SUPREME COURT OF QUEENSLAND

CITATION:	*R v Cruz* [2016] QCA 183
PARTIES:	**R** **v** **CRUZ, Felipe Martins** (applicant)
FILE NO/S:	CA No 275 of 2015 SC No 822 of 2014
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Application
ORIGINATING COURT:	Supreme Court at Brisbane – Date of Sentence: 18 September 2015
DELIVERED ON:	15 July 2016
DELIVERED AT:	Brisbane
HEARING DATE:	14 April 2016
JUDGES:	Margaret McMurdo P and Fraser JA and Douglas J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. The application to adduce evidence is granted.** **2. The application for leave to appeal against sentence is granted.** **3. The appeal against sentence is allowed.** **4. The sentence imposed is set aside and the matter is remitted to the Trial Division for sentence.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – MISCARRIAGE OF JUSTICE – where the applicant pleaded guilty to importing a marketable quantity of a border controlled drug, cocaine, and possessing a dangerous drug, cannabis – where the applicant was a Brazilian citizen with poor English skills – where the applicant encountered difficulty communicating with his lawyers due to a language barrier – where the applicant signed an agreed statement of facts without understanding the entirety of the document – where, had the applicant understood the statement of facts, he would have contested important factual matters – where the applicant's solicitors failed to take instructions as to his role in the offending and explain how this differed from the prosecution case with the assistance of an interpreter – whether there was a miscarriage of justice

Director of Public Prosecutions (Cth) v De La Rosa (2010) 79 NSWLR 1; [2010] NSWCCA 194, cited
Lau v R [2011] VSCA 324, cited
R v Agboti (2014) 246 A Crim R 72; [2014] QCA 280, cited
R v Alvarez [2000] QCA 290, cited
R v Jimson [2009] QCA 183, cited
R v Kaufusi and Moala [1998] QCA 294, cited
R v Maniadis [1997] 1 Qd R 593; [1996] QCA 242, cited
R v Mokoena [2009] 2 Qd R 351; [2009] QCA 36, cited
R v Tran [2007] QCA 221, cited

COUNSEL: The applicant appeared on his own behalf
B H P Mumford for the respondent

SOLICITORS: The applicant appeared on his own behalf
Director of Public Prosecutions (Commonwealth) for the respondent

[1] **MARGARET McMURDO P:** The applicant, Felipe Martins Cruz, pleaded guilty on 18 September 2015 to importing a marketable quantity of a border controlled drug, cocaine, between 12 November and 26 November 2013 and possessing a dangerous drug, cannabis, on 26 November 2013. He was sentenced to nine years imprisonment with a non-parole period of four and a half years on the importation count and one month concurrent imprisonment on the possession count. As he is a Brazilian citizen who came to Australia for the first time when he imported the cocaine in late 2013, his English was not good and he was assisted at the sentence hearing by a Portuguese interpreter. The transcript suggests that the interpreter did not translate every word but rather assisted the applicant when required.

[2] The applicant, who was self-represented in this Court and again assisted by an interpreter, applied for leave to appeal against his sentence on the grounds that it is manifestly excessive. He also applied to give evidence in the appeal about matters which were not before the primary judge and contends that this evidence demonstrates a miscarriage of justice in the sentencing process.

[3] Before dealing with the application to adduce further evidence it is helpful to summarise the sentencing proceeding. I will then deal with the competing contentions of the parties in this Court before explaining my reasons for granting the application to adduce further evidence and the application for leave to appeal, allowing the appeal, setting aside the sentence and remitting it for rehearing.

The sentencing proceeding

The statement of facts (Exhibit 2)

[4] The prosecution tendered a statement of facts at the sentencing proceeding.[1] It explained that, as a result of information received, Queensland police executed a warrant at the Surfers Paradise apartment of the applicant's co-offender, SDB, in the presence of SDB and the applicant. Police found a small quantity of cannabis, scales, cash, a cryovac machine and bags, and two large suitcases, one of which had been pulled

[1] Exhibit 2, AB 29 – 32.

apart with the lining removed. Green shrink wrap and the black plastic lining from the suitcase were in garbage bags in the kitchen. Drug detector dogs located clip seal bags containing white powder weighing approximately 936 grams in a large vase in the living area and in two portable safes. When police first inspected the intact suitcase they found nothing but, on re-examination in February 2014, customs officers located 1,318.1 grams of white powder secreted in the suitcase's plastic lining. In all, the white powder weighed 2,254.112 grams and it was later analysed as cocaine with a total pure weight of 1,769.524 grams. Its potential street value, once cut to a medium purity of 27 per cent and sold for between $350 to $400 per gram, was in excess of $2.6 million.

