CITATION:	*Clarke v The Queen* [2019] NTCCA 2
PARTIES:	CLARKE, Tegan v THE QUEEN
TITLE OF COURT:	COURT OF CRIMINAL APPEAL OF THE NORTHERN TERRITORY
JURISDICTION:	CRIMINAL APPEAL from the SUPREME COURT exercising Territory jurisdiction
FILE NO:	CA 22 of 2017 (21716804)
DELIVERED:	10 January 2019
HEARING DATE:	31 May 2018
JUDGMENT OF:	Grant CJ, Blokland and Barr JJ

CATCHWORDS:

CRIMINAL LAW – DRUG OFFENCES – JUDGMENT AND PUNISHMENT

Whether sentencing judge failed to give weight to sentencing purpose of rehabilitation – contention that sentencing court accorded inadequate or excessive weight to a factor properly viewed as a particular of manifest excess – appellant's history showed prospects for rehabilitation were poor – breach of suspended sentence by reoffending was serious – sentencing judge gave appropriate consideration to rehabilitation – open to conclude prospects of rehabilitation poor – open to conclude, the appellant's relative youth notwithstanding, that purpose of rehabilitation not a compelling sentencing purpose in the circumstances – appeal dismissed.

CRIMINAL LAW – DRUG OFFENCES – JUDGMENT AND PUNISHMENT

Whether sentencing judge fell into error by effectively sentencing appellant for supply of commercial quantity of methamphetamine when charge for less than commercial quantity – whether breach of principle in *The Queen v De Simoni* – appellant had significant and relevant criminal history – offending charged in count 2 involved intensive level of drug dealing activity notwithstanding total amount less than a commercial quantity – offending possessed financial or commercial character – appellant engaged in offending shortly after released on order suspending sentence – no basis to conclude appellant sentenced for supply of commercial quantity – appeal dismissed.

CRIMINAL LAW – DRUG OFFENCES – JUDGMENT AND PUNISHMENT

Whether sentences imposed individually and in total manifestly excessive – individual sentences for supply offences not manifestly excessive having regard to nature of offending conduct, appellant's prior criminal history and fact that offending occurred while appellant was taking the benefit of order suspending sentence – whether sentence imposed for possession of tainted monies manifestly excessive in all the circumstances of the offence and the offender – where offence of dealing with tainted monies does not constitute a separate act of criminality warranting a charge separate and additional to the offence by which those monies were derived, the charge will be an abuse of process and/or may attract a plea in bar – no abuse of process in charging both a supply offence and dealing with monies derived from that supply – where the dealing with tainted monies shares conduct, elements or criminality with the offence by which the monies were derived, matter properly addressed in the imposition of penalty and appropriate orders for concurrency – no necessary call for concurrency where tainted monies are derived from some source other than the supply with which the offender is also charged – assessing objective seriousness of an offence against s 8(1) of the *Misuse of Drugs Act* (NT) involves consideration of amount(s) involved, number of transactions, period over which transactions occurred, sophistication, size and extent of the operation which generated the monies, offender's role in operation and what became of the monies – assessment may also require comparison with the sentence fixed for criminal conduct by which proceeds derived – Crown did not discharge onus of showing that proceeds came in whole or part from activity not covered in supply charges – criminality inherent in sentences imposed in respect of counts 1 and 2 accommodated criminality charge in count 3 – commonality between those offences – sentence to imprisonment for four years and six months manifestly excessive – appeal allowed and applicant resentenced.

Criminal Code (NT) s 305
Misuse of Drugs Act (NT) s 5A, s 8, s 34, s 37

Bara v The Queen [2016] NTCCA 5, *Carroll v The Queen* (2011) 29 NTLR 106, *Clarke v The Queen* [2019] NTCCA 2, *Cook v The Queen* [2018] NTCCA 5, *Hinchcliffe v R* [2010] NSWCCA 306, *Horder v The Queen* [2019] NTCCA 3, *House v The King* (1936) 55 CLR 499, *Jadron v The Queen* (2015) 253 A Crim R 450, *Lawrence v The Queen* (2007) 171 A Crim R 286, *Markarian v The Queen* (2005) 228 CLR 357, *Nahlous v The Queen* (2010) 201 A Crim R 150, *Noakes v The Queen* [2015] NTCCA 7, *R v Dennison* [2011] NSWCCA 114, *R v Dickson; R v Issakidis (No 1)* [2014] NSWSC 1068, *R v Ellis* (1986) 6 NSWLR 603, *R v Hilton* (2005) 157 A Crim R 504, *R v Bin Huang; R v See Hon Siu* (2007) 174 A Crim R 372, *Redfern v the Queen* (2012) 228 A Crim R 56, *Standen v Commonwealth Director of Public Prosecutions* (2011) 254 FLR 467, *The Queen v De Simoni* (1981) 147 CLR 383, *The Queen v Roe* [2017] NTCCA 7, The *Queen v Syrch and Burns* (2006) 18 NTLR 160, *Thorn v The Queen* (2009) 198 A Crim R 135, *Truong v The Queen* (2015) 35 NTLR 186, *Yusup v The Queen* [2005] NTCCA 19, referred to.

Stockdale and Devlin, *Sentencing* (1987), pars 1.16-1.18.

REPRESENTATION:

Counsel:

Appellant:	J Lawrence SC
Respondent:	M Nathan SC

Solicitors:

Appellant:	Withnalls Lawyers
Respondent:	Office of the Director of Public Prosecutions

Judgment category classification:	B
Number of pages:	53

IN THE COURT OF CRIMINAL APPEAL
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

Clarke v The Queen [2019] NTCCA 2
No. 21716804

BETWEEN:

TEGAN CLARKE
Appellant

AND:

THE QUEEN
Respondent

CORAM: GRANT CJ, BLOKLAND and BARR JJ

REASONS FOR JUDGMENT

(Delivered 10 January 2019)

THE COURT

[1] This is an appeal against the severity of a sentence of imprisonment for offences charged under the *Misuse of Drugs Act* (NT). The Supreme Court imposed a term of imprisonment for four years and six months, including a non-parole period of two years and six months that was ordered to commence after the service of six months of a restored term of a sentence to imprisonment previously held in suspense. Together with the restored term, the total effective term is five years imprisonment.[1]

1 On 27 February 2018 a judge of this Court granted leave to appeal and extended time in which to file the application for leave.

The charges

[2] The appellant entered pleas of guilty on 31 August 2017 in the Supreme Court to the following counts on indictment:

(a) Count 1 charged that between 23 February and 5 April 2017 she supplied less than a commercial quantity of cannabis plant material, a Schedule 2 drug, contrary to s 5A(1) of the *Misuse of Drugs Act*. The maximum penalty for that offence was imprisonment for five years or a fine of 500 penalty units.

(b) Count 2 charged that between the same dates she supplied less than a commercial quantity of methamphetamine, a Schedule 1 drug, contrary to s 5A(1) of the *Misuse of Drugs Act*. The maximum penalty for that offence was imprisonment for 14 years.

(c) Count 3 charged that on 5 April 2017 the appellant received or possessed property, namely $40,500 in Australian currency, being the proceeds of an offence committed against the *Misuse of Drugs Act*, contrary to s 8(1) of the *Misuse of Drugs Act*. The maximum penalty for that offence was imprisonment for 25 years.

[3] As indicated above, the appellant also admitted a breach of a suspended sentence by that re-offending which had been imposed on 30 November 2016 for one count of aggravated robbery committed on 10 June 2016. Nine months and seven days remained outstanding on the suspended sentence at the time of the plea hearing for the charges on indictment.

The sentence

[4] For the offending in count 1, the appellant was sentenced to imprisonment for one year. For the offending in count 2, the appellant was sentenced to imprisonment for three years. For the offending in count 3, the sentencing judge indicated a starting point of imprisonment for six years. A reduction of 25 percent was allowed by reason of the early pleas of guilty. It was ordered that all sentences be served concurrently, resulting in a total sentence of four years and six months for the charges on indictment.

[5] Additionally, as a consequence of the breach of the suspended sentence, the balance of the sentence held in suspense was ordered to be restored. Six months of the restored term was served cumulatively on the sentences for the offences on the indictment. The sentences for the charges on the indictment, including the non-parole period, were ordered to commence on 5 October 2017, being the date of the conclusion of the six months of the restored term.[2] Although the non-parole period was set at two years and six months, in effect the appellant was not entitled to apply for parole until after the service of three years of the total effective term of five years.

[6] By consent, a forfeiture order was made pursuant to s 34(3) *Misuse of Drugs Act* with respect to the $40,500, being the proceeds identified in count 3 on the indictment.

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2 Appeal Book (**AB**) 62.

The grounds of appeal

[7] The first ground of appeal contends that the sentencing judge fell into error with respect to the sentence for count 2 on the grounds of a breach of the principle confirmed in *The Queen v De Simoni*[3]. It was argued the appellant was effectively sentenced for an aggravated form of the offence of supplying methamphetamine, being the supply of a commercial quantity, despite the fact that her plea of guilty was entered to the less serious charge of supplying "less than a commercial quantity" of methamphetamine.

[8] The second ground of appeal contends that in all of the circumstances of both the offending and the appellant, the sentences imposed individually and in total are manifestly excessive.

