

IN THE COUNTY COURT OF VICTORIA
AT MELBOURNE
CRIMINAL DIVISION
GENERAL LIST

Unrevised
Not Restricted
Suitable for Publication

Case No. CR-22-01339

DIRECTOR OF PUBLIC PROSECUTIONS (CTH)

v

DI SANH DUONG

JUDGE: HIS HONOUR JUDGE MAIDMENT

WHERE HELD: Melbourne

DATE OF HEARING:

DATE OF SENTENCE: 29 February 2024

CASE MAY BE CITED AS: CDPP v DUONG

MEDIUM NEUTRAL CITATION: [2024] VCC 182

REASONS FOR SENTENCE

Subject:

Catchwords:

Legislation Cited:

Cases Cited:

Sentence:

APPEARANCES:

Counsel

Solicitors

For the DPP

Office of Public Prosecutions

For the Accused

HIS HONOUR:

Introduction

- 1 Di Sanh DUONG, on 19 December 2023, you were found guilty by a jury on an Indictment charging you with an offence of Intentionally engaging in conduct between 30 April 2020 and 2 June 2020 with the intention of preparing for, or planning, a foreign interference offence against s 92.2(2) of the Criminal Code (Cth) contrary to s 92.4(1) of the Criminal Code (Cth). The maximum penalty for that offence is imprisonment for 10 years.
- 2 You have no prior criminal history.
- 3 At the plea hearing on 14 February 2024, Mr Doyle of Senior Counsel for the Prosecution tendered written submissions dated 12 February 2024 which he supplemented with oral argument.

Prosecution case at trial

- 4 In short summary, the case presented by the Prosecution at your trial was that between 30 April and 2 June 2020, at your invitation, The Honourable Alan Tudge, who was then a Cabinet Minister in the Australian Federal Government, agreed to become involved in the formal and well publicised presentation to the Royal Melbourne Hospital of a donation of \$37,450 raised by members of the Oceania Federation of Chinese Organisations for Vietnam, Cambodia and Laos (**Oceania Federation**) of which you were then the President. In support of the charge, the Prosecution alleged that your intention in soliciting Minister Tudge's involvement was to prepare for or plan future conduct on behalf of, or in collaboration with, the Chinese Communist Party. The alleged purpose of that future conduct was to influence Minister Tudge in relation to a political or governmental process in Australia to the advantage of the Chinese Communist Party whilst at the same time concealing from, or failing to disclose to, Minister Tudge that such future conduct was to be on behalf of, or in collaboration with, the Chinese Communist

Party. By its verdict of guilty, the jury found that case proved beyond reasonable doubt.

Commentary and findings

- 5 As a prominent and long-serving member of the Liberal Party, you had previously met with Minister Tudge on 26 July 2018, at his invitation, to discuss immigration policy. Consistent with the jury's verdict, I am satisfied beyond reasonable doubt that you sought deliberately to use your previous meeting with Minister Tudge as a means of attracting his interest in becoming involved in the donation to the Royal Melbourne Hospital. I am equally satisfied that, on 30 April 2020, you deliberately selected Minister Tudge as a target of the future foreign influence offence precisely because of Minister Tudge's political power as a Minister in the Australian Federal Government, and because you believed that he could potentially be persuaded to influence Australian Government policy in a manner favourable to the Chinese Communist Party. On your assessment, the attraction of this potential benefit was enhanced by your stated belief that Minister Tudge would, in the future, become the Prime Minister of Australia.
- 6 The evidence led at the trial demonstrated that after you had selected Minister Tudge as a potential target for your offending on 30 April 2020, you continued to deal with him and his staff up to and including the day of the donation ceremony on 2 June 2020, while representing yourself simply, and benignly, as a leader of the Oceania Federation and member of the Liberal party.
- 7 On 7 September 2020, some three months after the donation ceremony at the Royal Melbourne Hospital, you further sought to develop your relationship with Minister Tudge when you wrote to him seeking his urgent assistance to obtain a travel exemption from the then COVID international travel restrictions to allow a fellow senior member of the Oceania Federation to travel to Vietnam.
- 8 I note that your request for Minister Tudge's assistance was intercepted by members of his staff and re-directed to a different Government department,

apparently without Minister Tudge even becoming aware of your attempt to persuade him to intervene in the matter.