[5] Police detected the DNA and fingerprints on the cocaine packaging and suitcase lining of a third co-offender, Rafael Muniz. The applicant's fingerprints and DNA were not located on the packaging or suitcase lining. An image of the interior of a suitcase similar to those used to transport the drugs was found on both the applicant's and SDB's mobile phones.

[6] Police ascertained that SDB travelled to Brazil in October 2013. He provided two statements to the authorities. He said that the applicant asked him about bringing in a bag (inferentially drugs) from Brazil as he wanted some money. He understood the applicant was to be paid $50,000 for his role. Whilst SDB was in Brazil, he arranged to collect the drugs from someone in Florianopolis. He and the applicant tried to pull out of the importation but were told they would have to pay $10,000 to do so. He and the applicant travelled from Sao Paulo to Florianopolis, a nine hour drive, and met the man who provided the suitcases. They returned to Sao Paulo where SDB dropped the applicant and the suitcases at the applicant's home. SDB returned to Australia and a few days later collected the applicant from the Brisbane International Airport.

The prosecution's submissions at sentence

[7] At the sentencing proceeding the prosecutor tendered a pre-sentence custody certificate[2] which indicated the applicant had been on remand for 661 days and was eligible for a declaration under s 159A *Penalties and Sentences Act* 1992 (Qld). His plea was a timely one. He was 19 at the time of the offences, 20 at sentence and had no criminal history.

[8] In oral submissions, the prosecutor emphasised that SDB, "drove with the [applicant] from Sao Paulo to Florianopolis in Brazil which is approximately a nine hour drive. They collected two suitcases containing the drugs and then travelled back to Sao Paulo."[3] The drugs were concealed with sophistication and were not visible to the naked eye. The prosecutor noted that, as for Muniz, SDB's DNA and fingerprints were located on the lining of the dismantled suitcase and the clip seal bags of cocaine.[4]

[9] As SDB was sentenced under s 13A *Penalties and Sentences Act* 1992 (Qld), the prosecutor submitted that his sentence was not helpful in determining the sentence to be imposed on the applicant.[5] The maximum penalty for the importation offence was 25 years imprisonment. The applicant not only imported drugs but, the prosecutor explained, involved himself in their collection and transportation domestically whilst in Brazil and in their storage once they arrived in Australia. He spent some three days

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2 Exhibit 1, AB 28.
3 T1-5, AB 12.
4 T1-5, AB 12.
5 T1-13, AB 20.

in the Gold Coast unit with the drugs.[6] He had higher level knowledge of the operation than many couriers. He knew what the drug was, the method of concealment, and stood to obtain $50,000.[7]

[10] The prosecutor noted the applicant's limited English and that he would have to serve his imprisonment a long way from his Brazilian family. This was a matter of limited mitigation; those who involve themselves in drug importation run the risk of incarceration in a foreign country. The prosecutor also relied on a written outline of submissions[8] and a schedule of comparable sentences which included *R v Tran*;[9] *R v Mokoena*;[10] *R v Jimson*;[11] *Director of Public Prosecutions (Cth) v De La Rosa*;[12] and *Lau v R*[13] where sentences of between eight and 10 years were imposed with non-parole periods from four years and six months to six years. In all these matters, except *De La Rosa*, the offenders were to receive a much lesser reward than the applicant, and most were more removed from those who organised the importation and had little to do with handling the drugs or the items in which the drugs were concealed.[14] The prosecutor conceded, however, that the applicant was youthful. She submitted that the cases relied on by the applicant, *R v Kaufusi and Moala*[15] and *R v Alvarez*[16], were old matters involving less cocaine and less culpable offending than in this case.

[11] In written submissions, the prosecutor contended general deterrence was a fundamental consideration. A sentence of imprisonment with a non-parole period was appropriate. The minimum term must be of a severity appropriate in all the circumstances.[17]

Defence counsel's submissions at sentence

[12] Defence counsel tendered a large bundle of documents including a letter from the applicant to the judge, certificates of courses completed whilst in prison, case notes and behavioural reports, letters of support and references from the applicant's family and friends in Brazil, the applicant's prevention plan to assist in his rehabilitation[18] and defence counsel's written submissions.[19]

