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| IN THE COUNTY COURT OF VICTORIA  AT GEELONG  CRIMINAL DIVISION | ANONYMISED AND ADAPTED FOR EDUCATIONAL PURPOSES |

Case No. CR-ZZ-GAXT

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| COMMONWEALTH DIRECTOR OF PUBLIC PROSECUTIONS |  |
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| v |  |
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| ARMAND CERNAGOJ (A PSEUDONYM) |  |

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| JUDGE: | Her Honour Judge Hampel | |
| WHERE HELD: | Geelong | |
| DATE OF HEARING: | 3 June 2017 | |
| DATE OF SENTENCE: | 30 June 2017 | |
| CASE MAY BE CITED AS: | CDPP v Cernagoj | |
| MEDIUM NEUTRAL CITATION: | [2017] VCC MNM |  |

**REASONS FOR** **SENTENCE**

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Subject:

Catchwords:

Legislation Cited:

Cases Cited:

Sentence:

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| APPEARANCES: | Counsel | Solicitors |
| For the DPP | Ms M. Obama | Commonwealth Director of Public Prosecutions |
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| For the Accused | Ms C. Swan | Hooper Lawyers |

HER HONOUR:

# The interception of packages containing methamphetamine, amphetamine and MDMA, ordered through the darkweb site Silk Road, which had been posted to two addresses in Manifold Heights and Rippleside between June 2013 and February 2014, have led to you, Armand Cernagoj,[[1]](#footnote-1) pleading guilty to two rolled-up charges of importation of a marketable quantity of border controlled drugs. The police investigation conducted as a result of the interception of the parcels also led to you pleading guilty to one charge of trafficking in a drug of dependence between May and November 2012.

# I have already sentenced a co-offender, Dejan Ciceli,[[2]](#footnote-2) who agreed to allow you to direct the delivery of parcels of drugs ordered through Silk Road to his home address on a related charge.

# The circumstances of the offending to which you have pleaded guilty are these. Shortly after meeting a man by the name of Mitjan Kitek[[3]](#footnote-3) in April or May 2012, you offered to sell him ice and he became a regular customer. Between May and November 2012, you sold him a point of ice on about ten or 20 separate occasions. He paid you $100 for each supply. This forms the basis of Charge 1, trafficking.

# During the time that you were supplying ice to Mr Kitek, you told him that you were looking to import drugs from overseas and having them posted to you. You told him that you were doing so, based on advice obtained through the Silk Road website, by having the parcels addressed to names other than yours and preferably to addresses other than yours. You asked Mr Kitek if he was prepared to lend his name and address, that is, to act as a post box for the receipt of drugs ordered by you through Silk Road. He declined.

# Despite Mr Kitek’s refusal to participate in the scheme, between 4 June 2013 and 5 February 2014, four parcels of drugs were intercepted by Customs, which were addressed to Mr Kitek at your home address. The first of those parcels contained a single tablet, 0.1 grams of MDMA. The other parcels contained greater quantities. One parcel contained a DVD cover, in which there was a bag containing 5.5 grams of crystal, which yielded 4.1 grams of pure MDMA. The other two parcels were envelopes, one containing 4.7 grams of powder, which yielded 3 grams of amphetamine, and the other an envelope containing 8.3 grams of paste, with a very low yield, only 0.4 grams of pure amphetamine. It is this that gives rise to Charge 2, the first charge of importing a marketable quantity of border controlled drugs.

# From 3 September 2013 until 19 January 2014, that is, commencing whilst you were still having parcels directed to Mr Kitek to your home address, you also directed parcels containing drugs ordered from the Silk Road website to be delivered to the address of Dejan Ciceli. Some of those parcels were addressed to Mr Ciceli, others to the former owner of his house.

# Although there is no charge relating to this, the evidence before me reveals that you were also Mr Ciceli’s drug dealer. You were also supplying him with ice and it is apparently through that relationship that the sending of the parcels to his address occurred.

# The first of the parcels that went to Mr Ciceli’s address was directed to the former owner of his home and it was intercepted by Customs on 3 September 2013. It contained a packet of earphones and 19 green tablets containing 7.8 grams, or 2.9 grams pure of MDMA. There is no evidence on the material before me that Mr Ciceli was aware of this particular importation.

# However shortly after, on 19 September 2013, you engaged Mr Ciceli in a scheme where parcels were directed, either to him or to the former owner of his house, at his home address. They were to be collected by him and passed on to you. You paid him in kind, a point of ice worth $100 for each successful delivery. Between 19 September 2013 and 19 January 2014, whilst this agreement was still on foot, two parcels were delivered to Mr Ciceli’s address and passed on to you by him. As these two parcels were not intercepted, whilst it can be inferred that they contained drugs, there is no evidence as to the type of drug or quantity.