- 9 The Prosecution submits that the level of deception involved in your offending conduct was high. In representing your purposes for the donation as being purely altruistic and genuine, you deceived the intended target, Minister Tudge, as well as members of Minister Tudge's office staff, members of the Royal Melbourne Hospital associated with the donation, and members of the Oceania Federation who donated funds with no ulterior motive. The prosecution submits that this aspect of your conduct involved a significant breach of the trust of members of the Oceania Federation and of the Liberal Party by using your longstanding affiliation with those bodies as a form of cover in prosecuting the agenda of the Chinese Communist Party. Indeed, as the evidence at the trial amply demonstrated, such covert methodology was a feature of what is known as the United Front Work System, which is employed worldwide by the so-called United Front Work Department which operates under the direction and control of the Chinese Communist Party. I accept those submissions and find the facts that underpin them proved beyond reasonable doubt.
- 10 I also find to that same standard that you maintained contact prior to and during the offending period with Chinese Communist Party officials both in Australia and overseas. You communicated with them over the encrypted WeChat application, including with officials whom you knew or believed were operatives of the Chinese Government Ministry of State Security. The extent to which you were trusted by the Chinese Communist Party was evidenced by your relationship with the Chinese consulate and was reflected in your invitation from the Chinese Communist Party to attend the 70th Anniversary National Day Celebrations in Beijing. You duly attended those celebrations in Beijing on 1 October 2019.
- 11 The evidence led at the trial supports the conclusion that the United Front Work System, as operated by the United Front Work Department, is a sophisticated, far-

reaching and pervasive foreign influence program. The Prosecution submits that your offending, and your conduct both before and after the period of the offence, suggests that you were an adept exponent of the methodology of that System. You demonstrated an aptitude and enthusiasm for developing relationships with persons of influence in Australia and overseas and for hiding your connections with the Chinese Communist Party behind your roles in apparently innocuous community organisations. The prosecution submits that, in these respects, your offending may be regarded as sophisticated. I accept that submission and find the underlying facts proved beyond reasonable doubt.

- 12 The Prosecution conceded that there were aspects of your conduct which lacked sophistication. In particular, it was accepted that some of the written list of policy suggestions you put forward in 2019 to The Honourable Robert Clark, the former Victorian State Liberal Attorney-General who was then the President of the Victorian Liberal party, were vague, impracticable and unlikely to be taken seriously. Nevertheless, it was submitted that your approach to Mr Clark was an example of you using your long association with the Australian Liberal Party to enable you to gain access to, and present arguments favourable to the Chinese Communist Party to, a senior person of influence in the Victorian political arena. This evidence provides context when evaluating the nature of, and motivation behind, your approach to Minister Tudge on 30 April 2020.
- 13 I note that there is no suggestion in, or in connection with, these proceedings that either the Honourable Alan Tudge or the Honourable Robert Clark are implicated in your offending or that they acted improperly in any way in connection with their dealings with you.

Defence submissions

- 14 Turning to submissions made at the plea hearing on your behalf, your counsel, Mr Carolan, provided me with a written outline of submissions dated 8 February 2024.

That is Exhibit 1 on the plea hearing. He supplemented those submissions with oral argument.

15 In essence, Mr Carolan's submissions were directed at persuading me that a disposition which does not involve an immediate period of imprisonment is appropriate in the whole of the circumstances. He highlighted what he submitted was:

- 1) your relatively low moral culpability for the offence;
- 2) your relatively advanced age, difficulty in your family situation, your lack of prior convictions and your excellent character;
- 3) your long history of service to the Australian community; and
- 4) the delay of over three years, both as a result of the detail of the investigation and the COVID-19 pandemic.

