or starting point (whether expressed as a percentage of the head sentence, or otherwise) for the period of imprisonment that a federal offender should actually serve as imprisonment before release on a recognizance release order. Rather:

[section] 16A(1) and [s 16A](2) 'make it plain that all of the circumstances, including the matters in the non-inclusive list in s 16A(2), must be taken into account in making recognizance release orders just as they must be taken into account in imposing a sentence of imprisonment'. In determining what recognizance release order is to be made, s 16A(1) requires the sentencing court to 'make an order that is of a severity appropriate in all the circumstances of the offence'. What is the 'severity appropriate' is determined having regard to the general principles identified by this Court in *Power v The Queen*³³, *Deakin v The Queen*³⁴ and *Bugmy v The Queen*³⁵ [44].

104 The court in *Hili* also applied the usual principles for determining manifest excess or inadequacy to the fixing of a pre-release period on a recognizance release order.

³² *Hili v The Queen* [2010] HCA 45; (2010) 242 CLR 520.

³³ *Power v The Queen* (1974) 131 CLR 623.

³⁴ *Deakin v The Queen* (1984) 58 ALJR 367; (1984) 54 ALR 765.

³⁵ *Bugmy v The Queen* (1990) 169 CLR 525. See also *Inge v The Queen* [1999] HCA 55; (1999) 199 CLR 295.

105 In *Bugmy*, Mason CJ and McHugh J noted that:

[C]onsiderations which the sentencing judge must take into account when fixing a minimum term will be the same as those applicable to the setting of the head sentence. Obviously, the weight to be attached to these factors and the way in which they are relevant will differ due to the different purposes behind each function (531).

106 As McLure P noted in *Lam v The Queen*:³⁶

[B]ecause a non-parole period is a mitigation of punishment in favour of rehabilitation, positive sentencing factors in favour of rehabilitation in a particular case can reduce not only the length of the head sentence but also lower the proportion that the non-parole period bears to the head sentence. However, as *Power* makes clear, there is a limit below which the non-parole period cannot go. It cannot be reduced below the minimum that the justice of the case requires in order to satisfy all of the other sentencing objectives, including punishment, retribution and general deterrence [57].

107 In the present case considerations of general deterrence and facilitating the appellant's rehabilitation were relevant both to the fixing of the term of imprisonment and any pre-release period. However, considerations of general deterrence would assume less weight, and considerations of rehabilitation more weight, in considering release on recognizance. It would be expected that this weighting difference would have resulted in some pre-release period being seen as appropriate.

108 In my view, in all of these circumstances the inference should be drawn that there was some misapplication of principle in the decision not to make any recognizance release order at all. The inferred miscarriage of the exercise of the sentencing discretion requires me to resentence the appellant.

Re-sentencing

109 Having considered all of the matters referred to above, I agree with the magistrate's conclusion that the appropriate sentence for this offence is a term of imprisonment of 8 months. However, in my view it is not inappropriate to make a recognizance release order in this case. The appellant's antecedents are very favourable to his rehabilitation, and there is nothing in the nature or circumstances of the offence which count against an order being made. In all the circumstances, I consider the appropriate pre-release period to be 5 months' service of the sentence of imprisonment.

³⁶ *Lam v The Queen* [2014] WASC 114.

Orders

110 For the above reasons I would grant leave to appeal on both grounds, allow the appeal on ground 2, and set aside the sentence imposed on 25 September 2015.

111 I would substitute the following sentence. The appellant is sentenced to 8 months' imprisonment. I order that the appellant be released after serving 5 months of the sentence upon giving security by recognizance that he will comply with the following conditions:

1. be of good behaviour for 8 months; and
2. during those 8 months, be subject to the supervision of a community corrections officer and obey all reasonable directions of that officer.

112 The sentence will be backdated to commence on 25 September 2015, so as to enable the time spent in custody between the appellant's original sentence and grant of bail pending this appeal to be counted as service of the sentence.