[9] The third ground of appeal claims the learned sentencing judge failed to give any weight to the sentencing purpose of rehabilitation.

The sentencing facts

[10] The Crown facts presented in the sentencing proceedings were as follows.[4]

[11] The appellant was 23 years old, unemployed and living with her mother at the time of the offending. At some time prior to 5 April 2017, and immediately prior to 23 February 2017, the appellant's boyfriend was supplied with an unknown quantity of cannabis plant material and

3 [1981] HCA 31; 147 CLR 383.

4 AB 24-26.

methamphetamine. The appellant, with and for her boyfriend, sold those drugs to others in and around Darwin.

[12] On 5 April 2017 detectives executed a search warrant at the appellant's residence. On arrival they saw the appellant in the front yard with her young child. As they arrived, attending officers identified themselves and watched the appellant run through the front door and inside the house. She left her child unattended. Detectives accessed her residence through both the front and back of the house. A police officer who accessed the back of the premises saw the appellant run into the garden area. She was told to stop but turned and ran back inside where she was apprehended. Police located a black 'Sandleford' metal safe near the appellant's position when she was first seen in the back garden.

[13] During the course of the search, police found and seized a clip seal bag containing approximately 10 grams of cannabis in the first bedroom in a child's backpack; loose cannabis weighing approximately 0.5 grams in a bowl in the laundry; loose cannabis weighing approximately 0.5 grams in a bowl on the back veranda; three iPhones located in one bedroom; a black Alcatel One-touch phone on the veranda table; a silver Samsung phone on the veranda table; an iPhone on the veranda table; and a fridge bag containing shopping bags emitting a strong odour of cannabis under the kitchen sink.

[14] The safe found in the garden bed was seized and forced open. Inside was $40,500.00 in Australian currency in various denominations. At the conclusion of the search the appellant was arrested. She declined to participate in a recorded interview with police. Investigating police determined from text messages on her mobile telephone that she had, on the previous day, sold cannabis to an unknown person. Her mobile phone was forensically examined.

[15] Following the interrogation of her phone by forensic technicians, SMS text and chat messages revealed she had been engaged in sourcing and supplying significant quantities of methamphetamine and cannabis from 23 February to 5 April 2017. The downloaded phone content showed the appellant co-ordinated the on-supply from other persons or actively engaged in the supply of methamphetamine and cannabis in varying amounts and prices to a number of individuals.

[16] Typically the appellant would receive queries about q's (quarter points = 0.25 grams), hbs (half balls = 3.5grams) bs (balls = 7 grams) and g's (1 gram). Different prices were negotiated, depending on the customer, and a time to collect or deliver the substances would be discussed. Sometimes the drugs would be exchanged for jewellery or other goods. Truck City and local shops would frequently be used as 'drops' for exchange, while on other occasions the appellant would deliver directly to the purchaser.

[17] The appellant argues that the following passage in the agreed facts is particularly relevant to the first ground of appeal:

> In the period of the offending it is estimated that the offender, and her boyfriend, dealt in well over the traffickable amount of cannabis but at least commercial quantity (sic) of methamphetamine.[5]

[18] The appellant would at times actively solicit to others, asking if they were 'chasing' or 'looking'. Smaller sales were typically between $100 and $200. Larger sales were typically between $750 and $3000.

[19] The total amount of cannabis seized from the search was approximately 11 grams. The total amount of cash seized was $40,500.00, which was derived from the sale of illicit substances and was collected by the appellant's boyfriend.

The appellant's previous convictions

[20] The appellant's criminal history is a feature of some significance, particularly given that the offending on indictment was committed when she was subject to a suspended sentence. It is also relevant to the question of whether appropriate weight was given to the prospects of rehabilitation.

[21] As mentioned above, on 30 November 2016 the appellant had been convicted and sentenced to imprisonment by the Supreme Court for 11 months for one count of aggravated robbery committed on 10 June 2016. The robbery involved the appellant and her co-offender struggling with a

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5 AB 26, para [14].

loss prevention officer who was attempting to stop them from leaving a supermarket with stolen goods. As a result of the physical struggles the loss prevention officer sustained superficial scratches to his neck and upper arms. The value of the goods stolen in the robbery was $405. The sentencing judge described the robbery as "very much towards the lower end of the range for such offences".[6]

[22] The 11 month term was ordered to commence on 9 October 2016 and was suspended on 30 November 2016 on COMMIT conditions. An operational period of two years was fixed. The offending the subject of this appeal commenced less than three months after the appellant was released on the suspended sentence.

[23] Apart from that most recent offending, the appellant also had a number of further relevant convictions. She was convicted of stealing by the Local Court on 14 September 2016 and was ordered to serve seven days' imprisonment. She was convicted of supplying methamphetamine by the Local Court on 30 June 2016, in relation to offending which was committed in July 2015, and sentenced to imprisonment for three months. On the same date she was also dealt with for further stealing, traffic and breach of bail offences. She was convicted and fined by the Local Court on 13 May 2013 for possessing cannabis and methamphetamine. On the same date she was convicted of damaging property and engaging in violent conduct, and was

6 AB 36.

sentenced to two months' imprisonment suspended after she had served one day.

[24] While the appellant's previous drug offending was not in the more serious categories of offending of that kind, there is a clear history of prior offending against the *Misuse of Drugs Act*. The sentencing judge accepted the appellant had a drug problem, as this was evident from both her criminal history[7] and the previous sentencing remarks when she was dealt with for the aggravated robbery[8].

The appellant's subjective circumstances

[25] The sentencing judge ordered a pre-sentence report. In both the submissions made on her behalf and in the pre-sentence report, attention was drawn to the appellant's difficult background and childhood. The sentencing judge was told the appellant was both a victim of, and a witness to, severe violence involving and between her parents. She had had no recent contact with her father. She left school in Year 7. She was a single mother of three children. She entered into a relationship with an older man when she was 13 and gave birth to her first child at 15. Her children were aged two, five and seven at the time of sentencing.

[26] The appellant had been the victim of significant domestic violence perpetrated by her former partner, who is the father of her three children. At

7 AB 27-33.

8 AB 34-43.

the time of the plea hearing her former partner could not be located by police. He is properly characterised as the principal offender having regard to the agreed facts that he was the supplier of the cannabis and methamphetamine and he collected the cash from the sale of the illicit substances. That characterisation was conceded by the Crown during the course of the sentencing proceedings. The appellant's former partner had had no contact with the children and had not attempted to contact the appellant since her arrest. The children were residing with the appellant's mother at the time of the sentencing proceedings. The sentencing judge was told that for the first time the appellant intended to obtain a domestic violence order against her boyfriend.

[27] The pre-sentence report referred to the following matters. The appellant was raised using "permissive parenting" which had adversely affected her. That adverse effect is evident in her history with the criminal justice system. The appellant's mother was not currently employed as she had been diagnosed with cancer.[9] The appellant understood there was a link between drug abuse, her ex-partner and her offending behaviours, however she did not see her drug use as a problem. Rather, she associated her offending behaviours with her relationship with her ex-partner. The appellant had shown motivation to address her offending behaviours and was willing to participate in a rehabilitation program and obtain assistance from police to enforce a "no contact" domestic violence order against her ex-partner.

9 AB 52.

[28] In terms of her history of drug use, the pre-sentence report stated the appellant's drug use commenced when she was 12 years old.[10] She was a heavy user of cannabis and turned to "ice" while grieving the loss of her brother who committed suicide in 2012.[11] The report concluded with the observation that the appellant had shown at least some insight into her offending in acknowledging she should avoid contact with her ex-partner.

[29] During the plea hearing the appellant's counsel emphasised the appellant's intention to obtain a domestic violence order against her boyfriend. She was described as a damaged human being from a tender age whose social circumstances continued to be difficult. Given the appellant's age, it was submitted she should not be treated as a lost cause as she was coming to the realisation that her relationship with her ex-partner and her choice of peers were not healthy. Notwithstanding she remained on the COMMIT programme at the time of the offending, the appellant's counsel submitted that her prospects of reintegrating into the community would be enhanced by the imposition of a partially suspended sentence with the opportunity to again enter the COMMIT programme.[12]

[30] Counsel for the Crown drew the sentencing judge's attention to the sentencing remarks for the robbery matter, which identified that the appellant had previously relied on her purported commitment to change and

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10 AB 53-54.

11 AB 54.

12 AB 13-17.

to engage with rehabilitation and other services. The submissions on behalf of the Crown drew particular attention to the objective seriousness of the offending in count 3.[13]

The sentencing considerations

[31] The sentencing judge referred to the maximum penalties for each count and observed at the outset that count 3 was the most serious as it carried a 25 year maximum penalty. It was accepted that the Crown could not identify with precision the quantity of drugs that had been sold in order to derive the proceeds charged in count 3, but it was clear that the drugs were being sold on a very regular basis.[14] The sentencing judge also noted that the material which had been downloaded from the appellant's phone revealed the supply of both cannabis and methamphetamine on numerous occasions. So far as the supply charges were concerned, the sentencing remarks emphasized the significance of the role of an offender in the supply operation for sentencing purposes, and concluded that the appellant played a substantial role as the dealer.[15]

[32] The sentencing judge touched on a number of the appellant's previous personal difficulties and previous drug convictions. Mention was made of the plea of guilty being at an early stage, although it was also noticed the appellant had declined to provide assistance to police. Reference was made

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13 AB 18-19.

