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| IN THE COUNTY COURT OF VICTORIA | ANONYMISED AND ADAPTED FOR EDUCATIONAL PURPOSES |

AT MELBOURNE

CRIMINAL JURISDICTION

CR–ZZ-FRY

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| DIRECTOR OF PUBLIC PROSECUTIONS |  |
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| v |  |
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| XUAN TUAN (A PSEUDONYM) |  |

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| JUDGE: | HIS HONOUR JUDGE MULLALY |
| WHERE HELD: | Melbourne |
| DATE OF HEARING: |  |
| DATE OF SENTENCE: | 10 October 2017 |
| CASE MAY BE CITED AS: | DPP v Tuan (a pseudonym) |
| MEDIUM NEUTRAL CITATION: | [2017] VCC OZR |

REASONS FOR SENTENCE

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Subject:

Catchwords:

Legislation Cited:

Cases Cited:

Sentence:

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| APPEARANCES: | Counsel | Solicitors |
| For the Director of Public Prosecutions | Ms M. Hooth | Office of Public Prosecutions |
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| For the Accused | Mr J. Duggan |  |

HIS HONOUR:

1. Xuan Tuan,[[1]](#footnote-1) in December 2016 you were arrested running away from a house in Spray Street, Seaford. A search warrant was executed on the adjoining properties at 19 and 19A Spray Street, Seaford.[[2]](#footnote-2) The premises had been converted into growing cannabis. In fact, the walls between the houses had been removed.
2. What was found was a total of 394 plants in various stages of development. The total weight of the plants was 185.32 kg. That is nearly four times the commercial quantity by plant numbers, and 7.4 times the commercial quantity by weight.
3. Given the prevalence of this sort of offending and the similarity methodology, I have used the same description in a number of my sentencing reasons. The Court of Appeal in the recent case on appeal from my decision and sentence, that case being Qui Nguyen, the Court adopted and repeated these words:

"So again I say in this case the cultivation methods employed here were sophisticated. The lighting that had been installed was such as to allow the plants to be grown indoors. Power had been bypassed to allow for higher volumes of electricity to be consumed without detection and more importantly, cost. There were filters, timers, irrigation and nutrition systems. These are all expensive items, indicating there had been significant resources expended on the basis that large quantities of cannabis would be cultivated for profit."

1. And I add in this case, there were large quantities of cannabis heading towards harvest for the purposes of profit. There were seven rooms in one house and two rooms in the other house, all dedicated to growing cannabis. Given the considerable efforts and expense involved in setting up this indoor horticultural enterprise, the plants in each room were strong and healthy. The photographs tendered on the plea reveal this. Thus the yield of useable drug was likely to be very high. The plants were at various stages of growth, indicating that the harvest would be planned to be regular, providing ongoing cash flow. It would seem that the horticultural enterprise was one involving crop rotation.
2. All the features found at these houses are often found in suburban or country houses that have been converted into cannabis production operations. The crime is hard to detect, and even harder to establish who are the main players in the cannabis production and distribution chain. Before dealing with your role in this crime, it should never be forgotten that the cannabis grown by the cultivators ultimately has serious effects on many users, and our community bears a great cost while entrepreneurial cannabis cultivators profit significantly.
3. The entrepreneurial cultivators have sometimes sought to avoid their own detection by having vulnerable individuals mind the crops. These "crop-sitters" as they have become known ensure the equipment continues to operate. Also they provide, it would seem from time-to-time, a degree of security for the crop. Most importantly, they keep the entrepreneurs at arm's length from the crop while it grows to saleable product.
4. You are charged with cultivating not less than a commercial quantity over one day, the day of your arrest. The prosecution says that you are the lowest end in this operation. Accordingly, I will deal with you as a crop-sitter, and you will be sentenced as such. It is not necessary to sentence you in the terms that the Court of Appeal described in another case of Dai Nguyen, where they said that those above the crop-sitters - the sentences for them should be uplifted, that is not the case here, and I have not imposed a sentence with the intent to uplift sentences.
5. However, the gravity of the offending is clear. This was a very significant operation with a large amount of money involved, and a very significant number of plants and a very significant amount of cannabis by weight.
6. As to your personal circumstances, you are only 20 years old, although you will turn 21 in August of this year. Your mother and father are employed in Vietnam. You have one sister and she has supported you in these proceedings and is here today. You came to Australia in 2014, residing first with your sister, although you say you were both struggling to afford the rent and living expenses.
7. Initially you studied English and then a course in Sydney before transferring to Melbourne. Apparently your parents paid for some school fees, but you did not always attend classes. As to why you became involved in this sophisticated criminal operation, there is very little known. You made no comment in your record of interview.
8. The sentence that I will shortly announce will be less because you did plead guilty and did so at the earliest opportunity. Also you have no criminal history, and I take that into account in your favour. The crime of cultivating cannabis in not less than a commercial quantity is punishable by a maximum term of 25 years' imprisonment. As has been recently stated by the Court of Appeal, deterrence is of primary importance, given the prevalence of this offence.
9. Further, it is necessary that deterrence be to all those involved in this entrepreneurial cultivation activity, including those who take it upon themselves to be crop-sitters. It is also important to denounce your crimes. That is because you became involved in a criminal activity that has detrimental effect on many in this community.
10. In my denouncement of your crimes, there must be a practical impact, whereby you face the consequences of your criminality. The only appropriate sentence, it seemed to me, is one of detention in some form or other. Given your age, I had you assessed for a Youth Justice sentence. That report has some important aspects to it.
11. Importantly, it made clear that your time on remand with other Vietnamese prisoners has seen you settle. That has been confirmed again today by your counsel, Mr Duggan. You were placed in the Penhyn Unit at Port Phillip for three months. It was said in the Youth Justice assessment report that while there were no other Vietnamese-speaking prisoners in the unit, you are able to speak with others on work duty.
12. It has been pointed out to me today via the certificates that portend that you are involved in courses at the Marngoneet Prison, and there you have a number of Vietnamese-speaking prisoners that you are able to communicate with.
13. But what was pointed out in the assessment report relating to the Youth Justice assessment was that although you are currently 20 years of age, you will in fact turn 21 shortly, and thus are fast approaching the upper range for a Youth Justice Centre order. Perhaps to put it more accurately, you are fast approaching the age when you would not be eligible for a Youth Justice Centre order.
14. It was noted that you negotiated the adult remand period very well, and are currently housed in a unit where you can access education and a range of programs, with other work options available in the adult prison, and that has continued, it seems, from the material provided to me at the Marngoneet Prison. To that end, the experienced Youth Justice worker who assessed you considered that you did not present as being particularly impressionable or immature, and based on your own report in other material, you are not likely to be subject to undesirable influences in the adult gaol.
15. As to your prospects of rehabilitation, it was pointed out by the youth workers that there were limited rehabilitation resources or facilities available to you at the Youth Justice Centre at Malmsbury given your immigration status. What was pointed out is that you will not be able to have access to programs delivered on the open site at Malmsbury if you lack the appropriate visa for release into the community. What was said in the Youth Justice report was:

"Essentially, Mr Tuan will have very limited opportunities of contact with others of a similar cultural background in comparison to the more significant options available within the adult gaol. Unfortunately Mr Tuan will be required to remain in a secure unit for the duration of his sentence, and will not be granted a period of parole without an appropriate visa being authorised by the Department of Immigration."

1. Ultimately it was the view of the Youth Justice worker that you did not meet the criteria that is set out in the act of "(1) being a reasonable prospect for rehabilitation or (2) being particularly impressionable in that you will likely be subject to undesirable influences in the adult gaol", thus you were considered not suitable for a Youth Justice Centre order.
2. I will take into account that you will do incarceration, that is imprisonment, hard because of your limited English. That said, to your credit you are undertaking courses in English and other courses to advance yourself. This adds to your prospects of reform and an overall assessment of remorse.
3. There is no one set figure for crimes of this sort, but what mitigates most powerfully in your case is your youth. The reasons set out by the Court of Appeal in R v Mills (1998) 4 VR 235 and restated and elaborated on in R v *Azzopardi, R v Balatatzis, R v Gabriel [2011] VSCA 372*  I keep well to the fore the need for rehabilitation of youthful offenders such as you.
4. It is difficult to get a complete grip on your prospects for rehabilitation, as you have said that you would like to remain in Australia and study. Whether that is possible or whether you will return to your family in Vietnam is a matter for others. What remains a powerful consideration in this case is the volume of cannabis cultivated. The volume in this case is very significantly larger than many other cannabis grow houses that I have reviewed. It is necessary to reflect that fact in the sentence, as our sentencing regime is a quantity-based system.
5. But the seriousness of the offending means that to some degree your youth, or the matters that come forward because of your youth, such as rehabilitation, do have to yield to a degree.
6. The sentence I impose is this. For committing the crime of cultivating not less than a commercial quantity, you are sentenced to three years and three months' imprisonment, and I fix a minimum non-parole period before you are eligible for parole at 18 months.
7. Had you pleaded not guilty to these offences and been found guilty of them by a jury, I would have imposed a sentence of five years with a minimum non-parole period of three years.
8. You have already served a significant number of days in custody, which I knew at the time that I heard the plea, I do not know now.
9. MS HOOTH: It is 204 days Your Honour, not including today.
10. HIS HONOUR: Two-hundred and four?
11. MS HOOTH: Yes Your Honour.
12. HIS HONOUR: You have already served 204 days in custody, Mr Tuan. That figure having been reckoned, I declare that this period of 204 days served on remand is part of the sentence that I have just imposed, and I will ensure that this declaration is entered into the records of the court. Are there any other orders required?
13. MS HOOTH: No Your Honour.
14. HIS HONOUR: Thank you. Mr Tuan can be taken downstairs. Mr Interpreter, thank you very much for your assistance today. You may be asked to help Mr Duggan in discussing things with his client shortly, and I hope you are able to do that.
15. INTERPRETER: Yes Your Honour.
16. HIS HONOUR: Thank you, that is kind. There being nothing else in this matter, I thank counsel. Ms Hooth, for your assistance, and Mr Duggan for your assistance.
17. MS HOOTH: Thank you Your Honour.
18. MR DUGGAN: Thank you.

1. Xuan Tuan is a pseudonym. [↑](#footnote-ref-1)
2. 19 and 19A Spray Street Seaford is a pseudonym. [↑](#footnote-ref-2)