# A further five parcels addressed to Mr Ciceli’s home address were intercepted. Three of the five intercepted parcels contained envelopes in which MDMA, in powder form, was packaged. One package contained MDMA in tablet form. The final package contained methamphetamine in crystalline form, concealed inside two computer desktop hard drives. The total amount of MDMA intended to be delivered to Mr Ciceli’s address, or directed to be delivered to Mr Ciceli's and intercepted by Customs, was 22.9 grams pure. The total amount of methamphetamine directed to be delivered to Mr Ciceli’s address and intercepted by Customs was 58.1 grams pure.

# It is this that gives rise to a second rolled-up charge of importing a marketable quantity of border controlled drugs. By reason of the interception on 3 September 2013 of the first parcel, at a time before you enlisted Mr Ciceli’s assistance, the weight of the MDMA, the subject of this charge, is 2.9 grams more than the weight of MDMA referred to in the parallel charge to which Mr Ciceli pleaded guilty.

# Following the execution of the search warrant at Mr Ciceli’s home on 3 February 2014, analysis of text messages on his mobile phone revealed contact with you on 19 September, 30 September and 2 October 2013, and 19 January and 21 January 2014, relating to the anticipated arrival of parcels containing drugs ordered through the Silk Road website.

# Police executed a search warrant at your house on 18 February 2014. $10,100 in cash was found under shelf in your bedroom. Various telephones and electronic devices were also seized. Examination of those that revealed some been used, with several layers of encryption to access the Silk Road website to research importing drugs and the use of Bitcoin to purchase drugs online. Tracking numbers for two of the items imported were found, either on a USB stick at your home, or in the text messages exchanged between you and Mr Ciceli.

# Although the warrant was executed on 18 February 2014, like your co-offender, Mr Ciceli, there was a delay of two and a half years before charges were laid. It was not until 9 August 2016 that you were finally charged. Unlike your co-offender, you made no admissions at the time of your original arrest. It was not until the trials against the two of you were listed to commence and your co-offender had indicated, not only that he intended to plead guilty to what became a rolled-up charge of importation of a marketable quantity of border controlled drugs, reflecting his involvement, as I have just detailed it here but also give an undertaking to give evidence against you, in accordance with the admissions he had made at the time of his original arrest, which implicated you as well as himself, that you embarked upon negotiations with the prosecution. That led ultimately to the resolution of these charges against you and the entry of your guilty pleas to the charge of between dates trafficking, based on the admissions made by Mr Kitek, and to the rolled-up charges of importation of border controlled drugs, based on the intercepted packages direct to Mr Kitek at your address, the intercepted packages directed to Mr Ciceli's address and the information relating to two packages which were not intercepted, and were delivered to him.

# Yours, therefore, is a very late guilty plea. It clearly has utilitarian value, as it avoids the time and cost of trial. In my view, it carries greater weight than a court door plea would normally carry because, as I indicated at the time that Mr Ciceli was arraigned and gave his undertaking that that should lead to a re-evaluation by you and your legal advisors of the strength of the prosecution case against you. It is therefore a pragmatic acceptance of the strength of the case, but one which only obtained that added strength after Mr Ciceli had agreed to give evidence against you and given his undertaking.

# Following the hearing of the plea, the foreshadowed forfeiture application in respect of the money and the computer and electronic devices seized at your house has been made. It relates, not only to the $10,100 found in your house, but also a computer tower, a memory drive, a mobile phone and SIM card, three flash memory drives and an external hard drive. They are all obviously items of some value. You have now consented to the making of a forfeiture order in respect of that electronic equipment and the cash.

# I take into account first that there is likely hardship to you, by reason of the forfeiture of those items, which, apart from the money, clearly had legitimate uses other than use for the importation of the drugs and also the fact that the consent to the forfeiture order indicates a co-operation with the authorities, consistent with the plea of guilty. I consider therefore, that the consent to the forfeiture application operates to reduce the sentence otherwise appropriate and as I indicated just before I commenced reading my reasons, I have revised down the sentence that I had actually proposed to pass on you, as a result of that added information.

# As the prosecution rightly submitted, importations of marketable quantities of border controlled drugs are serious offences. One measure of the seriousness is the maximum penalty prescribed by Parliament, namely 25 years' imprisonment or a fine of $850,000. The seriousness of the offending can also be measured, in part, by reference to the quantity of drugs imported and the amount by which they exceed the threshold for a marketable quantity. The amount of MDMA imported as a result of the circumstances of both the importation charges was 54 times the marketable quantity. That compares to 40 times the marketable quantity for your co-offender, Mr Ciceli, in respect of his equivalent charge to your Charge 3. The amount of methamphetamine imported was 29 times the marketable quantity. That is the same as that relating to Mr Ciceli in his equivalent of your Charge 3. In your case, arising out of the circumstances of Charge 2, there is also an amount of amphetamine which is six times the marketable quantity.

