Neutral Citation Number: [2022] CA (Bda) Crim 5

Case No: Crim/2021/6

IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM THE SUPREME COURT OF BERMUDA SITTING IN ITS ORIGINAL CRIMINAL JURISDICTION
THE HON. MR. JUSTICE GREAVES
CASE NUMBER 2017: No. 042

Sessions House
Hamilton, Bermuda HM 12

Date: 18 March 2022

Before:

THE PRESIDENT, SIR CHRISTOPHER CLARKE
JUSTICE OF APPEAL GEOFFREY BELL
JUSTICE OF APPEAL DAME ELIZABETH GLOSTER

- -

Between:

JOSEF VLCEK

Applicant

- v -

THE QUEEN

Respondent

Ms Aura-Lee Cassidy (Kairos Philanthropy) for the Applicant
Ms Cindy Clarke (Director for Public Prosecutions) for the Respondent

Hearing date: 3 March 2022

- -

JUDGMENT

BELL JA:

Introduction

1. Josef Vlcek ("Vlcek") arrived in Bermuda on 23 September 2017 on board a commercial flight from London. He is a Czech national whose first language is Czech. However he has travelled to different parts of the world, and in so doing has gained some proficiency in a number of different languages, one of which is English. At different times since his arrival and arrest he has described his proficiency in English as being 75% (to the customs officers at the airport), 70% (in his police interview) and 75% (in his evidence, in cross-examination). This level of proficiency was gained when he spent some four years or so in London, both as a student and working, some years previously. But it has to be acknowledged that many of his statements, particularly in his police interview, gave rise to further questions which remain unanswered. And some of his comments, whether made to the police or to counsel cross-examining him, are hard to fathom. Whether the reason for this was his lack of proficiency in English is in my view doubtful.

2. On arrival in Bermuda, Vlcek collected the two bags which he had checked prior to his departure from London. As he sought to exit via the "green line" at the airport (for those passengers with nothing to declare), he was spoken to by a customs officer, at approximately 7.02pm. He was first asked whether he was a resident or visitor, to which he replied "visitor". He was then asked where he was staying, to which he responded "Clearview", and what type of work he did, to which he answered "artist". When he was asked when he had booked his room, he answered "yesterday". He was then asked when he had booked his ticket, to which he replied "Oh, ah, ah… Not sure. Yesterday".

3. At this point the customs officer concluded that Vlcek required further examination, and he was invited to and did follow the customs officer to a different part of the airport complex. Vlcek was then questioned by a different customs officer, who started by asking him the same type of questions as had been put to him by the first officer. In response he said that the purpose of his trip was "holidays", and said that he was staying for ten days. He said he would be staying at the Clearview Guest House, that the two bags were his only bags and that he was not bringing with him anything that would be staying in Bermuda. In response to the same question as asked previously about his line of work, he said that he was "a free artist". He gave the same answers as previously to questions as to when he had booked his hotel and airline flight, and again answered "yesterday". In the case of the timing of the flight booking, it was subsequently established that this was not true.

4. It was at this point that the customs officer removed the contents of the two bags, one of which was larger than the other. He unzipped the lining on the inside and at this point noticed a bulge along the outside of the bag. He called over another customs officer, who pulled apart the lining, at which point carbon paper was visible, and it was at this point that the officers cautioned Vlcek, telling him in the usual form of words that he was not obliged to say anything, but that whatever he did say would be written down and might be given in evidence. Vlcek confirmed to them that he understood what he had been told. This was at about 7.08pm, and the customs officer packed up the bag and escorted Vlcek to the search room, with the other officer.

5. At about 7.15pm, the officer asked Vlcek if he understood the caution which had been given to him earlier, and it was at this point that Vlcek responded that he understood about 75% of it. It is to be noted that all of the previous verbal exchanges had taken place in English, and Vlcek had not indicated at any point that he had any difficulty conversing in that language.

6. The customs officer then cautioned Vlcek again, telling him that he did not need to say anything about the contents of his bag, at which point Vlcek asked "What's wrong with my bag? When we were outside? I think it was some problem", to which the customs officer responded "It's definitely a problem".

7. The nature of the problem soon became apparent to Vlcek, when the suitcases were opened by the customs officers at the airport, to reveal a package in each bag containing a brown powder. But to put matters in context, some further background is needed. When Vlcek was first interviewed by the Bermuda police, on 25 September 2017, he said that he had bought the two suitcases at a market near Walthamstow, East London. They were not new, and although he thought he was buying one suitcase, he found when he opened it that there was a smaller one inside. In his evidence at trial, Vlcek gave a completely different account of how he had come into possession of the two suitcases.