[13] Although no detailed reference was made to these documents in defence counsel's submissions, the tendered material disclosed the following. Case notes recorded on 20 April 2014, he "speaks very little English"; on 7 June 2014, "his limited English is doing well"; and on 23 January 2015, "he has been attending the numeracy, literacy classes and his english, therefore his communications skills is becoming better" (errors in the original).[20] A translated medical report stated that the applicant's father suffered from myocardial infarction and a subsequent stroke, was on the waiting list for a heart transplant and was unable to work.[21] The applicant's mother, in a letter to

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6 T1-7, AB 14.
7 T1-7, AB 14.
8 Exhibit 3, AB 33 – 37.
9 [2007] QCA 221.
10 [2009] 2 Qd R 351.
11 [2009] QCA 183.
12 (2010) 79 NSWLR 1.
13 [2011] VSCA 324.
14 T1-12, AB 19.
15 [1998] QCA 294.
16 [2000] QCA 290.
17 Exhibit 3, [25] & [33], AB 36.
18 Exhibit 5, AB 41 – 125.
19 Exhibit 6, AB 126 – 128.
20 AB 69, 75 and 77.
21 AB 123 – 124.

the judge, stated that the applicant "had a problem in his backbone" requiring expensive surgery that they could not afford and that x-rays confirmed "his spine was 45 degrees curved and wouldn't go back to normal."[22]

[14] Defence counsel's written submissions emphasised the applicant's expressed remorse, his timely guilty plea; his youth; that he must serve his sentence far away from his close family; that his father has a life threatening illness; that the applicant wished to return home to assist his mother care for his father and her disabled brother; and the considerable steps the applicant had taken towards rehabilitation. Counsel emphasised the cases of *Alvarez*,[23] where a 28 year old Thai national was sentenced to eight years imprisonment with a non-parole period of three and a half years for importing 1270.8 grams of pure cocaine, and *Kaufusi and Moala*,[24] particularly as to the non-parole period. Counsel submitted that, whilst the court was required to carefully analyse existing sentencing patterns to ensure there was no breach of the principle of consistency between sentences served by federal offenders throughout Australia, the setting of the non-parole period was a matter of individual judicial discretion.[25]

[15] Defence counsel did not dispute any of the factual matters relied on by the prosecution. He emphasised that the applicant admitted to knowing he was importing cocaine and that he was ashamed and embarrassed. Counsel stated that when he spoke to the applicant in prison some time ago his English was very poor indeed. As his references established, he had taken positive steps to increase his English skills and he was now assisting other imprisoned Brazilian nationals with literacy and numeracy. Counsel made no reference in written or oral submissions to the applicant's scoliosis.

The judge's sentencing reasons

[16] The sentencing judge noted that the applicant was 19 at the time of the offending and had no prior criminal history. In setting out the facts, he noted the applicant's critical role in the importation of the cocaine. There was no reason to doubt SDB's statement that the applicant was to be paid $50,000. The applicant moved the cocaine internally within Brazil and brought the suitcases with him to Australia, taking them to SDB's apartment. His Honour noted that both SDB and the applicant at one point wished to pull out of the importation but could not as this required a $10,000 payment. His Honour referred to the applicant's important role in the collection, transportation within Brazil, importation into and storage in Australia of a quantity of drugs more than 800 times the prescribed marketable quantity. The offence was serious and general deterrence was important in sentencing. The judge noted that the applicant had made commendable efforts to rehabilitate whilst in prison and that his time in custody was more difficult because of language difficulties and his distance from friends and family. Those considerations could not, however, overwhelm the sentencing discretion. His Honour also noted that the applicant's guilty plea resulted in a more lenient sentence than otherwise. The judge thanked the interpreter for her assistance.

The application to adduce further evidence

[17] The applicant seeks to have this Court rely on his evidence about the offence and the sentence hearing, which he provided in an affidavit and orally at the appeal hearing.

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22 AB 83.
23 [2000] QCA 290.
24 [1998] QCA 294.
25 *R v Mokoena* [2009] 2 Qd R 351, [11] – [12].

The respondent contends the application to adduce further evidence should be refused, relying on the evidence, in an affidavit and orally by telephone, of the applicant's former solicitor, Mr Colin Greatorix.