14 AB 59.

15 AB 59.

to the pre-sentence report which indicated that the appellant did not see her drug use as the problem and that her response to being supervised in the community had been poor. The sentencing judge remarked that he doubted that rehabilitation played much of a role in the sentencing calculus, noting the previous convictions involved breaching bail and other orders, and that the appellant had shown little regard for the law in the past. The importance of general deterrence and punishment was stressed. In that respect, the sentencing judge remarked that the appellant "is going to have to learn the hard way".[16]

Ground 3: The learned sentencing judge failed to give any weight to rehabilitation

[33] Against that background, the third ground of appeal can be dealt with in relatively short order. As this Court has previously observed,[17] any contention that the sentencing court has accorded inadequate or excessive weight to a factor is properly viewed as a particular of manifest excess. For that reason, this ground of appeal as framed cannot stand alone and the contention made is properly considered in the context of the ground asserting manifest excess.

[34] Even were that not the case, in the present matter the sentencing judge obtained a pre-sentence report to assist with the assessment of the appellant's prospects. As should be obvious from the appellant's history as

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16 AB 59-60.

17 *Cook v The Queen* [2018] NTCCA 5 at [14]; *Noakes v The Queen* [2015] NTCCA 7 at [15], citing *Director of Public Prosecutions (Vic) v Terrick* [2009] VSCA 220; 24 VR 457 at 459-460.

set out above, the prospects for rehabilitation were poor at the time of the sentencing proceedings. The breach of the suspended sentence was serious, involving ongoing criminal activities. The appellant's prior criminal history, including breaches of orders and poor compliance with supervision, and her minimal employment history, were referred to in the remarks on sentence.[18] The sentencing judge gave appropriate consideration to the appellant's prospects of rehabilitation. It was open to conclude having regard to her personal circumstances that her prospects of rehabilitation were poor. It was also open to conclude, the appellant's relative youth notwithstanding, that the purpose of rehabilitation was not a compelling sentencing purpose in the circumstances of this matter.

[35] Nor do the sentencing judge's findings in that respect necessarily deprive the appellant of the opportunity for rehabilitation. It is open to the appellant, should she choose to apply for parole, to be considered again for the COMMIT programme or other rehabilitation support while on parole.

[36] This ground of appeal is dismissed.

Ground 1: In relation to Count 2, the learned sentencing judge erred by breaching the *De Simoni* principle

[37] In *The Queen v De Simoni*[19] the High Court dealt with sentencing for the offence of robbery under the *Criminal Code* (WA). During the course of the robbery the offender wounded the victim. Pursuant to the *Criminal Code*

18 AB 17-19; 59-60.

19 *The Queen v De Simoni* (1981) 147 CLR 383.

(WA), the wounding was a specified circumstance of aggravation which increased the maximum penalty from imprisonment for 14 years to imprisonment for life. Notwithstanding s 582 of the *Criminal Code* (WA), which provided that if "any circumstance of aggravation is intended to be relied upon, it must be charged in the indictment", the wounding was not charged as a separate circumstance of aggravation. Chief Justice Gibbs (with whom Mason and Murphy JJ agreed), set out the relevant principles in the following terms:

> At first sight it may seem unlikely that the framers of the Code intended that an offender should be sentenced on the fictitious basis that no circumstance of aggravation existed when it is found by the trial judge that such a circumstance did exist, particularly when such a finding is based upon an unchallenged statement of facts made by the prosecutor after the offender has pleaded guilty. However, the general principle that the sentence imposed on an offender should take account of all the circumstances of the offence is subject to a more fundamental and important principle, that no one should be punished for an offence of which he has not been convicted. Section 582 reflects this principle. The combined effect of the two principles, so far as it is relevant for present purposes, is that a judge, in imposing sentence, is entitled to consider all the conduct of the accused, including that which would aggravate the offence, but cannot take into account circumstances of aggravation which would have warranted a conviction for a more serious offence.
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> At common law the principle that circumstances of aggravation not alleged in the indictment could not be relied upon for purposes of sentence if those circumstances could have been made the subject of a distinct charge appears to have been recognised as early as the eighteenth century.[20]

20 *The Queen v De Simoni* (1981) 147 CLR 383 at 389.

[38] The principle expressed in that form has been held to apply to s 305(4) of the *Criminal Code* (NT),[21] although it has also been held s 305(4) of the *Criminal Code* does not envisage that every circumstance which aggravates the commission of an offence must be charged in the indictment.[22]

[39] The question here is not whether the appellant was sentenced for an aggravated form of the offence to which she had pleaded guilty, but whether she was sentenced on the basis of facts which could have grounded a more serious charge to which she had not pleaded guilty and of which she had not been convicted, thus exposing her to a higher penalty. In *The Queen v De Simoni*, Gibbs CJ went on to state a broader principle governing the present circumstances in the following terms:

> [W]here the Crown has charged the offender with, or has accepted a plea of guilty to, an offence less serious than the facts warrant, it cannot rely, or ask the judge to rely, on the facts that would have rendered the offender liable to a more serious penalty.[23]

[40] Counsel for the appellant submitted the broader principle expressed in *The Queen v De Simoni*[24] should have operated to prevent the Crown from proceeding with facts and submissions inconsistent with the entry of the guilty plea to the charge of supply less than a commercial quantity. Attention was drawn in that respect to the Crown's written submissions before the sentencing judge, and in particular to the submission: "The

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21 *R v Syrch and Burns* [2006] NTCCA 2; 18 NTLR 160 at [12]-[14] per Martin CJ (BR)with whom Riley and Southwood JJ agreed.

22 *R v Syrch and Burns* (2006) 18 NTLR 160 at [13].

23 *The Queen v De Simoni* (1981) 147 CLR 383 at 389.

24 (1981) 147 CLR 383.

Crown is unable to positively quantify the actual amount of ice and cannabis which was coordinated and supplied by the offender to others".[25] Attention was also drawn to the statement in the Crown facts that it was estimated the appellant and her boyfriend dealt in at least a commercial quantity of methamphetamine. Counsel for the appellant argued that these references, together with the Crown's oral submissions before the sentencing judge containing references to commercial quantities,[26] led to his Honour sentencing the appellant on that basis for count 2.

[41] Counsel for the appellant stressed that the appellant had not at any stage pleaded guilty to the offence of supply a commercial quantity of a Schedule 1 drug contrary to s 5 of the *Misuse of Drugs Act*, and sought to characterise that offence as an aggravated form of supply or as a circumstance of aggravation. While the offence created under s 5 of the *Misuse of Drugs Act* is clearly a more serious offence carrying a maximum penalty of 25 years' imprisonment, the *Misuse of Drugs Act* is structured in a manner that creates two distinct categories of supply offence. Section 5A of the *Misuse of Drugs Act* creates the offence of supplying "less than a commercial quantity" and provides a penalty of 14 years' imprisonment. Although the supply of a commercial quantity is not properly characterised as a circumstance of aggravation, it would clearly be an error of the kind identified in *The Queen v De Simoni* if the appellant had been sentenced for

25 AB 48.

26 AB 9, 26 at [24], 19 at [4], 46 at [11], AB 4 at [18].

the offending charged in count 2 on the basis she supplied a commercial quantity of methamphetamine. However, a fair reading of the presentation of the plea material and the sentencing remarks show the appellant was not sentenced on that basis.

[42] The submissions made on behalf of the Crown in the sentencing proceedings which mentioned a commercial quantity were clearly referrable to the facts and circumstances relevant to count 3. The manner in which the tainted monies were derived from dealing in illicit drugs was obviously a relevant consideration in fixing penalty for the offence charged in count 3 (which is discussed further below in the context of the second ground of appeal). It does not follow that his Honour sentenced the appellant for the more serious offence of supplying a commercial quantity for the offending in count 2. As part of the overall sentencing exercise his Honour was obliged to evaluate the circumstances relevant to count 3, however there is nothing in the transcript of the proceedings below, or otherwise, to indicate a breach of the fundamental principle that a person cannot be punished for an offence for which they have not been found guilty.

[43] Counsel for the appellant argued that the Crown's reliance for comparative purposes on a series of sentencing cases which dealt with the supply of methamphetamine in a commercial quantity[27] led to the appellant being sentenced for the supply of a commercial quantity. The cases to which

27 AB 48

reference was made by the Crown contain general statements concerning the salient factors considered by courts when assessing the gravity of drug supply offending. Those factors include such matters as the significance of the role of the offender in the operation, the sophistication of the operation, the harm caused by the particular drug and the prevalence of the offending.[28] Although the cases referred to involved commercial quantities, similar considerations apply to the assessment of the supply of the drug that involve less than a commercial quantity. That those cases were drawn to the sentencing judge's attention does not demonstrate the error alleged.[29]

[44] At the commencement of the remarks on sentence the sentencing judge referred to the maximum penalties for each offence, including the maximum penalty of 14 years imprisonment for the offending charged in count 2. That reference clearly indicated that the sentencing judge was dealing with the appellant for an offence against s 5A of the *Misuse of Drugs Act* with regard to the maximum penalty provided for that offence.