16 Mr Carolan outlined your personal history as follows:

You are now 68 years of age. You were born in Saigon, Vietnam in 1955. You were one of eight children. You are ethnically Chinese. Your family had resided in Vietnam for three generations prior to the Vietnam War. They were very poor, but slowly worked their way out of poverty through employment in business.

You were a young adult by the end of the Vietnam War. Your father had been employed as a manager at an international wine and biscuit company, which was shut down by the communist government. The family was not directly targeted by the new communist authorities, but ethnically Chinese persons, schools and other institutions faced discrimination. Corruption and discrimination against those perceived to have been entrepreneurial was widespread.

In about 1976, you were removed from your family and sent to a remote province to work as a labourer in the countryside. You remained in that position until you fled Vietnam in April 1979.

The boat journey from Vietnam was apparently a terrible experience in which you shared a boat with approximately 600 other people. Those who died on the journey were thrown overboard. Rations were insubstantial for the week-long journey to Thailand. During that time, the boat was attacked and robbed by Thai pirates. You were assaulted and slashed with a knife for refusing to give up your father's watch, which was a treasured possession.

In Thailand, you were placed in a refugee camp for approximately six months. You were sponsored by your younger sister and older brother to come to Australia. You arrived in 1980, on a refugee visa.

Following your arrival in Australia, you worked approximately six days a week at a drycleaning store while attending night classes to learn English. In 1985 you opened a small business in the textile manufacturing industry. This business operated for approximately seven years but shut down largely as a result of tariffs imposed on imported textiles by the Federal government.

The issues associated with your business prompted an interest in politics and you joined the Liberal Party. You joined the Richmond Branch and were elected President of that Branch in 1992. You held that position for 17 years. In 1996, you ran unsuccessfully for election to the Parliament of Victoria, apparently at the urging of the then Premier of Victoria.

In or about the same year, you also became involved in community work within the ethnic-Chinese community in Victoria. You commenced a role as a Social Worker Manager at the Indo-Chinese Ethnic Chinese Association of Victoria Inc, a community organisation that assisted new migrants from Asia. Evidence was led in your trial to the effect that you have been active as a community leader and volunteer on behalf of the ethnic-Chinese community since that time. Your involvement has been via various organisations, including the Oceania Federation.

For about 15 years during this period, you worked as an Asian-market consultant for Cameo, monumental masons, before starting your own business as a monumental mason in 2018 with the assistance of an investor in China who was seeking an avenue to sell stone to the Australian market. The business operates at a profit and employs five full-time and two part-time employees.

In 2013, you married. You and your wife have one child, a son, now aged seven years. Unfortunately, as evidenced by the Report dated 17 August 2023 from the Western Children's Health Centre (Exhibit 2 on the plea hearing), your son is beset with a number of functional difficulties requiring professional intervention under the NDIS scheme. I take those matters into account generally and under s 16A(2)(p) of the *Crimes Act 1914* (Cth) (***Crimes Act***).

- 17 Mr Carolan told me that you are in reasonable physical and mental health. I note that in or about 2019, you suffered a medical emergency for which you received treatment in China and from which you have now largely recovered, though you still suffer from some symptoms, which are largely associated with your eyes. You suffer from glaucoma and cataracts as well as Diabetes and high blood pressure, for which conditions you are regularly medicated.