8. But there is another aspect of his evidence which may or may not help in understanding Vlcek's comments when the suitcases were opened at the airport. He confirmed in his police interview that when the suitcases were opened, and the packages were discovered, he had said "If it's gold it's mine, and if it's drugs it's not mine", which he said was intended as a joke (page 226 of the Record of Appeal). He maintained that he did not know what was in the packages, but made reference to both gold and diamonds as being the contents, and this possibility had its origins in what he told the police (and this was repeated in his evidence) in relation to a trip, of relatively short duration which he had made to South Africa a short time before his journey to Bermuda. In fact, he had told the police that the problem arose because someone had found in his case "some diamonds and some gold and some drugs" (page 199 of the Record).

9. During the police interview, Vlcek declined to say how he had paid for his ticket to Bermuda, save to say that someone he knew "just a little" had helped him with the cost of the fare. When asked to describe the man who had bought the ticket for him, Vlcek said that he thought it better not to say anything, following a reminder from the lawyer who was present on his behalf that he did not need to say anything. And when he was asked about his trip to South Africa, which was some ten days or so before the trip to Bermuda, Vlcek again declined to comment (page 206 of the Record). He did say that he had stayed there for about a week, during which time he had stayed in his hotel.

10. However, at trial, Vlcek said much more about his trip to South Africa. The starting point was that he had met two men in a pub in London. Among other things, they had talked about art and travel, and he said they had offered him financial support with the promise of help for an exhibition of his art. Two days or so after that meeting he had met one of them again, this time with a different person, and he had then arranged to meet them in a different pub, and this time he was asked if he could help them, by bringing gold and diamonds from Johannesburg to London. In relation to the cost of the trip, Vlcek would pay part of the costs, and they would pay the rest. In total he said he met these people at least five times.

11. During his evidence in chief he was shown the relevant pages of his passport, which confirmed that he had arrived in Johannesburg on 6 September 2017, and had left on 13 September, so ten days or so before his trip to Bermuda. He described how on arrival, someone at the airport held up a card with his name on it, and he was taken to a hotel, though he subsequently moved hotels "once or twice". But before his departure back to London the people brought him "some packages". He described one as being heavy, and the other as "something like glass, like diamonds", itself a strange statement because he said that he did not see the inside of the packages, and he described them as cubes of waxed red paper. He duly returned to London, and went to the place where he used to stay, and one of the men whom he had previously dealt with came and collected the packages. One of them visited him the following day, and as well as talking about art and exhibitions, he was told that they would have another trip for him, to Bermuda.

12. For some reason Vlcek was uneasy about this trip, which he was told would involve taking gold and diamonds to Bermuda. He said he was persuaded by means of an interview, which took place on a tablet, with someone from the Bermuda government, who was something to do with sport. Vlcek described the man as looking trustworthy. In any event, he was persuaded, and agreed to the trip, which he said they paid for. In fact, his ticket to Bermuda had been paid for while he was in South Africa. The people he was dealing with brought him the suitcases which he took to Bermuda, and although he expected them to contain gold and diamonds, when he looked inside, they contained nothing. As to the gold and diamonds, he said he was told that they would bring those "at the right time". But in fact nothing further was delivered to him before his flight.

13. So this appears to be the basis of Vlcek's various statements that he expected at some stage to see gold and diamonds in the suitcases, bizarre though his version of events may appear.

14. In the event, the customs officers who opened the lining of both suitcases discovered packages with silver and blue wrappings containing brown powder, which when tested was found to be diamorphine, with a total weight of 2964.8 grams. I will hereafter refer to the drug by its more commonly used name of heroin, except where referring to the indictment, which uses the word diamorphine. This figure represents the total weight of the two packages, and the police expert, DS Bhagwan, who gave evidence at trial as an expert in drug related matters, said that the purity of the drug following analysis was just under 50%. He also testified that heroin is sold locally in "decks" comprising 3 milligrams of heroin, at a cost of $20 per deck. If sold this way, the total street value of the heroin contained in the two suitcases would have been approximately $9,550,200.

15. Vlcek's evidence at trial was that he had been told by the men who supplied him with the suitcases that taking gold and diamonds into Bermuda was legal, that he did not know that there were illegal drugs in the suitcases, and that the discovery of drugs in the suitcases was a big surprise to him.