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28 *The Queen v Roe* [2017] NTCCA 7 at [47]-[58] per Grant CJ and Southwood J. The Crown also drew attention to *Truong v The Queen* [2015] NTCCA 5; *The Queen v Indrikson* [2014] NTCCA 10; and the sentencing remarks in *R v Sararat* SCC 21706478, 23 August 2017; *R v TB* SCC 21651207, 18 August 2017; *R v Booth* SCC 21552879, 1 February 2017; *R v Esparon* SCC 21532746, 9 February 2016; and *R v Condello* SCC 21547368, 12 February 2016.

29 It was unnecessary and potentially misleading for the Crown in written submissions in the sentencing proceedings to refer to the evidentiary presumption in s 37(6) of the *Misuse of Drugs Act*: AB 46. That section creates a presumption concerning the intention to supply in sentencing a person for an offence against Part II, Division 1, Subdivision 2 or 3 (cultivation, manufacture and possession offences). It had no bearing on the offences with which the appellant was charged. However, it is clear by reference to both the sentencing remarks and the ultimate sentence that the submission concerning the presumption did not lead the Court below to sentence the appellant on any basis other than that the offending charged in count 2 involved less than a commercial quantity.

[45] In as much as the appellant relies on comparative sentences for supplying less than a commercial quantity of methamphetamine as an indication that the appellant was sentenced on the basis of supplying a commercial quantity, it must be remembered the appellant had a significant and relevant criminal history. Moreover, the offending charged in count 2 involved an intensive level of drug dealing activity notwithstanding the total amount charged was less than a commercial quantity. The offending still possessed a financial or commercial character. She engaged in this intensive activity soon after she had been released on a suspended sentence and while still subject to conditions and an operational period. The combination of those factors might be expected to result in the imposition of a sentence higher than sentences imposed for offending which did not involve those same objective and subjective circumstances.

[46] Counsel for the appellant made the submission, based on a schedule of cases, that the average sentence imposed by the Supreme Court for the offence of supplying less than a commercial quantity of methamphetamine is imprisonment for two years. As this Court has previously observed in relation to a similar submission in a different context, "advertence to a mean sentence was of limited utility because that methodology failed to take account of the particular facts and circumstances at play in each case, and

failed to take account of whether and what discount had been applied in recognition of a guilty plea."[30]

[47] At the other end of the spectrum, it was argued that the sentence imposed on the appellant for the offending in count 2 was at the same level as sentences passed on offenders who commit serious offences of supplying commercial quantities of methamphetamine. By way of example, counsel for the appellant drew attention to *Truong v The Queen*[31], a case on which the Crown had relied in submissions in the sentencing proceedings. In *Truong*, this Court dismissed an appeal against sentence for supplying 55 g of methamphetamine worth $83,000. The appellant in *Truong* had previous drug convictions and was on bail for a drug offence charged interstate. He was sentenced to imprisonment for 4 years and 10 months with a non-parole period of 2 years and 5 months.

[48] That comparator is of little assistance for this purpose. The head sentence imposed in *Truong* was significantly higher than the head sentence imposed for count 2 in the present matter. The offending conduct in *Truong* was comprised by a single act of transportation. As has already been pointed out, the appellant here was involved in ongoing drug dealing activities with numerous arrangements for supply revealed on her phone. The reasoning in authorities such as *Lawrence v The Queen*[32] permits a sentencing judge to

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30 *Forrest v The Queen* [2017] NTCCA 5 at [84].

31 [2015] NTCCA 5; 35 NTLR 186 (***Truong***).

32 [2007] ACTCA 10; 171 A Crim R 286.

form a view as to the nature and extent of drug distribution activity for contextual purposes based on agreed facts.

[49] Given the various and diverse sentencing considerations that may be relevant to assessing both the gravity of the offending and the subjective circumstances of the offender in any given case, it is readily conceivable that an offender charged under s 5A(1) of the *Misuse of Drugs* Act, depending on the scale of activities, prior convictions and response to previous orders, may ultimately be sentenced to a term that approximates the term imposed on an offender dealt with for a single act of commercial supply in different circumstances. A bare comparison between the two categories of offending, or of sentences imposed in individual cases, does not assist in establishing that the sentence for count 2 was imposed on the basis that the appellant supplied a commercial quantity of methamphetamine.

[50] For these reasons, this ground of appeal is dismissed.

Ground 2: The sentences, individually and in total, are manifestly excessive

[51] The principles governing an appeal contending that a sentence is manifestly excessive are well known. It is fundamental that the exercise of the sentencing discretion be not disturbed on appeal unless error in the exercise of the discretion is shown. The presumption is that there is no error. Given the nature and operation of the sentencing discretion, including the likelihood that there may be a range of judicial views as to the appropriate

sentence, it is not sufficient for an appellant relying on this ground to show that this Court might have imposed a lower sentence than that determined by the sentencing judge. The sentence must be demonstrated to be so excessive as to bespeak error in the exercise of the discretion, notwithstanding that no specific error can be identified.[33]

Relevant sentencing principles for the supply offences

[52] It is convenient to deal first with the principles that govern sentencing for the offences charged in counts 1 and 2. The relevant maximum penalties are imprisonment for five years for the offending charged in count 1 and 14 years for the offending charged in count 2. Those maxima are relevant sentencing yardsticks, to be taken and balanced with all other factors, and contemplate a wide range of offending conduct. In *Markarian v The Queen*[34], the High Court observed that maximum penalties invite comparison between the worst possible case and the offending under consideration.

[53] As has been discussed in the context of the first ground of appeal, the gravity of the offending is informed by a range of factors which have recently been identified in cases before this Court[35], subject to appropriate adjustments to take account of the fact that the amount supplied in respect of both counts was not a commercial quantity. When assessing the gravity of the offending for the supply of drugs, whether Schedule 1 or Schedule 2

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33 *House v The King* [1936] HCA 40; 55 CLR 499 at 505.

34 [2005] HCA 25; 228 CLR 357 (***Markarian***) at [31].

35 *The Queen v Roe* [2017] NTCCA 7; *Truong v The Queen* (2015) 35 NTLR 186 at [34]–[36].

drugs under the *Misuse of Drugs Act*, a sentencing court will necessarily consider the role and position of the offender in any particular supply operation, the sophistication of the enterprise and the extent of any commercial aspect of the operation. That is so even where the weight of the drug supplied is below the commercial threshold. The amount of profit and the extent or reach of any supply into the community may also be relevant. In the application of those considerations, a single occasion of the supply of a drug in a social context will be assessed as less objectively serious than an ongoing operation for commercial gain. The primary sentencing purposes in that latter category of case will be punishment, denunciation and general deterrence.

[54] Turning then to the offending charged in count 1, the quantity of cannabis seized from the appellant's house was approximately 11 grams. That is a relatively small quantity, however possession of the 11 grams of cannabis was not the gravamen of the supply charge. As already described above, the salient facts in relation to the charge for supplying less than a commercial quantity of cannabis reveal that the appellant was engaged in the active and frequent supply of cannabis for commercial gain over a period of approximately six weeks. Her role in that operation was as the dealer in illicit substances which had been supplied by her partner.

[55] Similar observations may be made in relation to the gravamen of the charge of supplying less than a commercial quantity of methamphetamine. The conduct charged involved the appellant engaging in the supply of

methamphetamine over a six-week period, including actively soliciting prospective purchasers, negotiating quantities and prices, arranging for the delivery and collection of the drug, and providing the drug on occasion in exchange for jewellery or other goods.

[56] The results of the interrogation of the appellant's mobile phone illustrated that level of activity. The amount of the cash seized, although primarily relevant to the offending charged in count 3, is also relevant for contextual purposes in the assessment of the scale and commercial character of the offending charged in counts 1 and 2. The offending charged on those counts was attended by at least some degree of sophistication. Multiple mobile phones were used and a safe was utilized to store the monetary proceeds. It has not been suggested that the sentencing judge was in error in finding that the appellant's role in that supply activity was "substantial". Plainly it was.

[57] Even having regard to the appellant's unfortunate background and the other matters in mitigation, the individual sentences for counts 1 and 2 cannot be said to be manifestly excessive having regard to the nature of the offending conduct, the appellant's prior criminal history and the fact that the offending occurred while the appellant was taking the benefit of an order suspending sentence. In any event, by reason of the sentence imposed in respect of count 3 and the order for concurrency, those individual sentences had no bearing on the total effective period of imprisonment. We turn then to consider the sentence imposed in respect of count 3.

Sentencing for the receipt or possession of tainted monies

[58] Section 8(1) of the *Misuse of Drugs Act* (NT) provides:

> **Receiving or possessing tainted property**
>
> (1) A person commits an offence if:
>
> (a) the person intentionally receives or possesses property other than a dangerous drug; and
>
> (b) the property was obtained directly or indirectly from the commission of:
>
> (i) an offence against Subdivision 1; or
>
> (ii) an act done at a place outside the Territory that:
>
> (A) if it had been done in the Territory, would have constituted an offence against Subdivision 1; and
>
> (B) is an offence under the law in force in the place where it was done; and
>
> (c) the person has knowledge of the circumstance mentioned in paragraph (b).
>
> Maximum penalty: Imprisonment for 25 years.