# Although your instructions as put to me on the plea that you were, yourself, a user of methamphetamine, it was acknowledged that this was a commercial operation that you had engaged in. That is, that even if you were using some of what was received, or intended to use some of what you had ordered for your own use, you intended to supply the drugs to others, and for profit as well. As the materials found at your home revealed, you had set up accounts for Silk Road and Bitcoin and had that large amount of cash concealed in your home. This was at a time, as I was told, you were unemployed. The trafficking, too, clearly has a commercial aspect to it.

# A person who engages in a course of conduct involving the importation of marketable quantities of border controlled drugs and who engages in trafficking drug of dependence for profit and so far as the importations are concerned, using the subterfuges that you used, the encrypted websites, payment by Bitcoin and arranging for deliveries to names or addresses other than your own, will usually be required to serve a substantial custodial sentence.

# General deterrence must be given significant weight in this case. The sentences for those caught engaged in the importation of border controlled substances and in the trafficking of drugs of dependence, must be sufficiently severe to deter those who might otherwise be tempted to become involved in such activities. The financial rewards, whether they be by way of offsetting the cost of the purchase of their own drugs, or by selling to others, or by making a profit over and above that, must not be seen or perceived to outweigh the risk of punishment. The sentence must be sufficient to deter other people from taking the risks that you did.

# Ms Swan acknowledged in the course of the plea, that in most cases, a custodial sentence was inevitable, but submitted that it was not so in your case. She relied on the following matters: Parity, exceptional hardship and the impact of delay.

# So far as parity is concerned, she submitted that the similarities in your circumstances and those of Mr Ciceli, outweighed the differences in your circumstances. You were both men of about the same age, late-30s or early-40s. Neither of you have any significant or relevant prior convictions or subsequent convictions. Both of you had fallen victim to the disappearance of the manufacturing industry in this area and had found yourselves, after extended periods of employment from leaving school until your 30s, unemployed and idle. Both had, in the circumstances of the inexcusable two and a half year delay by the prosecution in bringing the charges after the execution of the warrants, addressed your substance use and had returned to living useful and productive lives. In other words, that both had used the delay, despite the oppression of having the matters hanging unresolved over your heads, to rehabilitate yourselves.

# Ms Swan acknowledged that the roles played by you and Mr Ciceli were different, that you were the principal, that your offending was more widespread and occurred over a longer period. She acknowledged that Mr Ciceli had made admissions, made a statement implicating you and given his undertaking, all of which had to be reflected in a lesser sentence for him. She acknowledged that your guilty plea was made later and precipitated by the undertaking given by Mr Ciceli to give evidence against you.

# Those differences counting in Mr Ciceli’s favour, she submitted, were outweighed by the exceptional hardship which would be caused to your child, were you to be sentenced to a term of immediate imprisonment. I will return to that after I have dealt with delay.

# Delay was a significant factor here. As I have already characterised it, that two and a half year delay by the prosecution in bringing the charges after the execution of the warrants, is inexcusable. Although you did not, when questioned, make admissions, and when charged, indicate an intention, up until the last minute, to contest the charges, I accept that you too, although not to the same extent as Mr Ciceli, have had this matter hanging over your head for three and a half years. That is an oppression which also warrants some reduction in sentence.

# More significantly, however, you have used the time well, it would appear. You have not been charged with any further drug-related offences. You have ceased your drug use and you have recently returned to employment. I accept that these are all matters which indicate positive benefits arising out of the unfortunate delay and which count in your favour. I accept that they also justify characterising your prospects for rehabilitation as good.

# Dealing then with the issue of hardship, I was told you had full and sole custody of your eight year old daughter, a child who had recovered from the significant physical and emotional neglect she endured when in the care of her substance abusing mother. I was told the child is now flourishing, emotionally, physically and academically whilst in your care. I was told that her mother has had no contact with her from the time that she was three and that after a period in your parents' care, she had come to live with you. I want to note that I am referring to her as your child, rather than by name, in order to protect her privacy and not because I am seeking to, in any way, dehumanise or devalue her.

# The significance of your care for your child is indeed a weighty matter. Were you to be imprisoned, she would be deprived of the person who has cared for her, either solely or significantly over the last few years. Given the neglect that she had suffered in her early years, loss of the parent who has been such a part in overseeing her recovery and has assisting in giving her much needed stability, it was said, could imperil that recovery. She is properly to be characterised as an innocent victim of your wrongdoing and the impact on her must be carefully considered.