16. There were other statements made by Vlcek in his police interview which were the subject of probing in cross-examination. He said that he had come to Bermuda intending to stay for ten days, and said that the cost of staying at the Clearview Guest House would, he thought, be $100 per day. Yet he had only $600 with him. He said that it was his plan to find some job, as he had always been able to do elsewhere. He professed ignorance as to the need for a work permit. He also said

that he planned to paint and sell his artwork, as he had also done previously, but he had no paintbrushes or canvas, and while he referred to taking photographs, he had no camera with him.

17. At the conclusion of his trial the jury deliberated for approximately three hours before returning unanimous guilty verdicts on 11 March 2019, on the charges in the indictment, of importing diamorphine into Bermuda, and being in possession of the same with intent to supply. On 13 March 2019 he was sentenced to thirty years' imprisonment on each count, to run concurrently.

This appeal

18. Vlcek did not make a timely appeal against either conviction or sentence, though he said that he had given the necessary papers to the prison officers, but they had not been acted upon. His former attorney Susan Mulligan set out the circumstances under which she had advised Vlcek to file the notice of appeal even though he no longer wished to have her represent him, something which she said he had agreed to. In the end those aspects of the case are academic, because this court granted an enlargement of time within which to appeal, and leave to amend the grounds of appeal previously filed, to those filed by Ms Cassidy. However, leave to appeal against both conviction and sentence remains to be argued. I therefore now turn to the grounds of appeal.

The first ground of appeal

19. This first ground complained that the trial was unfair because Vlcek had not had sufficient time and facilities to instruct counsel, and started with a complaint that there had been no proper assessment regarding Vlcek's comprehension and capabilities in the English language. The immediate answer to this complaint comes from his own statements, to the customs officers, to the police and in his evidence at trial which gave his proficiency in English at 70 or 75%. To this can be added the fact that he had at one stage lived in England for four years, and that he thought nothing of travelling to countries such as South Africa and Tanzania where English was the main language spoken. But the most compelling answer can be found in the police interview. The transcript of this runs to some 33 pages, and is of course in English. All members of the court have watched the video of the interview with the transcript to hand, and were satisfied that the transcript was entirely accurate. Indeed Ms Cassidy accepted as much, although she complained about the manner in which the interpreter present had performed his duties, something which could not be substantiated because those parts of the interview which took place in the Czech language between Vlcek and the interpreter were not translated or recorded in any way. The interview took place with two police officers present, Vlcek, and Sarah Tucker, a lawyer, who said at the outset of the interview that she was present at Vlcek's request to provide legal advice if he needed it. Also present was a local veterinarian, Dr Heinz, who was a Czech national who had agreed to act as interpreter.

20. As is clear from the video of the interview, the police interviewers asked Vlcek questions in English, to which he responded in English. It was not until well into the interview that Vlcek first felt the need to converse with Dr Heinz in Czech. And at the start of the interview, Vlcek was told that his legal rights were ongoing throughout the entire process, by which was meant that he could stop and speak to his lawyer in confidence at any time. He was told that he was still under caution, and when asked if he understood what was said, he answered affirmatively.

21. And in relation to the time needed to instruct counsel, it should not be forgotten that Ms Mulligan, who represented Vlcek at trial, was the third senior defence attorney whom Vlcek had instructed. Such changes of attorney inevitably mean that time is lost, indeed wasted. But neither should one lose sight of the fact that the trial turned on a relatively narrow issue; whether Vlcek knew that the suitcases he brought into Bermuda contained heroin. And on this question, the manner in which he had acquired the suitcases was very much a key issue. Ms Cassidy's submissions suggested that Vlcek had not been afforded sufficient time to prepare his defence, which of course begs the question as to what his defence actually was. But Vlcek did in fact set out his defence when he gave his version of events to the police in his interview on 25 September, as to how the two suitcases had been acquired. That was the defence which he put forward at the first opportunity he had. And when he admitted in his evidence that this version of events was a fabrication, any defence which he may have had which differed from that which he had first said was always in danger of being rejected by the jury. And while Ms Cassidy relied upon the authority of *Adamopolous v Olympic Airways* [1991] 25 NSWLR 75, in support of this complaint, that was a case where the assistance of an interpreter had been refused. Vlcek had the assistance of an interpreter throughout the trial, and beforehand to assist counsel. Ms Mulligan had spent 2.5 hours with Vlcek and an interpreter on 28 February 2019, 4.5 hours on 1 March, and 30 minutes before the start of the trial on 4 March. His proof of evidence was finalised and signed by him at court on 6 March 2019. And while a complaint was made that the trial judge had said that Vlcek did not need to understand the ruling he gave on the admissibility of the police interview, that mis-states what the judge said, which was that there did not need to be a contemporaneous translation of the ruling.