[59] Similar provisions creating specific offences in relation to dealing in the proceeds of drug offences have been enacted in Queensland, Tasmania and the Australian Capital Territory. The Northern Territory provision would appear to be modelled closely on s 7 of the *Drugs Misuse Act 1986* (Qld). There are no equivalent provisions in Commonwealth, New South Wales, South Australian, Victorian and Western Australian legislation, although those jurisdictions do have provisions creating offences for dealing with the proceeds of crime generally. Although the offence created by s 8(1) of the *Misuse of Drugs Act* is that of receiving or possessing property obtained directly or indirectly from the commission of a drug offence, rather than

"dealing" with the proceeds of crime, the relevant sentencing principles are similar for the purposes of this ground of appeal.

[60] The New South Wales Court of Criminal Appeal has had occasion to consider the operation of various provisions which create the offence of dealing with the proceeds of crime, with particular reference to the proper approach to sentencing where the charge concerns the proceeds of crime derived from primary offences for which the offender has also been charged and stands to be sentenced.

[61] *Thorn v The Queen*[36] involved charges of fraud and dealing with the proceeds of crime contrary to the provisions of the *Criminal Code* (Cth). The tainted monies the subject of the dealing offence were the monies which had been dishonestly obtained as a result of the commission of the fraud offences. The dealing in question was constituted by the offender transferring the monies obtained by the fraud from the company accounts to his personal account and drawing it from that account. One of the grounds of appeal under consideration was that the sentence imposed for dealing with the tainted monies was excessive because the criminality inherent in the dealing offence was lower than the criminality inherent in the fraud offences.

[62] The Court observed that although the dealing offence carried a maximum penalty of imprisonment for 20 years and the fraud offence a maximum

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36 (2009) 198 A Crim R 135 (***Thorn***).

penalty of imprisonment for 10 years, in the particular circumstances of that case the higher maximum penalty was not a reliable guide as to the seriousness of the conduct involved.[37] In drawing that conclusion, the Court made reference to the decision of the High Court in *Markarian*[38], and in particular to an extract from Stockdale and Devlin, *Sentencing* in the following terms:

> A maximum sentence fixed by Parliament may have little relevance in a given case, either because it was fixed at a very high level in the last century ... or because it has more recently been set at a high catch-all level ... At other times the maximum may be highly relevant and sometimes may create real difficulties ...
>
> A change in a maximum sentence by Parliament will sometimes be helpful [where it is thought that the Parliament regarded the previous penalties as inadequate].[39]

[63] As already noted, *Markarian* is also authority for the proposition that the maximum penalties invite comparison between the worst possible case and the offending under consideration.[40] The Court in *Thorn* drew attention to the disparity between the relative seriousness of the fraud offences and the dealing offence in the following terms:

> This was an unusual use of a money laundering offence. To the extent that there was an overlap with the fraud offences the charge represented the use of the funds that had been dishonestly obtained under those offences. The criminality was very much in the obtaining of the funds not in their use. It is somewhat analogous to a robber being sentenced for both the robbery and being in possession of the stolen goods. But in

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37 *Thorn v The Queen* (2009) 198 A Crim R 135 at [33] per Howie J (Campbell JA and Rothman J concurring).

38 (2005) 228 CLR 357 at [30].

39 Stockdale and Devlin, *Sentencing* (1987), pars 1.16-1.18.

40 *Markarian v The Queen* (2005) 228 CLR 357 at [31].

> the present case, according to the maximum penalties described, the money laundering offence was more serious than the frauds by which the money was obtained.[41]

[64] After referring to a number of decisions in money laundering cases referred to by the primary judge which "involved money laundering of a completely different character" to the conduct engaged in by the appellant, the Court continued:

> … [h]ere the applicant was merely transferring the money obtained by the fraudulent claims from the company accounts to his personal account or drawing it from an ATM so that he could use it to gamble. He was doing nothing to hide the source or to change the nature of the funds. He was simply gaining access to them. The activity came within the scope of the offence under s 400.4, because the offence is so widely drawn. But it was a highly technical version of the offence.[42]

[65] It is clear from that discussion and the result in *Thorn* that the Court considered the maximum penalty fixed for the dealing offence to be a "catch-all" penalty designed to accommodate a very broad range of offending behaviours. While that is necessarily the case with all maximum penalty provisions, the more general the provision the broader the range of offending conduct it will capture. That s 8(1) of the *Misuse of Drugs Act* has a similarly broad reach is apparent from the second reading speech for the Misuse of Drugs Bill, in which the Attorney-General said:

> Thirdly, the bill recognises that the underlying scourge in our community are those callous individuals who organise the drug trade, make huge profits out of the misery of others and seek to hide their

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41 *Thorn v The Queen* [2009] 198 A Crim R 135 at [27] per Howie J (Campbell JA and Rothman J concurring).

42 *Thorn v The Queen* [2009] 198 A Crim R 135 at [31] per Howie J (Campbell JA and Rothman J concurring).

> involvement by using intermediaries. The Mr Bigs and not so big, and those who finance drug trafficking are always hard to catch. This bill will make it easier to bring those people to justice.[43]

[66] A range of factors will be relevant to the assessment of the objective seriousness of an offence against s 8(1) of the *Misuse of Drugs Act*. These factors may include the amount(s) involved, the number of transactions, the period over which those transactions occurred, the sophistication, size and extent of the operation which generated the proceeds, the offender's role in that operation, and what became of the money.[44] In addition to those considerations, the Court in *Thorn* also observed that in the circumstances there under consideration the question whether the sentence imposed for the dealing offence was manifestly excessive would depend in part upon how that sentence compared with a sentence appropriately reflecting the seriousness of the dishonesty offences by which the monies had been obtained.[45]

[67] The offender in *Thorn* was sentenced for fraudulent activity involving approximately $312,000, from which he personally obtained approximately $103,000. Those monies personally obtained were the total amount of the monies involved in the dealing offence. In the final result, the Court resentenced the offender to imprisonment for three years for the fraud

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43 Northern Territory Legislative Assembly Debates, 25 May 1989, 6529 – 6535

44 See, in relation to the analogous offence in s 400.4(1) of the *Criminal Code 1995* (Cth): *R v Dennison* [2011] NSWCCA 114; *R v Bin Huang; R v See Hon Siu* [2007] NSWCCA 259; (2007) 174 A Crim R 370 at [32]-[36].

45 *Thorn v The Queen* (2009) 198 A Crim R 135 at [35] per Howie J (Campbell JA and Rothman J concurring).

offences and imprisonment for two years and eight months for the dealing offence with 18 months' cumulation, yielding a total effective sentence of imprisonment for four years and two months. That result reflected a near equivalence in the sentences imposed for the fraud and dealing offences respectively, but a degree of cumulation to reflect the fact that criminality of the dealing offence was not entirely captured by the fraud offences.

[68] In *Nahlous v The Queen*[46], which was decided the following year, the New South Wales Court of Criminal Appeal considered a matter in which the offender had been sentenced for six offences involving the sale of unauthorised decoders contrary to the *Copyright Act 1968* (Cth), and also for dealing with the proceeds of those sales in the amount of $15,000 contrary to the same provision of the *Criminal Code* which had been considered by the Court in *Thorn*. The Court held that the receipt of the monies as a result of the sale did not constitute a separate act of criminality warranting a separate charge and penalty, and the dealing offence was dismissed. That was because the offence of sale encompassed the criminality of possessing the proceeds of that very same sale.[47] In reaching that conclusion, however, the Court was at pains to distinguish the result in *Thorn* on the basis that the dealing offence in the earlier matter also captured the additional criminality inherent in the offender's joint criminal enterprise with a co-offender.[48]

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46 (2010) 201 A Crim R 150 (***Nahlous***).

47 *Nahlous v The Queen* (2010) 201 A Crim R 150 at [17].

48 *Nahlous v The Queen* (2010) 201 A Crim R 150 at [14]-[15].

[69] More recently, in *Jadron v The Queen*[49] the New South Wales Court of Criminal Appeal considered an appeal against sentences imposed for the offences of supplying methylamphetamine, supplying cannabis and dealing with the proceeds of crime contrary to s 193B(2) of the *Crimes Act 1900* (NSW). The grounds of appeal included that the sentencing judge had erred in the application of the principle of totality by making the sentences for the supply of the prohibited drugs cumulative on the sentence imposed for the dealing offence. The proceeds of crime subject to the dealing charge were monies derived solely from the supply of the prohibited drugs charged in the other two offences, and that ground was conceded by the Crown. The Court made the following observation in relation to that concession:

> The Crown's concession that her Honour should not have accumulated the sentences in such a way as to impose any additional time to be served for Count 4 (dealing with proceeds) was properly made having regard to such decisions as *Thorn v R* and *Nahlous v R* [citations omitted]. The present was a case where the admitted proceeds of crime were an accumulation from the sales of drugs as charged on Counts 1 and 3. The Appellant's dealing in the proceeds occurred as part of his commission of the two offences against s 25(1). It took place in the same period. The sentence for it should be concurrent with the sentences for the supply charges.[50]

[70] Unlike *Nahlous*, there was no suggestion in those reasons or in that result that the receipt and possession of the monies from the sale of the prohibited drugs did not constitute a separate act of criminality warranting a separate

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49 (2015) 253 A Crim R 450 (***Jadron***).