- 18 Mr Carolan told me that the lengthy delay in finalising this matter has taken a toll on your mental health, but you do not suffer from any diagnosed mental condition of relevance to the Court's sentencing exercise.
- 19 Mr Carolan then made submissions concerning the objective seriousness of the offending, the appropriate interpretation of the jury verdict and the appropriate assessment of your moral culpability. He correctly noted that this is the first case of its kind prosecuted in an Australian Court. He went on to submit that the offending falls at the lower end of the scale of objective seriousness.
- 20 In Mr Carolan's written submission on this topic he began with the proposition that "it is a rare circumstance where a person falls to be sentenced by a Court for engaging in an act of charity". However, he went on immediately to accept that the jury's verdict was directed at the elements of the offence which went well beyond that overly simplistic statement of the offence. In particular, they included the critical elements of guilty intent which attended your personal selection of Minister Tudge as a person to become involved in the public and well-publicised donation of money raised by members of the Oceania Federation to the Royal Melbourne Hospital with the underlying intention that Minister Tudge would, in the future, be subjected to influence in his role as a Minister of the Australian Government to act in a manner favourable to the Chinese Communist Party.
- 21 Mr Carolan reminded me that it had been acknowledged by Mr Doyle in his opening address to the jury that your initial involvement in, and promotion of, the donation of monies collected from members of the Oceania Federation was motivated by a genuine and benign charitable purpose. Mr Carolan quoted the following passage from Mr Doyle's opening address to the jury as follows:

You'll hear from witnesses who were involved in that donation process and who contributed for perfectly good reasons. And what's more, we say that Mr Duong shared those reasons. He believed, among other things, in the need during the time of COVID-19, to demonstrate to the Australian community the loyalty of its Chinese members, because, after all, during that time there was an elevation in racism directed at the local Chinese population because of news about the origins of the COVID-19 virus. Nothing wrong with promoting positive sentiment toward the local Chinese

community. And that is doubtless a significant part of why this donation was organised at all by the Oceania Federation and by Mr Duong ...

22 I note however, that the Prosecution case against you was that your initial benign intent behind the donation changed on 30 April 2020 when, in your discussion with fellow leaders of the Oceania Federation you first promoted the idea that, by involving Minister Tudge in a well-publicised donation process, he could later be influenced as a senior member of the Australian Government to act in favour of the Chinese Communist Party.

23 Whilst acknowledging that the jury's verdict "indicates that [you were] co-opted by [the United Front Work] System", Mr Carolan submitted that I should not attribute to you "every one of the United Front Work System's goals". I accept that submission.

24 Dealing with your moral culpability, Mr Carolan referred me to a passage in Mr Doyle's closing address at your trial as follows:

... there can be no doubt that Mr Duong has taken to heart the connection to the motherland that the United Front Work System is designed to incubate in people just like him. He has become exactly the sort of patriot that the system is designed to create, and it's become part of who he is. It's the system working and there's a sense in which you can't blame Mr Duong for that. It's now become a cast of mind that [you are] in no position to shake off.

25 Mr Carolan went on to submit that, if that assessment by Mr Doyle is accepted, your moral culpability for the offence is minimal and the objective seriousness of the offending falls at the lower end of the scale.

26 Mr Carolan also relied on other factors set out as matters of relevance in s 16A(2) of the *Crimes Act*. In addition to evidence led at your trial that you have no prior criminal history, Mr Carolan urged me to give you full credit for the testimony of witnesses at your trial who spoke of your long history of public and community service and charitable work.

27

- 28 Mr Carolan also urged me to take account of your age and health issues as matters that would cause a custodial sentence to weigh more heavily upon you than upon an offender without such conditions. So too the delay between October 2020 when the investigation of this offence was first brought to your attention and today's date will undoubtedly have caused significant stress to you and your family pending final resolution of the matter. I accept that those matters need to be weighed in the balance of factors relevant to reduction of sentence.
- 29 Mr Carolan accepted that the principle of general deterrence was significant but that, having regard to your age, lack of prior convictions and what he submitted were your 'excellent' prospects of rehabilitation, specific or individual deterrence was not a significant factor.
- 30 Mr Carolan went on to submit that by proper application of s 17A of the *Crimes Act* I should conclude that available sentencing alternatives other than a sentence of imprisonment were properly open and that, if I conclude that a period of imprisonment is required, I should impose a Recognisance Release Order with no immediate imprisonment.