22. It follows from what is set out above that I would reject this ground of appeal. There was nothing unfair in the trial process by reason of Vlcek's lack of complete facility in the English language. He had no difficulty giving the original version of events in his police interview, and no doubt was capable of informing counsel of the different version which he later gave at trial with the assistance of an interpreter. That much is clear from the transcript of the police interview. And neither can it be said that there was insufficient time to instruct counsel. Indeed, ignoring the changes of counsel to which I have referred, Ms Mulligan had more than sufficient time to take instructions on what was a relatively straightforward issue; how Vlcek came to be in possession of the two suitcases. And in this regard he chose to tell one version to the police shortly after his arrest, and a completely different one at trial, with the inevitable consequence, damaging to his defence, that he was bound to admit that one of those versions, the first, was a fabrication.

The second ground of appeal

23. The second ground of appeal concerns the record of the police interview, where it is said that the judge erred in law in admitting this. The arguments made to the judge were replete with inaccuracies, such as that Vlcek was not properly advised of his right to counsel (counsel was present); that he was not properly cautioned in a language he understood (Vlcek said in terms that he understood the caution); that he had no meaningful legal advice before the interview (he was told that he could stop at any time and consult with his lawyer, something that he acknowledged); that substantial portions of the interview were not interpreted properly or at all (Ms Cassidy expressly accepted that the transcript of what was said in English was accurate, and there is no

basis for saying that the exchanges in the Czech language between Vlcek and Dr Heinz were inaccurately translated, since those were neither translated nor transcribed); and, lastly, that there was no evidence before the court that Vlcek did not understand what was being said by the interpreter, a matter of which Ms Cassidy did not make complaint before us.

24. The reality is that Vlcek demonstrated a good command of the English language during the police interview. Ms Cassidy complained that Dr Heinz was giving Vlcek advice, specifically in relation to his right to stay silent. This was something which was made clear at the start of the interview, but more to the point, was a right which Vlcek exercised on a number of occasions. The notion that every question and answer needed to be translated into Czech before Vlcek responded in Czech ignores his facility to understand questions put to him in English and his ability to respond in English, which he demonstrated throughout the interview. And it is clear that on those occasions when Vlcek did decline to answer a question, it was not because he did not understand the question, but because, as in the first occasion when he declined to answer a question, he did not want to involve his "friends" in his problems, or get anyone else involved.

25. As the judge said, the interview was filled with exchanges from which only one inference could be drawn, namely that Vlcek clearly understood English, both spoken to him and by him, and the interpreter played a minimal role. The judge was satisfied that the interview was conducted fairly, and that Vlcek properly understood it and properly responded. I agree completely, and would reject this ground of appeal.

The third ground of appeal

26. This complaint is that the judge was biased to such extent that the fair-minded and informed observer would so conclude, applying the test set out in *Porter v Magill* [2002] 2AC 357. But in truth the complaints in this regard were not directed primarily at the judge but rather at the conduct of Crown counsel, which it was said that the judge should have controlled. It is true that Crown counsel did make comments and interrupt Ms Mulligan, but equally the case that the judge did remonstrate, with both counsel. And while he was said to have shouted at Ms Mulligan, this followed an instance where she had interrupted with an answer which Vlcek had then given in identical terms to the words used by Ms Mulligan, which understandably aroused the judge's ire. Ms Cassidy relied upon the case of *Boucher v R* [1955] SCR 16, but the complaint in that case was that Crown counsel had expressed a personal view of the defendant's guilt.

27. Ms Cassidy also complained that the judge should have instructed the jury that the use of an interpreter was a fundamental right. In fact, he did so, in clear and unequivocal terms – see page 41 of the Record. There is nothing to these complaints, and I would reject them.

