CITATION:	*The Queen v Meginess* [2019] NTCCA 5
PARTIES:	THE QUEEN v MEGINESS, Matthew
TITLE OF COURT:	COURT OF CRIMINAL APPEAL OF THE NORTHERN TERRITORY
JURISDICTION:	CRIMINAL APPEAL from the SUPREME COURT exercising Territory jurisdiction
FILE NO:	CA 5 of 2018 (21729885)
DELIVERED:	14 January 2019
HEARING DATE:	16 July 2018
JUDGMENT OF:	Kelly, Blokland and Barr JJ.

CATCHWORDS:

CRIMINAL LAW – DRUG OFFENCES – JUDGMENT AND PUNISHMENT

Appeal against sentence – Crown appeal – whether sentence manifestly inadequate – respondent pleaded guilty to four offences of supply or possess Schedule 1 drugs – three offences involving a commercial quantity – respondent sentenced to three years' imprisonment – fully suspended – appellant not contending head sentence manifestly inadequate – appellant contends sentencing discretion miscarried in fully suspending sentence – error in assessment of seriousness of commercial supply of ketamine – need to emphasise general deterrence – undue emphasis on rehabilitation – sentence manifestly inadequate – appeal allowed – respondent re-sentenced – head sentence affirmed – sentence to be suspended after respondent serves six months.

Misuse of Drugs Act 1990 (NT) s 5(1), s 7(1), s 7A(1), s 37(6)(b), Schedule

Ibbs v The Queen (1987) 163 CLR 447; *Adams v The Queen* (2008) 234 CLR 143; *Lawrence v The Queen* (2007) 171 A Crim R 286; *Truong v The Queen* (2015) 35 NTLR 186; *Clarke v The Queen* [2009] NTCCA 5; *The Queen v Roe* [2017] NTCCA 7; *R v Stamatov* [2018] 2 Qd R 1; *Edmonds v The Queen* [2019] NTCCA 1, referred to

REPRESENTATION:

Counsel:

Appellant:	M Nathan SC
Respondent:	J Tippett QC

Solicitors:

Appellant:	Office of the Director of Public Prosecutions
Respondent:	Maleys

Judgment category classification:	B
Number of pages:	15

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

The Queen v Meginess [2019] NTCCA 5
No. CA 5 of 2018 (21729885)

BETWEEN:

THE QUEEN
Appellant

AND:

MATTHEW MEGINESS
Respondent

CORAM: KELLY, BLOKLAND and BARR JJ

REASONS FOR JUDGMENT

(Delivered 14 January 2019)

The Court:

[1] On 22 February 2018, the respondent entered pleas of guilty to four offences charged contrary to the *Misuse of Drugs Act 1990*. He was sentenced to an aggregate sentence of three years, wholly suspended, subject to conditions including supervision by a probation and parole officer, with an operational period of three years.

[2] The appellant contends that the sentence imposed on the respondent was manifestly inadequate. On the hearing of the appeal, the ground was pressed in relation to the suspension, but not the head sentence.

The offending

[3] Count 1 in the indictment charged the supply to another person of a commercial quantity of the Schedule 1 dangerous drug MDMA. No actual supply took place. On the Crown facts,[1] as corrected,[2] the 'supply' was made out by (1) the respondent entering into an arrangement to sell MDMA to a co-worker, in the form of capsules which would be processed by the respondent, and then (2) purchasing MDMA from sellers on the dark web, using bitcoin. The total quantity of MDMA alleged and admitted was 28.67 g. The threshold amount for a commercial quantity of MDMA is 25 g.

[4] Count 2 charged the supply to another person of a commercial quantity of the Schedule 1 dangerous drug ketamine. Again, no actual supply took place. On the Crown facts,[3] the respondent purchased the ketamine from a seller on the dark web, using bitcoin. The parcel containing the drug was intercepted at the Winnellie Post Office. The total quantity of ketamine alleged and admitted was 1.02 g. The threshold amount for a commercial quantity of ketamine is 0.10 g.

[5] Count 3 charged the possession of a commercial quantity of the Schedule 1 dangerous drug Lysergide. The quantity alleged and admitted was 0.17 g, contained in nine tabs. The threshold amount for a commercial quantity of Lysergide is 0.10 g.

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1 AB 23, pars 2 - 5, 8.

2 AB 7.8.

3 AB 23, pars 2 - 5

[6] In respect of count 3, the statutory presumption against the respondent under s 37(6)(b) *Misuse of Drugs Act* was that he intended to supply the drugs for commercial gain. The respondent did not attempt to disprove the presumption.