50 *Jadron v The Queen* (2015) 253 A Crim R 450 at [54] per Fagan J (Leeming JA and Hamill J concurring). See also *Redfern v The Queen* [2012] NSWCCA 178; 228 A Crim R 56 at [9]-[17], it was held to be unnecessary and inappropriate to impose an additional sentence in respect of an uncharged offence included on a Form 1 of dealing with the proceeds of crime in circumstances where penalty had already been imposed for the supply charges by which those proceeds were derived.

charge and penalty. Rather, the matter appears to have been resolved by the application of the principle laid down by the High Court in *Pearce v The Queen*[51] to the effect that where two offences of which an offender stands convicted contain common elements, it would be wrong to punish that offender twice for the commission of the elements that are common. In that respect, McHugh, Hayne and Callinan JJ observed (footnotes omitted):

> [40] To the extent to which two offences of which an offender stands convicted contain common elements, it would be wrong to punish that offender twice for the commission of the elements that are common. No doubt that general principle must yield to any contrary legislative intention, but the punishment to be exacted should reflect what an offender has done; it should not be affected by the way in which the boundaries of particular offences are drawn. Often those boundaries will be drawn in a way that means that offences overlap. To punish an offender twice if conduct falls in that area of overlap would be to punish offenders according to the accidents of legislative history, rather than according to their just deserts.
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> [41] …
>
> [42] … The identification of a single act as common to two offences may not always be as straightforward. It should, however, be emphasized that the inquiry is not to be attended by "excessive subtleties and refinements". It should be approached as a matter of common sense, not as a matter of semantics.[52]

[71] In the application of that principle, the New South Wales Court of Criminal Appeal in *R v Hilton*[53] held that it is not only the commonality of the legal elements of the offences which are to be considered, but also the commonality of the relevant facts and circumstances. *Hilton* was an appeal

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51 (1998) 194 CLR 610 (***Pearce***).

52 *Pearce v The Queen* (1998) 194 CLR 610 at [40], [42] per McHugh, Hayne and Callinan JJ.

53 [2005] NSWCCA 317; 157 A Crim R 504 (***Hilton***).

against sentence involving substantial overlap of factual elements as between multiple charges of receiving money knowing it was derived from child prostitution and having control over premises in which child prostitution took place. Partial accumulation was ordered as between the penalties imposed for the two sets of offences. The Court found the overlap between the two types of charges was "almost complete" as there was, in reality, no difference in substance between the activities constituting the two types of offences even though the relevant conduct could be described in two different ways.

[72] The same principle was applied by the New South Wales Court of Criminal Appeal in *R v Dennison*[54], which involved the Commonwealth offences of using a carriage service to make available child pornography and dealing in the proceeds of crime. In the course of dismissing a Crown appeal against inadequacy which contended that an order for substantial concurrence as between the child pornography charges and the dealing in proceeds of crime charge was in error, the Court confirmed that it is not only the commonality of the legal elements of the offences which are to be considered but also the commonality of facts and circumstances. The rationale and the sentencing process was described in the following terms:

> As explained in *R v Elphick* [[2010] NSWCCA 112 at [29]] when an offender is being punished for more than one offence arising out of the same set of facts, the need to avoid punishing an offender twice does not require that elements which are common to any overlapping

54 *R v Dennison* [2011] NSWCCA 114.

> offences with which the offender is charged be ignored. Rather, it is necessary to consider, independently, the facts and circumstances relevant to the sentence imposed for the first offence and to sentence accordingly. Then, when turning to deal with the second offence, 'any necessary step in assessment of punishment for that crime to avoid that which would amount to double punishment can be taken'.[55]

[73] This Court has adopted the same approach in the context of the offences of using a boat for commercial fishing and possessing a foreign boat under the *Fisheries Management Act 1991* (Cth)[56], and in the context of dual charges of armed robbery and unlawful entry in possession of an offensive weapon[57]. The Crown's concession in *Jadron*, and the Court's endorsement of that concession, reflect the fact that the commonality of elements in that matter warranted full concurrency.

[74] There is no material distinction to be drawn between the respective operations of the dealing provisions in s 400.6(1) of the *Criminal Code 1995* and s 193B(2) of the *Crimes Act 1900*, or the relationship between the substantive offences and the proceeds, which would explain the different approaches taken in *Nahlous* and *Jadron*. The relevant point of distinction is that the gravamen of the offence against the *Copyright Act 1968* which was the subject of consideration in *Nahlous* was the sale of an unauthorised decoder, which in its terms necessarily and wholly comprehended the elements of, and the criminality inherent in, the second offence charged for

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55 *R v Dennison* [2011] NSWCCA 114 at [95] per Schmidt J (Whealy JA and McCallum J concurring).

56 *Yusup v The Queen* [2005] NTCCA 19 at [12] per Riley J (Mildren and Southwood JJ concurring).

57 *Bara v The Queen* [2016] NTCCA 5 at [53]-[55].

receiving the monies on that sale. Conversely, the supply offences in *Jadron* were directed principally to the criminality inherent in the distribution, transportation and supply of prohibited drugs, which might also, but not necessarily, involve the receipt of fee, reward or consideration in respect of the supply. The primary purpose to which supply offences are directed is to prevent the distribution of illicit drugs in the community.

[75] In circumstances where the "dealing" with the proceeds of crime does not constitute a separate act of criminality warranting a separate charge and penalty, the charge will be an abuse of process and/or may attract a plea in bar. Where the dealing does constitute a separate act but shares conduct, elements or criminality with the offence by which the proceeds were derived, as in *Jadron* and *Thorn*, the matter is properly addressed in the imposition of penalty. The High Court gave specific attention to that distinction in *Pearce*. In that case the offender had pleaded guilty to charges under s 33 and s 110 of the *Crimes Act 1900* (NSW), both of which had as an element of the offence the infliction of grievous bodily harm. The charges arose out of a course of criminal conduct involving the infliction of grievous bodily harm upon the one victim. In that respect, McHugh, Hayne and Callinan JJ observed (footnotes omitted):

> [28] Inevitably, any test of the availability of the pleas in bar which considers the evidence to be given on the trial of the second prosecution except in aid of an enquiry about identity of elements of the offences charged would bring with it uncertainties of the kind identified by Scalia J. The stream of authorities in this country runs against adopting such a test and there is no reason to depart from the use of the test which looks to the elements of the

offences concerned. Each of the offences with which the appellant was charged required proof of a fact which the other did not. It follows that no plea in bar could be upheld.

Stay of proceedings

[29] Confining the availability of the plea in bar in this way does not deny the existence of the inherent powers of a court to prevent abuse of its process. That there may be cases in which the repeated prosecution of an offender in circumstances where that offender has no plea in bar available would be an abuse of process is illustrated by *Rogers v The Queen* (1994) 181 CLR 251.

[30] The decision about what charges should be laid and prosecuted is for the prosecution. Ordinarily, prosecuting authorities will seek to ensure that all offences that are to be charged as arising out of one event or series of events are preferred and dealt with at the one time. Nothing we say should be understood as detracting from that practice or from the equally important proposition that prosecuting authorities should not multiply charges unnecessarily.

[31] There was, however, no abuse of process in charging this appellant with both counts 9 and 10. The short answer to the contention that the charging of both counts was an abuse of process is that because the offences are different (and different in important respects) the laying of both charges could not be said to be vexatious or oppressive or for some improper or ulterior purpose. To hold otherwise would be to preclude the laying of charges that, together, reflect the whole criminality of the accused and, consonant with what was held in *R v De Simoni* ([1981] HCA 31; 147 CLR 383), would require the accused to be sentenced only for the offence or offences charged, excluding consideration of any part of the accused's conduct that could have been charged separately.[58]

[76] The nature of this distinction was also addressed by Beech-Jones J in *R v Dickson; R v Issakidis (No 1)*[59] when dealing with an application for the stay of a charge of conspiring to deal with the proceeds of crime where those proceeds were alleged to be the product of a fraud charged in the same

58 *Pearce v The Queen* (1998) 194 CLR 610 at [28]-[31] per McHugh, Hayne and Callinan JJ.