The fourth ground of appeal

28. The fourth ground is that the judge failed to give a good character direction. This complaint might seem attractive at first blush, but does not stand up to scrutiny. As Ms Clarke for the Crown pointed out, the best that could be said was that Vlcek was entitled to a modified good character direction, because he had lied in his police interview, and admitted as much in his evidence. This was in relation to the critical issue of how Vlcek came to be in possession of the two suitcases in which

the illegal drugs were hidden. So this was not some minor slip, and the reason given by Vlcek for having lied to the police was first given in his evidence in chief when he said that he did not know that he had the right to remain silent. That itself is clearly not true, and it is ironic that part of Ms Cassidy's criticism of the veterinarian interpreter was that he was giving Vlcek exactly that advice. And while Vlcek also said that he was short of breath at the police station, in shock and unable to breathe, the video does not bear that out. His demeanour was calm, as was his speech. Similarly, his statement to the customs officers that he had bought his ticket the day before travelling was untrue, and as Ms Clarke pointed out, Vlcek's own evidence was that he had smuggled gold and diamonds from Johannesburg to London. So the modifications would have needed to be significant.

29. Quite apart from those matters, the judge at the end of his summation, after the jury had retired, had asked counsel if there was anything that needed to be addressed, and nothing was raised. In *Teeluck v The State* [2005] UKPC 14, which is binding on this court, Lord Carswell set out the principles material to the issue (paragraph 33). He said that the defendant's good character must be distinctly raised, adding that it is a necessary part of counsel's duty to ensure that a good character direction is obtained where the defendant is entitled to it and likely to benefit from it. And he closed by saying … "The duty of raising the issue is to be discharged by the defence, not by the judge, and if it is not raised by the defence the judge is under no duty to raise it himself : *Thompson v The Queen* [1998] AC 811."

30. Accordingly I would reject this ground of appeal.

The fifth ground of appeal

31. This ground is close to the third ground of appeal, insofar as complaint is made that the judge mocked Vlcek's case and bolstered that of the Crown. The problem for Ms Cassidy was that she was unable to point to any part of the transcript where the complaint was made out, despite being given the lunch adjournment to review it. She made complaint concerning the mixed statement direction given by the judge as part of his summation, appearing at pages 53 and 54 of the Record. But there was nothing in the judge's directions which seemed to us exceptionable, and while Ms Cassidy maintained that the direction should have been given more clearly, she was unable to say how that might have been possible. So it follows that I would reject that ground of appeal.

Conclusion on appeal against conviction

32. Given the findings in relation to all grounds of appeal covered above, I would refuse the application for leave to appeal against conviction.

Sentence

33. Before dealing with the authorities, I should refer to Ms Cassidy's submissions. She suggested that the starting point was a sentence of 12 to 15 years, which with the statutory uplift would give a total sentence of 18 to 22.5 years. But she also referred to Vlcek's personal circumstances, and the fact that he would not be able to secure a release on licence by reason of being a foreign national.

Ms Cassidy suggested that the relevant sentence should be reduced by two thirds to take into account the position regarding eligibility for parole.

34. In reply to this submission, Ms Clarke directed the court to the case of *Cashman v The Parole Board and the Minister of Labour Home Affairs and Public Safety* [2010] SC Bda 36 Civ (9 July 2010), a judgment of Kawaley J (as he then was), where a foreign national sentenced to a substantial period of imprisonment for drug importation had sought judicial review, seeking first to quash the decision of the Parole Board refusing him parole, secondly, for an order compelling the Parole Board to determine that he was eligible for release on parole, and thirdly, for a declaration that the Parole Board had a discretion to decide whether foreign prisoners could be released on parole notwithstanding the absence of any reciprocal agreement between Bermuda and the prisoner's country of origin. Kawaley J held that the principal issue falling for determination was the legality of the Parole Board's view that section 12 of the Prisons Act 1979 did not empower it to grant parole to foreign prisoners in their country of origin. And in this regard he preferred the arguments for the Parole Board and the Minister, and refused relief. The case does not trespass into the territory of the sentencing judge, and there does not appear to be any authority for the proposition that the difficulty of a foreign national in obtaining parole should be taken into account in the sentencing process.

35. The only route to relief from the hardship of being a foreign national in the context of parole and release on licence in Bermuda is, Ms Clarke submitted, through an application made pursuant to section 15 of the Bermuda Constitution on the ground that the different treatment between a foreign and a Bermudian national infringes section 12(1) or (2) of the Constitution. And she maintained that this would be a route open to Vlcek in due course, as Kawaley J had indicated in *Cashman*. Interestingly, she advised the court that Zegelis (as to whom see paragraph 38 below) had been repatriated to Latvia using this route. Ms Clarke submitted that there were no criminal cases where the potential difficulty in securing parole had been taken into account as a ground for a reduction in sentence. That does not surprise me, and I reject the notion that a foreign national should be entitled to any reduction in sentence by virtue of his nationality. The sentencing function and the role of the Parole Board are two entirely separate functions, and should be so regarded.