[18] This Court will receive evidence not before the sentencing court, only where to do so would result in a different sentence being imposed than that imposed at first instance: see *R v Maniadis*.[26]

The applicant's evidence

[19] In his affidavit, the applicant claimed that the facts placed before the sentencing judge were inaccurate in that he did not travel with SDB to Florianopolis to pick up the suitcases containing the cocaine. SDB told him that cocaine was hidden in one of two suitcases he brought to the applicant's home in Sao Paulo. SDB said that the drugs could not be detected because there was only a small amount for personal use for himself, the applicant and SDB's Australian friends. The applicant never saw the cocaine before importing it and accepted what SDB told him. SDB collected him at the airport and the applicant handed him both suitcases. He accompanied SDB to his Gold Coast apartment where the applicant stayed until his arrest. He received no money and was unaware of the quantity or value of the drugs. He was not involved in removing the cocaine from the suitcases or concealing it in the vase or the safes. Prior to sentence, his lawyers visited him in prison but he could not communicate properly because of his difficulties with English; there was no interpreter at any of these conferences. The judge, he contends, sentenced him on the wrong basis, namely that he sought out SDB to become involved; he travelled to Florianopolis with SDB to pick up the suitcases containing the cocaine; and was involved in its storage in Australia so that he had a substantial role in, and knowledge of, the importation. The truth was he was a mere courier. He also deposed that, during his incarceration, his uncle, to whom he was close and for whom he was a carer in Brazil, had died and that the applicant's scoliosis has been causing him unspecified but significant difficulties.

[20] As to this last point, he sought to rely on a radiology report dated 15 January 2016 (after his sentence) which confirmed that he suffered from scoliosis with thoracic deformity. The attached medical notes referred to related ongoing back, hip and neck pain requiring regular medication.

[21] The applicant was sworn and gave the following oral evidence in cross-examination, with the assistance of the interpreter. He maintained that he did not go to Florianopolis from Sao Paulo to collect the suitcases with SDB and nor did he approach SDB to take part in this importation. He said SDB approached him, asked him to import the drugs and delivered the suitcases to the house of the applicant's mother about three weeks before the flight to Australia.[27]

[22] He agreed that, following his imprisonment, he had many conferences with his solicitor, Mr Greatorix, some by video link. He had a conference at the prison with his first barrister, Mr Lancaster, and later with the barrister who appeared at his sentencing, Mr Cole.[28] Mr Greatorix and Mr Cole came to the prison on two occasions to speak with him.[29] He also spoke with them on the morning of the sentence in the court cells. All conversations were without an interpreter. He denied telling

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26 [1997] 1 Qd R 593, 597.
27 T1-10.
28 T1-13.
29 T1-14.

Mr Greatorix and Mr Cole in June 2015 that he did not need an interpreter. He always told them he needed an interpreter because he did not fully understand. His lawyers told him that it did not matter what SDB said; this would not affect his sentence because he was pleading guilty as a "mule" or courier. As he had agreed with his lawyers that he would plead guilty on the basis that he was a courier, he did not think he needed an interpreter to discuss this further. At sentence, however, the prosecution said he was more involved than a courier. He asked his lawyers what was going on but they said nothing.[30]

[23] He ultimately accepted in cross-examination that Mr Greatorix read the prosecution's statement of facts (Exhibit 2) to him. He signed two papers in the cells on the morning of the sentencing hearing, one of which was that statement of facts. He asked his lawyers about the allegation that the imported drugs were worth $2.6 million. They told him that that was what the Crown was "giving against" him but it would not affect his case: they would tell the judge how he had rehabilitated in prison.[31] He read the statement of facts but not in detail: he saw what he thought were the important parts and signed it but must have missed the bits that were wrong. He could not remember whether his lawyers read aloud the parts he now disagreed with.

[24] During an earlier conference with Mr Lancaster, he said that his lawyers discussed SDB's statement. He asked if it would "be changed on the day" because there were things in it that were not true.[32] He asked whether he was still pleading guilty to being a "mule."[33] At this time, his English was poor and he did not fully understand. He told his lawyers it was not true that he was to get $50,000. They told him this would not affect his sentence and confirmed that he was to be sentenced as a "mule." He was not sure at first if he would plead guilty because he did not think his role in the offending was significant. He told his lawyers that the prosecution contention he was keeping the drugs here in Australia was not true. He understood that SDB was claiming that the applicant went with SDB to Florianopolis to pick up the drugs but as he did not know this was important, he did not tell his lawyers it was not true.[34] If his lawyers had told him these matters would affect his case, he would have instructed them to contest those factual matters at sentence. He prepared for his lawyers a statement of his involvement in the offence in Brazil but it was in Portuguese.[35]