59 [2014] NSWSC 1068.

indictment. His Honour said, with reference to the earlier cases including *Nahlous* and *Thorn*:

> [21] All of these decisions were sentencing decisions. Care needs to be taken in taking discussions of double punishment in a sentencing context and applying them to a consideration of whether there is an attempt at double prosecution (*Pearce v R* [1998] HCA 57; 191 CLR 610 at [15] per McHugh, Hayne and Callinan JJ) ("*Pearce*"). Thus, with one exception, the disapprobation in these cases of the overcharging involved did not state that what had occurred was an abuse of process. The one exception was *Nahlous* where an offender was sentenced for selling "decoders" contrary to ss 135ASB(1) and 135ASC(1) of the *Copyright Act 1968* (Cth), and then a money laundering offence under s 400.6(1) of the Code for dealing with the proceeds of those sales.
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> …
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> [25] An example of the application of *Pearce* in a context similar to the present is *Delaney v R* [2013] NSWCCA 150 ("*Delaney*"). In *Delaney*, Hoeben CJ at CL (with whom Harrison J and I agreed) held that there was no abuse of process in prosecuting the appellant for demand money with menaces in company contrary to s 99(2) of the *Crimes Act 1900*, and dealing with the proceeds of crime contrary to s 193B(2) of the *Crimes Act 1900* where the relevant dealing was receiving monies yielded as a consequence of the demand (at [31] to [39]). Relying on the above passage from *Pearce*, Hoeben CJ at CL noted that the elements of the two offences were different and that "[n]either offence is wholly included in the other" (at [36]). *Delaney* was not a case involving "repeated prosecutions" or any other circumstance that might fall within *Pearce* at [29].
>
> [26] The discussion in *Nahlous* referred to an abuse of process arising if there was no "separate act of criminality that warranted a separate charge and a separate penalty". As this passage was stated to be consistent with *Pearce*, I do not understand the concept of "act of criminality" as used in *Nahlous* to be different to elements of the offence. Thus this analysis leads to a conclusion that an abuse of process will occur in such cases where there is no element of the further offence which is separate and distinct from the predicate offence. However, if there is some element of overlap, even if not of a substantial nature, then without more it will not amount to an abuse of process. To the contrary, to conclude

> otherwise may result in the charges laid not fully reflecting the criminality of the conduct said to have been engaged in.[60]

[77] We respectfully concur with those conclusions concerning the decision in *Nahlous*. This limitation on the application of *Nahlous* is also apparent from other decisions of the New South Wales Court of Criminal Appeal. In *Hinchcliffe v The Queen*[61], following express consideration of the result in *Nahlous*, the Court held that the act of criminality in receiving stolen property (even where the stolen property happens to be drugs) is quite different from the act of criminality in possessing that property for the purpose of sale.[62] Similarly, in *Standen v Commonwealth Director of Public Prosecutions*[63] the Court held that there was no abuse of process in charging the accused with both conspiracy to import a border controlled precursor and of knowing participation in an attempt to supply a prohibited drug, even where the precursor and the prohibited drug were constituted by the one quantity of 300 kg of pseudoephedrine. The court observed that unlike the position obtaining in *Nahlous*, it was not a matter where there was no possibility at all that the accused could be found guilty of one charge but not guilty of the other, or in which the criminality of one offence necessarily encompassed the criminality of the other.[64]

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60 *R v Dickson; R v Issakidis (No 1)* [2014] NSWSC 1068 at [21], [25]-[26].

61 [2010] NSWCCA 306.

62 *Hinchcliffe v R* [2010] NSWCCA 306.

63 [2011] NSWCCA 187; 254 FLR 467.

64 *Standen v Commonwealth Director of Public Prosecutions* (2011) 254 FLR 467 at [22]-[43].

[78] The results and reasons in those cases disclose a number of principles of general operation in this context.

[79] First, where the offence of dealing with tainted monies (or receiving or possessing tainted monies, as the case may be) does not constitute a separate act of criminality warranting a charge separate and additional to the offence by which those monies were derived, the charge will be an abuse of process and/or may attract a plea in bar.

[80] Secondly, in the ordinary course there will be no abuse of process in charging both a drug supply offence and dealing with, receiving or possessing monies derived from that supply.

[81] Thirdly, where the offence involving the tainted monies shares conduct, elements or criminality with the offence by which the monies were derived, the matter is properly addressed in the imposition of penalty and appropriate orders for concurrency having regard to the commonality between the offences.

[82] Fourthly, there will be no necessary call for concurrency where the tainted monies are derived from some source other than the supply with which the offender is also charged, and the ordinary principles will apply.

[83] Fifthly, the maximum penalty fixed by s 8(1) of the *Misuse of Drugs Act* is a "catch-all" penalty designed to accommodate a very broad range of

offending behaviours which requires a careful assessment of the objective seriousness of the offending under consideration.

[84] Finally, the assessment of objective seriousness will involve a consideration of, where apparent, the amount(s) involved, the number of transactions, the period over which those transactions occurred, the sophistication, size and extent of the operation which generated the monies, the offender's role in that operation and what became of the monies. That assessment may also require some comparison with the sentence fixed for the criminal conduct by which those proceeds were derived.

The sentence imposed for count 3

[85] By virtue of the appellant's plea of guilty to count 3, the sentencing judge was bound to proceed on the basis the appellant admitted the elements of the charge. Those elements are the intentional receipt or possession of proceeds in the sum of $40,500 knowing it was obtained from the commission of an offence against the *Misuse of Drugs Act*. Further, for the purposes of the assessment of the gravity of the offending in count 3 the sentencing judge was entitled to proceed on the basis the appellant had admitted the Crown facts as clearly indicated by her counsel in the course of the sentencing proceedings.[65]

[86] Counsel for the appellant contended on appeal that the possession of the $40,500 charged in count 3 was "money obtained from a combination of the

65 AB 5 and 9.

drugs supplied in counts 1 and 2".[66] If it was indeed the case that all of the proceeds were derived from the supply charged in counts 1 and 2, on the basis of the authorities considered in the foregoing discussion the fixing of sentence for the tainted monies charged by count 3 would require some comparison with the sentences fixed for the supply offences, and appropriate orders for concurrency having regard to the commonality between the offences. In the ordinary course, it would not be expected that the sentence would be structured in a manner that imposed some further effective period of imprisonment for possessing the proceeds of the supply. However, the sentencing facts do not expressly identify the source of funds. The only relevant passage in the agreed facts is in the following terms:

> The total amount of cash seized was $40,500.00 which was derived from the sale of illicit substances and was collected by the offender's boyfriend.

[87] The offence of supplying less than a commercial quantity of cannabis comprehends the supply of something up to 500 g of that drug. It is common knowledge in this Court that cannabis sells for $30 per gram in Darwin. It is conceivable, then, that the charge of supplying cannabis comprehended proceeds in an amount up to $15,000. The offence of supplying less than a commercial quantity of methamphetamine comprehends the supply of something up to 40 g of that drug. The agreed facts state expressly that sales of methamphetamine were made in varying quantities from quarter points up to larger quantities. Applying that same

66 Appellant's outline of submissions at [1], "Count 3".

common knowledge in relation to the price of methamphetamine in Darwin, it is conceivable that the charge of supplying methamphetamine comprehended proceeds in an amount up to $20,000 if sold by the gram, even on a conservative estimate. The proceeds would have been significantly greater if sold primarily by the quarter point.

[88] In bringing the charge of dealing with the proceeds of drug offences on the same indictment as two related supply charges, the onus was on the Crown to establish to the requisite standard that the proceeds charged came in whole or in part from activity not covered in the supply charges if it wished to press a submission that there is no commonality between the offences to that extent. The Crown did not discharge that onus in this case. The agreed facts do not allow a finding to the requisite standard that the proceeds came in any part from activity not covered by the supply charges. The ready reckoning undertaken in the previous paragraph suggests a reasonable possibility that they did not.

[89] Even if we are wrong in that, and the onus was on the appellant to establish on the balance of probabilities that the tainted monies were derived entirely from the supply offences charged, during the course of the sentencing proceedings the prosecutor made the following submission:

> Of course, the whole enterprise is characterised by that third charge on the indictment, which is, we are dealing with the sum of about $40,500. That's from a one and a half month period where we can actually determine that this drug dealing is taking place. We can't positively say when it is that the money was accumulated and whether it was from

> the sale of cannabis or whether it was from the sale of methamphetamine.[67]

[90] That operated as a clear concession by the Crown that the tainted monies had been derived over the same period particularised in the supply charges, and as a result of the conduct charged in counts 1 and 2. The Crown is properly bound to that concession for the purposes of this appeal.[68]

[91] So far as any comparison with the sentences fixed for the supply offences is concerned, for the reasons already given those sentences reflect findings that the appellant engaged in the supply of cannabis and methamphetamine over a six-week period, including actively soliciting prospective purchasers, negotiating quantities and prices, and arranging for the delivery and collection of the drugs. The sentences were imposed for a course of sustained supply activity for commercial gain. It is not readily apparent that the sentences imposed for the supply charges did not also encompass the criminality inherent in the charge of possessing the tainted monies. For those same reasons, it is also not readily apparent why the sentence imposed in respect of count 3 was significantly and substantially more severe than the sentence imposed in respect of count 2.

[92] The disparity in the sentences imposed is also borne out by an examination of the sentences imposed by the Supreme Court for offences against s 8(1)

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67 AB 19.

68 Cf the submission made by counsel for the respondent during the hearing of the appeal that the $40,500 was *in part* referrable to the offending on counts 1 and 2, although the part was not known and could not be specified.

of the *Misuse of Drugs Act*. The recent comparative sentences in this jurisdiction for offences involving tainted monies derived from the supply of cannabis are catalogued in *Horder v The Queen*[69], which was delivered at the same time as the decision in this appeal. We repeat that summary as follows.

(a) In the matter of *Higgins* the offender was sentenced to imprisonment for five years after discount for his guilty plea for the possession of $121,145 obtained from the commission of drug offences (including the supply of 2.2 kg of cannabis and 150 g of methamphetamine).