[7] There is an important caveat in relation to sentencing for possession or supply of traffickable and commercial quantities of Lysergide. Both Lysergide and Lysergic acid are Schedule 1 dangerous drugs under the *Misuse of Drugs Act*. Under Schedule 1 to the Act, 0.10 g of either constitutes a 'commercial quantity', and so, in this case, 0.17 of a gram of Lysergide was close to twice the threshold amount for the statutory commercial quantity. However, the weight of 0.17 g included the medium in which the drug was supplied; that is, the weight incorporated the whole "preparation or mixture", to include the weight of the paper tab or other medium in which the drug was absorbed.

[8] Territory courts are cautious in relation to sentencing for Lysergide because the maximum prison terms vary so substantially: two years where the quantity is neither a commercial quantity nor a traffickable quantity; seven years where the quantity is a traffickable quantity; and 25 years where the quantity is a commercial quantity. Yet these substantial variations in maximum sentences may depend not on the actual quantity or amount of Lysergide but on the nature and weight of the medium. A person who is in possession of enough Lysergide in pure form to make up 100 or perhaps

1000 tabs may be liable to a lower maximum penalty than a person who is in possession of 10 tabs, or, for example, 10 doses absorbed into sugar cubes.

[9] The learned sentencing judge made reference to this anomaly, where he noted that the Lysergide was impregnated into nine tabs such that the mass recorded was of the tabs, and not of the drug itself.[4]

[10] Count 4 charged the possession of a traffickable quantity of MDA. The statutory presumption against the respondent under s 37(6)(a) *Misuse of Drugs Act* was that he intended to supply the drug, and that presumption was not disproved.

[11] The overall period covered by the indictment was 20 April 2017 to 22 June 2017. The offending commenced on 20 April 2017, the date on which the respondent opened a post office box at the Palmerston Post Office. His intention was that the dangerous drugs which he purchased online would be sent to the post box, not to his father's home where he was living. When police executed a search warrant at the respondent's home on 22 June 2017, they found what was described as "a variety of used miscellaneous express post mail packages" addressed to the respondent at his post office box. It is open to a sentencing court to use agreed facts in order to contextualise the offending for the purpose of determining whether or not the charges represented isolated incidents.[5] It may be reasonably inferred that the

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4 AB 56.

5 *Edmonds v The Queen* [2019] NTCCA 1 at [35].

respondent's offending conduct went beyond ordering the drugs found in the three express post parcels which were intercepted by police officers on 22 June. Moreover, on the agreed facts, police intercepted a capsule packing press on 16 June. As noted by the primary judge, the respondent agreed that he had purchased the press so that he could fill medical grade capsules with MDMA more efficiently than if he did so by hand. The inescapable conclusion is that the respondent was 'gearing up' for intended ongoing commercial drug supply.

[12] In sentencing the respondent, the primary judge imposed an aggregate sentence of three years imprisonment. His Honour noted that, if the respondent had not pleaded guilty, co-operated with police and expressed remorse, the sentence would have been an aggregate four years imprisonment.[6] The respondent was a young man, only 23. His Honour considered that his prospects for rehabilitation were very good. Although punishment, denunciation and general deterrence were important sentencing objectives, his Honour arrived at a view that there was nothing to be gained by sending the respondent to prison. His Honour expressed concern that a term of actual imprisonment could adversely affect the respondent's prospects of rehabilitation, and risk his falling into the company of 'new friends' who could take advantage of the respondent's skill and experience in accessing the dark web and using bitcoin to purchase dangerous drugs.

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6 AB 61.9.

His Honour expressed the view that it was in the interests of the community primarily, that the respondent not be sent to prison.[7]

[13] His Honour fully suspended the sentence on conditions which included supervision by a probation and parole officer. The operational period was fixed at three years.

[14] Before considering the grounds of appeal, we would make some remarks about the seriousness of the offending on each count. All of the counts related to Schedule 1 dangerous drugs: two counts of supplying a commercial quantity, one count of possession of a commercial quantity (with deemed intention to supply for commercial gain) and one count of possession of a traffickable quantity.

[15] The maximum penalty for each of counts 1, 2 and 3 was imprisonment for 25 years. The maximum penalty for count 4 was imprisonment for seven years.

[16] Although the quantity of drug the subject of count 1 was only marginally in excess of the threshold amount for a commercial quantity, and no actual supply took place, the manner in which the respondent sourced the drugs and his intention to process and re-sell the drug to a pre-arranged buyer markedly increased the respondent's criminality.