[25] He agreed that he was in court when the prosecutor told the sentencing judge he and SDB drove to Florianopolis, collected two suitcases and drove back to Sao Paulo. He did not raise this with his lawyers even though this was wrong.[36] He also heard the prosecutor tell the judge that he not only imported the drugs but involved himself in their collection and transportation within Brazil and their storage in Australia, spending three days in the Gold Coast unit with the drugs. He asked the interpreter at sentence why the prosecutor was saying this. She spoke to the solicitor who said it was part of the case.[37] Although the applicant disputed these facts, he did not know what he could do; he did not know whether he could raise his hand and stop it. Although his sentence spanned the lunchtime adjournment, he had no contact with

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30 T1-15.
31 T1-17 – T1-19.
32 T1-19.
33 T1-20.
34 T1-23.
35 T1-25.
36 T1-25.
37 T1-26.

his lawyers over lunch.[38] He did not tell them that something needed to be changed because he trusted that his barrister would put his case that he was just a courier.[39] His lawyers always said they were going to tell his story.

[26] As to his scoliosis, he stated that there was an intricate operation available to assist him but, as he was not an Australian citizen, it was unclear whether he would be able to have the procedure.

The evidence of the applicant's solicitor

[27] The applicant's solicitor, Mr Greatorix, deposed to the following. He acted for the applicant at sentence. The applicant understood English and the factual basis for his sentence. He held videoconferences with him on 28 January, 27 February, 8 and 14 May and 16 July 2014. On 14 October 2014 he met with him at the prison, together with his barrister, Mr Lancaster. He had further video conferences with the applicant on 11 September 2014 and 11 February 2015. On 17 June 2015 he and barrister, David Cole conferred with the applicant at the prison. They asked if he needed an interpreter but he said he did not and Mr Greatorix did not consider there was any indication for an interpreter. They had a further video conference on 27 July 2015. On 26 August 2015 he and Mr Cole conferred with the applicant at the prison. They next conferred on the morning of the sentence. He showed the prosecution's final statement of facts (Exhibit 2) to the applicant who took "a reasonable amount of time to read" it. He confirmed he understood it and signed the bottom right-hand corner of each page. Although there was an interpreter at sentence, this was to assist the judge in case he wanted to clarify foreign documents. The applicant's English comprehension had improved dramatically since his first contact with Mr Greatorix.

[28] Mr Greatorix gave oral evidence by telephone in this Court. The applicant suggested to him, through an interpreter and sometimes with the Court's assistance, that when the prosecutor stated that the applicant was involved in the storage of drugs once they arrived in Australia, he spoke to Mr Greatorix through the interpreter, querying what was being said. Mr Greatorix told him not to worry as the defence would have its turn soon. Mr Greatorix had no recollection of that incident.[40]

[29] Mr Greatorix explained that he did not have the applicant's file with him. All he could recall was in his affidavit and he could not further elaborate.[41] He agreed that when he first spoke to the applicant, he could not speak English and Mr Greatorix endeavoured to get an interpreter, apparently unsuccessfully. Over time, the applicant's English improved. When Mr Lancaster first met with him he had quite a grasp of English and understood exactly what was being said. On a number of occasions his lawyers asked if he was "cognisant of the material being placed before" him and he responded that he was "quite comfortable with it." Mr Greatorix believed the applicant had a full and comprehensive knowledge of what was being put to and before him during conferences.[42] Mr Greatorix agreed that, on the morning of the sentence when shown the statement of facts, the applicant went through it quite quickly and signed it. Mr Greatorix's distinct recollection was that Mr Cole went through the statement very carefully, very slowly and explained it. He could not recall how quickly the

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38 T1-27.
39 T1-26.
40 T1-33.
41 T1-34.
42 T1-35.

applicant read the statement before handing it back, but the lawyers took great pains to ensure he was fully informed of its contents.[43] Mr Cole read its entire contents to him. As Mr Greatorix did not have access to the applicant's file, he could not recall whether he or Mr Lancaster took a complete statement of fact from the applicant about his involvement in the offence.[44]

The competing contentions in these applications

[30] In essence, the applicant submitted that this Court should accept his evidence that he was a courier and not as involved in the offending as the statement of facts (Exhibit 2) alleged. He submitted that his English language difficulties, before and at sentence, meant that there was a partial breakdown in communication with his lawyers so that the sentencing court was not informed of his true role in the offending. His poor English language skills were documented in his case notes tendered at sentence which indicated that in 2014 he spoke very little English.[45] He placed emphasis on *R v Agboti*,[46] which he submitted was a more serious case, where a sentence of nine and a half years imprisonment with parole eligibility after four and a half years was imposed, as well as *Alvarez*, and contended he should receive a more lenient sentence than that imposed.