36. Ms Cassidy also submitted that Vlcek suffered a detrimental effect in prison because of the language barrier, and said that he was unable to communicate his needs in relation to matters such as medical and dental care to the prison authorities. I unhesitatingly reject that submission. Vlcek had referred in his police interview to the fact that he needed dental treatment and had an appointment scheduled for his return. Anyone watching the video and reading the transcript would be left in no doubt that Vlcek was well able to communicate with the prison authorities on his need for a dental appointment. In regard to the relevant case law, Ms Cassidy relied upon *R v Omar Davy*, indictment # 27 of 2018, which is referred to below.

37. I now turn to the reasoning given by the judge for imposing what amounts to the heaviest sentence for unlawful drug importation in this jurisdiction. The reason for that, according to the judge, rested on the fact that this was the largest importation of heroin effected into Bermuda. He went carefully through the recent cases of importation of heroin, comparing the quantity of the drug imported and the sentence in a number of cases, identifying whether there had been a trial or a guilty plea. He identified three cases of importation of heroin where the quantity imported, and the consequent

sentence, was substantial. In *Smith v R* [2005] Bda LR 13, where the quantity was 339.6 grams, there was a guilty plea, and the sentence was 14 years' imprisonment. The value of the drugs was $1.83 million. In *Mitchai*, indictment #21 of 2002, the quantity was 575.3 grams, the street value was $2.675 million, and the sentence was 18 years. It is not clear from the submissions whether this was following a trial. Finally, in the case of *Davy*, on which Ms Cassidy relied, the quantity was 220.88 grams with a street value of $765,000, and after trial the sentence was 18 years. The Court of Appeal rejected an appeal against sentence in that case.

38. But the case to which the judge paid the most attention was *R v Zegelis* [2014] Bda LR 28, where the defendant imported 164.13 kilograms of cocaine, and after trial received a sentence of 25 years' imprisonment. The street value of those drugs was put by the Court of Appeal at between $17 and $48 million, dependent on how the drugs were marketed. As the judge pointed out, the *Zegelis* case represented the high water mark in terms of sentence for the importation of cocaine, and the judge thought it fitting that the importation of the greatest quantity in terms of value of cocaine should attract the highest ever sentence for the importation of that drug. He carried on to say that it was arguable that the importation of the highest volume and value of heroin should similarly attract the highest sentence recorded so far. The judge rejected the submission that because there was no distinction between heroin and cocaine drawn in the scheduling to the Misuse of Drugs Act, the two ought not to receive different sentences, pointing out that the sentences for heroin in this jurisdiction have always been greater than for cocaine.

39. I confess that, for my part, I was surprised to learn that the total weight of just under 3 kilograms was the greatest weight of heroin importation into Bermuda. But I do not think that the value of the drug can be completely discounted. In *Zegelis*, a very large quantity of cocaine (more than fifty times the weight of the heroin in this case) was imported on a boat. There could have been no question of the sailor of that boat being ignorant of the existence of the drugs in the boat. In fact, it was said at one stage that the importer's boat had met another boat by arrangement when the drugs had been transferred from one boat to the other, though that became an issue at trial. But at the same time, the sailor of that boat was originally sailing to Latvia, and it was only because of a storm and consequent damage to his boat that he ended up in Bermuda.

40. It does seem to me that the various factors in this case and the *Zegelis* case do tend to cancel each other out, particularly given the huge disparity in weight and value, as against the difference between heroin and cocaine. And I also take into account that the *Zegelis* importation could be said to have been happenstance, whereas Vlcek fitted into the category of the traditional drug mule. I have also read carefully the reasons for sentence given by a very experienced judge, and it is hard to disagree with anything he says about the significant difference between heroin and cocaine in terms of the former's addictive and destructive nature. But it does not seem right to me that the defendant in this case should receive a higher sentence than that given in the case of *Zegelis*.

41. In these circumstance, I would regard 25 years as the appropriate sentence in this case, and would therefore grant leave to appeal against sentence and allow a variation of sentence from 30 years' imprisonment to one of 25 years. I recognise that the existence of the statutory uplift produces a rather strange preliminary number, but in making her submissions, Ms Mulligan had suggested that the maximum sentence should be twenty years, which requires a sentence of 13.333 years to

reach the end result of 20 years with the uplift. And notwithstanding the need to apply the statutory uplift, sentencing judges invariably keep in mind the effect of the uplift on the starting point.

GLOSTER JA:

42. I agree.

CLARKE P:

43. I also agree.