# The following observations are also relevant. On the materials before me and on what I was told in the course of the plea, the child was in your care, either solely or shared with your parents over the extended period of your offending. That is, from 2012, when you were trafficking to Mr Kitek and over the period from June 2013 to February 2014, when you were engaged in importing the drugs through Silk Road. There was evidence in the depositions, both from Mr Kitek and Mr Ciceli, that the child was present when you supplied them with drugs. Ms Swan put to me that your instructions were that you were using or abusing methamphetamine at the time of the offending. Even if you did not actually administer the drugs to yourself in your child's presence, as I was told were your instructions, you were using, receiving and storing drugs in the house and supplying them to others from the house whilst she was in your care.

# It does not sit comfortably to use your responsibility to care for your daughter and the risk to her wellbeing, were you to be imprisoned, as a reason for a non-custodial sentence, when you were, apparently without compunction during the protracted period of the offending, exposing her to the fact of and the risks associated with your illegal drug-related activities.

# Although I am told you are now your daughter’s primary caregiver, it is clear that your parents, particularly your mother, have played and continue to play a significant role in her life. It would appear that when she was first removed from her mother’s care, it was your parents and not you who assumed primary responsibility for her.

# I was provided with a number of reports from the consultant paediatrician who was responsible for her care, covering the period from October 2012 to October 2013. That is, covering a substantial part of the period of offending. Those reports refer to the child living with her grandparents and describe her grandmother, that is, your mother, as the primary caregiver and the one who, in the reports, was given credit for the child’s progress.

# There were a number of references to the child’s mother and her past role in parenting in those reports, but there was no reference to you having a past, or then current role in her care.

# I am satisfied, based on the evidence in the depositions from Mr Kitek and Mr Ciceli, that your child was, at times, in your care and present in the house when you were involved in the criminal activity for which you now come to be sentenced.

# Your parents are still involved in your daughter's life. Their ongoing commitment to her welfare is demonstrated by them having taken on the responsibility for paying the fees of the private school she now attends. I am satisfied, on the materials before me, that your child's needs will be well met by her grandparents.

# The effect of this is to diminish the strength of your arguments that your role in your child’s wellbeing would create such hardship as to constitute exceptional circumstances, justifying the imposition of a merciful, but disproportionate sentence. That is, one which did not involve imprisonment.

# I am not satisfied that you have discharged the onus that rests on you to establish exceptional hardship by reason of your daughter's circumstances. Sadly, all too often, children and the elderly parents on whom the responsibility for caring for an offender's children falls if an offender is sentenced to a term of imprisonment, are the ones who suffer. But to state the obvious, that is something you should have thought of at the time.

# So far as parity is concerned, your sentence on Charge 3 must be greater than the sentence I imposed on Mr Ciceli in respect of Charge 4, his equivalent charge. You were the principal, the deviser and executor of the plan. As Ms Swan put it on the plea, you “owned” the drugs. More than that, you ordered them, paid for them, chose what quantity and type that you wanted and directed where they would be delivered and in what name. There is one more shipment in Charge 3, compared to those in which, on Charge 4, Mr Ciceli acknowledged an involvement and for which he was sentenced. And I take the view that his sentence must be significantly different from yours, because of the undertaking to assist. Whilst parity does not strictly apply, I have sought, taking into account the differences that I have identified, to make the sentences proportionate to each other.

# Could you now please stand.

# Armand Cernagoj, on the charges to which you pleaded guilty, you are convicted.

# On Charge 1 of trafficking, you are sentenced to be imprisoned for a period of six months.

# On Charge 2 of importation of a marketable quantity of border controlled drugs, you are sentenced to be imprisoned for a period of 18 months.

# On Charge 3 of importation of a marketable quantity of border controlled drugs, you are sentenced to be imprisoned for a period of three years.

# The sentence on Charge 1 is to commence today.

# The sentence on Charge 2 to commence one month after the sentence on Charge 1 commences.

# Sentence on Charge 3 is to commence three months after the sentence on Charge 1 commences, that is, two months after the sentence on Charge 2 commences.

# So Charge 3 is the base sentence and one month of the sentence on Charge 1; and two months of sentence on Charge 2, are to be served cumulatively upon each other and on Charge 3.

# That makes a total effective sentence of both State and Federal offences, of three years and three months.

# I fix a non-parole period of one year and six months. I direct that you must serve that before being eligible for parole.

# I declare that you have spent three days in pre-sentence detention and direct that that be counted and reckoned as part of the sentence already served.

# I declare, pursuant to s.6AAA of the *Sentencing Act*, that but for your pleas of guilty, I would have sentenced you to a total effective sentence of four years and six months, with a non-parole period of three years.

# Being satisfied that it is appropriate to make the forfeiture order sought, I do so.

# Could you remove Mr Cernagoj please.

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1. Armand Cernagoj is a pseudonym. [↑](#footnote-ref-1)
2. Dejan Ciceli is a pseudonym. [↑](#footnote-ref-2)
3. Mitjan Kitek is a pseudonym. [↑](#footnote-ref-3)