Prosecution response

- 31 In response to Mr Carolan's submissions, the Prosecution relied on its written submissions as well as Mr Doyle's supplementary oral arguments. Mr Doyle urged me to reject Mr Carolan's submission that your moral culpability for the offence is 'minimal'. Mr Doyle submitted that no matters of substance have been put forward to support that conclusion. Ultimately, the Prosecution submitted that, in all the circumstances, no sentence other than a term of imprisonment involving a period to be served in custody is appropriate.
- 32 Mr Doyle pointed out that the passage from his closing address which I read out a short time ago concerning your co-option into the United Front Work System and which was relied on in Mr Carolan's submissions, was designed to illustrate the fact that your application of the United Front Work System was an example of that

system working to the point where you had absorbed its messages. Mr Doyle further submitted that the United Front Work System did not, however, turn you into some kind of 'automaton'. He submitted that the jury's verdict confirms as a matter of fact that you acted voluntarily and intentionally when you engaged in the offending acts. He submitted that your offending was calculated and involved a series of choices and that you bear full moral responsibility for those choices. I accept those submissions.

33 Mr Doyle accepted that you had co-operated with the Police when they executed search warrants and by answering questions put to you in a lengthy interview conducted at your place of work. However, Mr Doyle also pointed out that, during that interview, you denied any wrongdoing. He submitted that you also told the Police several lies in relation to significant matters relevant to the investigation, particularly in seeking to minimise or conceal your connections with the Chinese Communist Party.

34 In relation to the principle of specific deterrence and in response to Mr Carolan's submission that I should give you substantial credit for your good character, community service and charitable work, Mr Doyle argued that you deliberately used your reputation and standing in the community and your history of charitable work to gain access to politicians such as Minister Tudge in the first place. It was a combination of those factors and your long service to and membership of the Liberal Party that enabled such access. He argued that I should therefore reduce the weight to be attached to your good character accordingly.

35 The Prosecution further submitted that, pursuant to s 16A(2)(ma) of the *Crimes Act*, that it was an aggravating feature of your offending that you exploited your good standing in the community and your membership of and service to the Liberal Party to aid your offending.

36 The Prosecution submitted that general deterrence must be treated as a paramount sentencing factor for offending of this type. Parliament introduced the

foreign interference laws to protect the integrity of Australia's system of government. The Prosecution submitted that the risk of that system being undermined by foreign actors, and those loyal to them, exists on an unprecedented scale and that sentences passed by the Courts for the contravention of those laws must reflect the need to deter attempts at covert or deceptive conduct by foreign principals and those willing to act on their behalf.

Further defence submissions

37 In further written submissions dated 27 February 2024, Mr Carolan raised further arguments directed at the oral submissions of Mr Doyle on 14 February 2024. Those further submissions will be marked Exhibit 3. I deal briefly with them as follows:

1. I make no finding to the effect that you had a “longstanding and knowing collaboration with the Chinese Communist Party”. A finding that you intended that the relevant future conduct would be engaged in in “collaboration” with the Chinese Communist party was not essential to support the jury’s verdict. It is sufficient for the jury to have found that you intended that the relevant future conduct would be engaged in “on behalf of” the Chinese Communist Party. Such a finding is consistent with the jury’s verdict. I proceed on that basis.

It is true that the evidence at the trial revealed several instances where, in discourse with others, you showed you are prone to brag and to exaggerate your own importance. For that reason, I have been careful to avoid relying on such material to draw inferences against you in the absence of corroboration.

I note that there was ample independent evidence led at the trial to support the findings I made earlier in these reasons, namely:

that you maintained contact prior to and during the offending period with Chinese Communist Party officials both in Australia and overseas. You communicated with them over the encrypted WeChat application, including

with officials whom you knew or believed were operatives of the Chinese Government Ministry of State Security. The extent to which you were trusted by the Chinese Communist Party was evidenced by your relationship with the Chinese consulate and was reflected in your invitation from the Chinese Communist Party to attend the 70th Anniversary National Day Celebrations in Beijing. You duly attended those celebrations in Beijing on 1 October 2019.