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7 AB 62.7

[17] The quantity of the drug ketamine, the subject of count 2, was more than ten times the threshold amount for a commercial quantity. Courts in the Northern Territory may not be particularly familiar with ketamine, in part because it has not been commonly associated with the same level of violent and other serious offending as, for example, methamphetamine. However, this appeal raises the question as to what extent it is open to the court to distinguish between different drugs specified in Schedule 1 of the *Misuse of Drugs Act 1990* for sentencing purposes.

[18] Those dangerous drugs considered more serious are listed in Schedule 1 to the *Misuse of Drugs Act 1990*. The Act provides a quantity-based penalty regime. For possession offences, the Act distinguishes between Schedule 1 drugs by setting defined "commercial" and "trafficable" quantities (and, by default, less than traffickable quantities) for each drug. Similarly for supply offences, the Act distinguishes between drugs by setting defined "commercial" quantities (and, by default, less than commercial quantities) for each drug. In relation to supply, the Act creates separate offences depending on whether a commercial quantity or a less than commercial quantity is supplied.[8] The Act makes no distinction in maximum penalties between any of the drugs listed in Schedule 1.[9]

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8 *Misuse of Drugs Act 1990*, s 5, s 5A.

9 Although it may be noted that the maximum penalties for possession and supply of Schedule 1 dangerous drugs are higher than for Schedule 2 dangerous drugs.

[19] In *Adams v The Queen*,[10] the High Court rejected a submission by the appellant that the sentencing judge had erred by equating the importation or possession of ecstasy with the importation or possession of heroin. The appellant submitted that he should have been sentenced on the basis that ecstasy was "less harmful to users and to society than heroin". The submission was rejected for a number of reasons. Apart from the factual and evidentiary difficulties in determining relative harm, the appellant's submission was contrary to the relevant legislative scheme. As the majority observed:[11]

> In fixing the trafficable and commercial quantities of heroin and MDMA respectively, and applying the same maximum penalties to the quantities so fixed, Parliament has made its own judgment as to an appropriate penal response to involvement in the trade in illicit drugs. The idea that sentencing judges, in the application of that quantity-based system, should apply a judicially constructed harm-based gradation of penalties (quite apart from the difficulty of establishing a suitable factual foundation for such an approach) cuts across the legislative scheme.
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> … there is nothing in the *Customs Act*, or the evidence, or the demonstrated state of available knowledge or opinion, which requires or permits a court to sentence on the basis that possessing a commercial quantity of MDMA is in some way less anti-social than possessing a commercial quantity of heroin. …

[20] We consider that the cautionary remarks of the High Court in *Adams* in relation to the *Customs Act* (Cth) are applicable to sentencing for drug offences in the Northern Territory because the Northern Territory legislature

10 *Adams v The Queen* [2008] HCA 15; 234 CLR 143 at [6].

11 234 CLR 143 at [10], [11], per Gleeson CJ, Hayne, Crennan and Kiefel JJ.

has also adopted a quantity-based penalty regime in enacting the *Misuse of Drugs Act 1990*.

[21] In *R v Stamatov*, the Queensland Court of Appeal referred to *Adams* and made the following observation: [12]

> Any legislation which penalises possession or other conduct with respect to specified dangerous drugs according to the quantity of the drug is making a statement about the harm or the relative degree of harm of dealing in those drugs above a certain amount.
>
> Harm may come in many forms. These include harm to the health of users, to the welfare of families of users, to the personal safety of citizens, to the victims of property crimes that are committed to feed drug addictions, and to the social fabric of entire communities.
>
> .... Ultimately, the placing of drugs in particular categories is a policy-based legislative decision, rather than a classification based upon a scientifically-based scale of harm.[13]

[22] The Court in *Stamatov* explained that, where Parliament has indicated that offending conduct in respect of certain drugs should attract the same or a similar penalty, judicial deference to the legislative assessment of relative harm is required.[14] We respectfully agree with those observations, to the extent that we consider that it would be inappropriate for a sentencing judge to assess the seriousness of offending on the basis of value judgments about the relative harm of one drug vis-à-vis another drug.

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12 *R v Stamatov* [2017] QCA 158; [2018] 2 Qd R 1 at [38] – [40] per Applegarth J, Gotterson JA and Atkinson J agreeing at [1] and [2].

13 The issue of relative harm in *Stamatov* arose because the applicant asserted failure by the sentencing judge to distinguish between steroids and other Schedule 1 dangerous drugs for the purpose of sentencing for the offence of trafficking in a dangerous drug.

14 [2018] 2 Qd R 1 at [57], [65].