(b) In the matter of *Daly* the offender was sentenced to imprisonment for 19 months after discount for his guilty plea for the possession of $7,385 obtained from the commission of a drug offence. The offender was also charged with and convicted of the primary supply offence involving 1.979 kg of cannabis, and was sentenced to imprisonment for two years and six months. The sentences were ordered to be served in full concurrency in circumstances where the tainted monies were derived from the supply for which the appellant was also sentenced.

(c) In the matter of *Goedegebuure* the offender was sentenced to an aggregate term of imprisonment for three years and 10 months for offences which included supplying 21 kg of cannabis and possessing tainted monies in the sum of $177,085. That sentence incorporated a

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69 [2019] NTCCA 3.

discount for the offender's guilty plea and remorse, and a further discount on *Ellis* grounds.

(d) In the matter of *Daniels* the offender was convicted of supplying cannabis in an indigenous community, the possession of cannabis and the possession of $8,140 obtained from the supply of cannabis. He was sentenced after discounts for his pleas of guilty to imprisonment for three years and two months for the supply offence and imprisonment for two years and five months for the possession of the tainted monies. One year of the sentence for the offence of possessing tainted monies was ordered to be served cumulatively on the sentence for the supply offence.

(e) In the matter of *Turnbull* the offender was sentenced after discount for his guilty pleas to imprisonment for 15 months for the supply of 637.6 g of cannabis and to imprisonment for 20 months for the possession of $19,900 obtained from the supply of cannabis. Those sentences were ordered to be served cumulatively as to four months.

(f) In the matter of *Calesso* the offender was sentenced after discount for his guilty pleas to an aggregate period of imprisonment for three years for the offences of supplying 7.257 kg of cannabis, possessing a small quantity of cannabis plant material, and possessing $4,850 obtained from the supply of that same cannabis.

(g) In the matter of *Bosse* the offender was sentenced after discount for his guilty pleas to an aggregate period of imprisonment for three years and

six months for the offences of supplying 1.308 kg of cannabis and possessing $94,470 obtained from that and other supply activity.

(h) In the matter of *Ahfat* the offender was sentenced after discount for his guilty pleas to an aggregate period of imprisonment for two years for the offences of supplying cannabis and possessing $17,205 obtained from the supply of that same cannabis.

(i) In the matter of *Cameron* the offender was sentenced after discount for his guilty pleas to an aggregate period of imprisonment for two years and four months for the unlawful supply of 2.815 kg of cannabis and possessing $8,586 obtained from the supply of that same cannabis.

(j) In the matter of *Witham* the offender was sentenced after discount for his guilty pleas to an aggregate period of imprisonment for three years for the possession of a small quantity of cannabis, the supply of a trafficable quantity of cannabis to an indigenous community and possessing $24,000 obtained from the supply of that and other cannabis.

(k) In the matter of *Salzberger* the offender was sentenced after discount for her guilty pleas to an aggregate period of imprisonment for three years for three counts of supplying cannabis in an indigenous community and two counts involving the receipt of a total of $14,300 obtained from that supply.

(l) In the matter of *Hubbard and Patrick* the offender *Hubbard* was sentenced after discount for his guilty pleas to a total effective period

of imprisonment for five years for a range of offences, the principal ones of which were the supply of 4.889 kg of cannabis, the supply of 1.006 kg of cannabis and the possession of $68,850 from that supply. Before orders for partial concurrency, each of those offences attracted an individual sentence of imprisonment for 28 months. The offender *Patrick*, whose involvement was at a lower level, was sentenced after discount for her guilty pleas to a total effective period of imprisonment for three years for those same offences.

(m) In the matter of *Delacoeur* the offender was sentenced after discount for his guilty pleas to an aggregate period of imprisonment for 18 months for the offences of supplying cannabis in an indigenous community and receiving $9,900 obtained from that supply.

(n) In the matter of *Do* the offender was convicted of supplying 1.018 kg of cannabis, the possession of a small quantity of cannabis seeds, and the possession of $30,000 obtained from the supply of that and other cannabis. He was sentenced after discounts for his pleas of guilty to imprisonment for two years for the supply offence and imprisonment for two years for the possession of the tainted monies. One year of the sentence for the offence of possessing tainted monies was ordered to be served cumulatively on the sentence for the supply offence.

(o) In the matter of *Herbert* the offender was sentenced to an aggregate period of imprisonment for 18 months for the supply of 445 g of cannabis in an indigenous community and the possession of $30,000

obtained from the supply of cannabis. That sentence incorporated discounts for both the offender's pleas of guilty and his significant cooperation with authorities.

(p) In the matter of *Robinson* the offender was sentenced after discount for his pleas of guilty to an aggregate period of imprisonment for three years for the cultivation of cannabis, the possession of 6.286 kg of cannabis, and the possession of $19,164 in cash, gold bars and a motorcycle obtained from the supply of cannabis.

[93] The recent comparative sentences in this jurisdiction for offences involving any substantial quantity of tainted monies derived from the supply of methamphetamine may be summarised as follows:

(a) In the matter of *Ainslie and Orrell* the offender *Ainslie* was sentenced after discount for her guilty pleas to an aggregate period of imprisonment for four years and nine months for the offences of possessing and supplying 191.39 g of methamphetamine and receiving $10,500 obtained from drug supply offences. The offender *Orrell* was sentenced after discount for his guilty pleas to a total effective period of imprisonment for six years for the possession and supply of the 191.39 g of methamphetamine and the receipt of approximately $35,000 from drug supply offences.

(b) In the related matter of *Margetic* the offender was sentenced after discount for her guilty pleas to imprisonment for 12 months for the

possession of 191.39 g of methamphetamine and the receipt of $5,500 from drug supply offences, but her involvement in the offending was peripheral.

(c) In the matter of *Byrnes* the offender was sentenced after discount for her guilty pleas to imprisonment for 18 months for the supply of methamphetamine and to imprisonment for 18 months for the receipt of $2,890 from that supply, with those sentences to be served concurrently.

(d) In the matter of *Marsh* the offender was sentenced after discount for his guilty pleas to an aggregate period of imprisonment for five years and three months for supplying commercial quantities of methamphetamine and MDMA, supplying cocaine and possessing $4,895 obtained from that supply.

(e) In the matter of *Domaschen* the offender was sentenced after discount for his guilty pleas to imprisonment for two years and six months for the supply of 250.06 g of MDMA, imprisonment for two years and six months for the supply of 39.91 g of methamphetamine, and imprisonment for 12 months for the possession of $12,950 obtained from that supply. Those sentences were ordered to be served concurrently.

(f) In the matter of *Daniels* the offender was sentenced after discount for her guilty pleas to an aggregate penalty of imprisonment for four years for the possession of 138.47 g of methamphetamine, the possession of

21.92 g of MDMA, and the possession of $28,450 derived from drug supply offences.

(g) In the matter of *Sawyer* the offender was sentenced after discount for his guilty pleas to an aggregate period of imprisonment for four years for possessing 42.8 g of methamphetamine and $50,000 obtained from the supply of drugs.

(h) In the matter of *Lane* the offender was convicted of a range of drug offences largely involving steroids. He was also charged with the possession of relatively small quantities of MDMA, methamphetamine and cannabis. He was also charged with the possession of $135,090 obtained from the supply of drugs. In addition to the sentences imposed for the drug offences, he was sentenced to imprisonment for two years and three months for the possession of the tainted monies.

(i) In the matter of *Aloua* the offender was sentenced after discount for his guilty pleas to an aggregate sentence of imprisonment for five years for the supply of 11.6 g of methamphetamine and the receipt of $26,900 from drug supply offences. That offending was aggravated by the fact that it was committed while the offender was on parole.

(j) In the matter of *Milton* the offender was sentenced after discount for his guilty pleas to an aggregate sentence of imprisonment for eight years and six months for the supply of 280 g of methamphetamine and receiving $20,500 from that supply. That offending was aggravated by

the large quantity of methamphetamine involved, the nature of the supply operation and the offender's prior criminal history.

[94] Having regard to those comparators, the criminality inherent in the sentences imposed on the appellant in respect of counts 1 and 2, and the commonality between those offences and the offence charged in count 3, the sentence after discount to imprisonment of four years and six months imposed for count 3 was manifestly excessive.

[95] The appeal is allowed on this ground and the appellant will be resentenced. Having regard to the appellant's criminal history and her prior breaches of orders, an appropriately adjusted non-parole period will be fixed. No complaint is made in relation to the order for restoration of six months of the sentence held in suspense, the order that the restored sentence be served prior to the commencement of the sentences imposed for this offending, or the order for the forfeiture of the $40,500.

Disposition and resentence

[96] Accordingly, we make the following orders:

1. The appeal is allowed on the basis that the sentence imposed in respect of count 3 was manifestly excessive.

2. The sentence of imprisonment for four years and six months imposed for the offence against s 8(1) of the *Misuse of Drugs Act* is set aside.

3. The appellant is sentenced to imprisonment for three years for the offence against s 8(1) of the *Misuse of Drugs Act*.

4. That sentence is to be served concurrently with the sentences of imprisonment for one year and three years respectively imposed on the appellant for the offences contrary to s 5A(1) of the *Misuse of Drugs Act*.

5. The total effective period of imprisonment is three years backdated to 5 October 2017.

6. A non-parole period of one year and six months is fixed, also backdated to 5 October 2017.

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