2. I noted during discussions with counsel at the plea hearing that the fact you had been “outed” as an offender reduced your capacity to engage undetected in further offending of a similar kind. But that is not the only factor relevant to the principle of specific deterrence.
3. I make no finding about the broader effect of the offending upon the Chinese Australian community.

The Prosecution responded orally today.

Consideration

- 38 I am satisfied beyond reasonable doubt that you told several deliberate lies as alleged by the Prosecution in its closing address to the jury and in its submissions at the plea hearing. You are not to be punished in sentencing either for telling those lies or for pleading not guilty at your trial, but I am unable to find any evidence of contrition or remorse. I regard your current prospects of rehabilitation as guarded at best.
- 39 I also accept that specific deterrence is not an insignificant sentencing consideration in the circumstances of this case. The absence of contrition or other signs of acceptance by you of any criminal responsibility, supports the submission that there is an ongoing risk of your attempting covertly to influence political or governmental processes in Australia in a manner favourable to the Chinese Communist Party.
- 40 I sentence you as a first offender with no prior criminal history.
- 41 However, I am satisfied beyond reasonable doubt that you exploited your absence of prior criminal history, your good reputation and your high status in the

community, particularly as a longstanding member and servant of the Liberal Party and as the President of the Oceania Federation, to aid your offending to a level where, pursuant to s 16(A)(2)(ma) of the *Crimes Act*, I should treat that fact as an aggravating feature of your offending.

42 In all the circumstances, I find that your moral culpability for the offence is high and that your selection of a serving Federal Cabinet Minister as the object of your criminal intent, aimed, as it was, at the heart of the Australian Government, amounts to a serious example of an inherently serious offence, reflected in the maximum sentence of imprisonment of 10 years. In my judgement, the degree of need for a sentence that has the capacity to deter others from similar offending conduct is high.

43 Despite your age, your health, the probable hardship to your wife and son, the absence of any prior criminal record and the evidence of your general good character and extensive community service, the delay since October 2020 and other matters in your favour raised by your counsel, including the need for me to apply s 17A(1) of the *Crimes Act*, I am driven to conclude that a proper application of s 16A(1) and s 16(A)(2)(k) of the *Crimes Act* requires me to impose a sentence of imprisonment with a portion to be served in custody. Pursuant to s 17A(2) of the *Crimes Act*, I state that for the combination of reasons I have already referred to, particularly the serious nature of the offending, the maximum penalty, the aggravating factor supporting the application of s 16(A)(2)(ma) and the weight to be accorded to the principle of general deterrence, I am satisfied that no sentence other than a sentence of imprisonment is appropriate and I order that those reasons be entered into the records of the Court.

Sentence

44 Di Sanh DUONG, for the offence of preparing or planning a foreign interference offence you are convicted and sentenced to imprisonment for 2 years and 9 months. This sentence commences today.

45 I further order that you be released after serving 12 months of that sentence on your own recognisance of \$3,000 to be of good behaviour for 4 years.

46 The recognisance release order will permit your release after you have served a period of 12 months, and you will be released on condition that you be of good behaviour for the four years during which the release order is in force. If you were to commit another offence punishable by imprisonment during the period of your release on recognisance, you would be liable to forfeit the \$3,000, to which I have referred, but you would also be liable to be brought back before this court and required to serve the remainder of your sentence. I also advise you that this order may be discharged or varied under section 20AA of the *Crimes Act*.

Postscript

47 Finally, it was impossible to ignore the reports in today's press of statements made by the Director General of Security, principally concerning alleged historical instances of foreign interference. I had no advance warning of those statements or the timing of them. I had, and still have, no knowledge of the subject matter beyond what I have read this morning. I do not detect any link with the facts of this case. I make it crystal clear that I have not been influenced in my sentencing decision or reasoning by anything in the press reporting.