[31] The respondent contended that the applicant's evidence should not be received as it would not make any significant difference to his sentence. Even on the applicant's version, he had the suitcases in his possession for about three weeks before he imported the drugs into Australia and he unquestionably stayed for some time in the Gold Coast unit where they were stored. The prosecution case was not that he received $50,000, but that he had an expectation of receiving it. His medical condition of scoliosis was referred to in the tendered material from his mother before the primary judge. His new evidence about scoliosis did not state that it would make his time in prison more difficult than otherwise. *Alvarez* was a less serious case than this and the offender in *Agboti* had more compelling mitigating circumstances. The respondent contended the application to adduce further evidence should be refused. The sentence, the respondent contended, is not manifestly excessive; the application for leave to appeal against sentence should be dismissed.

Conclusion

[32] The applicant's contention that he thought he was bringing in a modest quantity of drugs for the use only of SDB, the applicant, and SDB's Australian friends, seems unlikely, given that, even on his version, he was bringing in two substantial suitcases provided by SDB. And even on his version, his role in the importation warranted a stern penalty by way of general deterrence, involving a substantial period of imprisonment.

[33] That said, after considering the further evidence placed before this Court, both from the applicant and Mr Greatorix, I am satisfied that the applicant, because of language difficulties in communicating with his lawyers, did not appreciate the significance of some important factual matters placed before the sentencing judge. Had he done so, he would have contested those matters. The judge particularly referred in his sentencing reasons to the fact that, according to SDB, the applicant was to be paid $50,000 for his role and moved the cocaine internally within Brazil. The judge also found that the applicant took the suitcases to SDB's Gold Coast apartment after

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43 T1-36.
44 T1-37.
45 Exhibit 5, AB 76 and AB 79.
46 [2014] QCA 280.

importing the drugs. It can be inferred that his Honour accepted the prosecution submission that the applicant was more than a courier. The applicant strongly denies those matters and maintains he was no more than a courier. His lawyers did not provide this Court with any statement of facts taken from him by way of instructions, covering highly relevant matters such as his role in Brazil before the importation and at the Gold Coast after the importation.

[34] The applicant's poor English skills are confirmed by the case notes tendered at sentence. Although he made commendable progress with English after his arrest and imprisonment, it was clear from his evidence in this Court that he is still prone to accept things said to him before he has a complete comprehension of them, resulting in later confusion. He was a young man, with limited English, far from his home and family, who was likely to be sentenced to a lengthy term of imprisonment. It was incumbent on his lawyers to carefully take instructions as to his role in the offending and to explain to him of and how that differed from the prosecution case, with the assistance of a competent Portuguese interpreter. This did not happen. Nor did his lawyers directly inform the Court of his significant physical disability arising from scoliosis. They did not provide any medical report to support his mother's claims or investigate how the scoliosis might impact on his time in prison.

[35] Had the judge accepted the applicant's version of the offending which he gave to this Court, that he was not to receive $50,000 as a reward, was recruited by SDB who brought the suitcases to him with the drugs already secreted, that he thought he was bringing in a modest quantity of drugs, that he had nothing to do with the drugs after handing the suitcases to SDB at the airport, and that he was suffering from a serious physical disability which could be expected to make his time in custody more difficult, he would have been sentenced to a slightly lesser term of imprisonment. Some aspects of the applicant's version receive support from the prosecution's statement of facts, namely that SDB flew to Brazil in October 2013, presumably to arrange the importation, and the applicant's DNA and fingerprints, unlike those of SDB and Muniz, were not found on the cocaine packaging or suitcase lining.

[36] There is a real prospect that there has been a miscarriage of justice in that the applicant has been denied an opportunity to put his version of the offending before the sentencing court because of his difficulty in effectively communicating in English with his lawyers. The matter should be remitted to the Trial Division so that these issues can be fully explored at a new sentence hearing. I would grant the application for leave to appeal, allow the appeal against sentence, set aside the sentence imposed at first instance and remit the matter to the Trial Division for resentencing.

Orders

1. The application to adduce evidence is granted.
2. The application for leave to appeal against sentence is granted.
3. The appeal against sentence is allowed.
4. The sentence imposed is set aside and the matter is remitted to the Trial Division for sentence.

[37] **FRASER JA:** I have had the advantage of reading the reasons for judgment of Margaret McMurdo P. I agree with those reasons and with the orders proposed by her Honour.

[38] **DOUGLAS J:** I agree with the reasons of and the orders proposed by the President.