[23] It follows from the discussion in [17] – [22] that, prima facie, possession or supply of a commercial quantity of any Schedule 1 drug should be treated as equally serious as possession of any other Schedule 1 drug. Likewise, possession or supply of ten times the commercial quantity of any Schedule 1 drug should be treated as equally serious as possession or supply of ten times the commercial quantity of any other Schedule 1 drug. However, that is not to say that the maximum penalty fixed by reference to the quantities set out in Schedule 1 is the only relevant consideration. The High Court in *Adams* did not question the correctness of the general principle stated in *Ibbs v The Queen*,[15] that in sentencing for an offence which carries a single maximum penalty but which may be committed in a variety of forms, the Court is not required to treat each form of the offence as being equally serious.[16]

[24] The mandatory matters for consideration contained in s 5(2) *Sentencing Act* apply to sentencing for drug offences as much as to any other kind of offence. As well as the nature and seriousness of the offence, and a range of matters personal to the offender, those matters include "any harm done to a community as a result of the offence (whether directly or indirectly),[17] and the prevalence of the offence.[18] The Court can take into account its own knowledge of the prevalence of particular offences, and can take judicial

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15 *Ibbs v The Queen* (1987) 163 CLR 447.

16 234 CLR 143 at [11], per Gleeson CJ, Hayne, Crennan and Kiefel JJ.

17 *Sentencing Act*, s 5(2)(da).

18 *Sentencing Act*, s 5(2)(g).

notice of certain kinds of harm to the Northern Territory community which are notorious. For example, sentencing judges in this jurisdiction regularly take into account the harm visited upon vulnerable members of Aboriginal communities, children in particular, when scarce money is spent on buying cannabis at inflated prices.

[25] It is in light of these principles that the following statement of the Court of Criminal Appeal in *The Queen v Roe* should be considered:[19]

> The supply and use of methamphetamine are matters of widespread concern in the community. Such offending is prevalent. The supply and use of the drug has an immediate and primary impact on individual users who suffer adverse physical and mental health outcomes. Methamphetamine use also has obvious and predictable adverse consequences for the family of the individual user. The proliferation of the drug is also detrimental to the wider community, as use of the drug quickly leads to antisocial and criminal conduct including violent behaviours. As a consequence, punishment, denunciation and deterrence are the main sentencing objects.

[26] To some extent, the remarks extracted in the previous paragraph simply state the implications of the policy-based legislative decision to place the drug in Schedule 1 of the *Misuse of Drugs Act*; to some extent they state matters of which the Court is entitled to take judicial notice; and to some extent they are an assessment the Court is entitled to make, for sentencing purposes, as to the prevalence of the offending based on the Court's experience of the frequency with which such matters come before the Court. They are not intended to be used in comparing the seriousness of a charge of possession

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19 *The Queen v Roe* [2017] NTCCA 7 at [47].

or supply of methamphetamine with the seriousness of a charge of possession or supply of any other Schedule 1 drug.

[27] As with all matters of comparison, there may be some necessary qualification(s). For example, there may be differences in the cost of purchasing different drugs and the sale prices obtained. Depending on market supply and demand, it may be significantly more profitable to engage in the commercial supply of a particular drug, relative to one or more other drugs. The 'greed' factor may be more egregious, in turn requiring greater emphasis on general deterrence as a sentencing objective. Similarly, a court may be required to take into account prevalence in the commercial dealing of a particular drug in order to appropriately emphasise general deterrence in sentencing for offences involving commercial dealing in that drug.

[28] The sentencing judge was informed by the prosecutor and expressly referred to the fact that the quantity of ketamine was "about ten times over the commercial quantity threshold for Ketamine".[20] However, at a later point, after stating his view that the offending on count 1, in relation to MDMA, was "towards the middle level of seriousness for that kind of offence", his Honour went on to say that, in relation to the "other drugs" (and this reference included ketamine, the subject of count 2), the offending was "towards the lower level of seriousness".[21]

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20 AB 56.7.

21 AB 58.2.

[29] It is well established that the quantity of a drug possessed or supplied is but one factor to be considered in the exercise of the sentencing discretion.[22] However, we consider that his Honour was in error in characterising the offending on count 2 as "towards the lower level of seriousness". The respondent had purchased an amount of ketamine some ten times the commercial threshold quantity, from a seller on the dark web, using bitcoin. He was to be taken as intending to supply the ketamine for commercial gain. The offending represented the same or an even greater level of criminality than the offending charged as count 1 (supply of MDMA) which his Honour characterised as "towards the middle level of seriousness for that kind of offence".

[30] For reasons explained in [7] – [9], the offending charged as count 3 was towards the lower end of the scale of seriousness for possession of a commercial quantity of a Schedule 1 dangerous drug.

[31] In relation to count 4, although the quantity of drug, 1.72 g, was three to four times the threshold amount for a traffickable quantity of MDA, it fell a long way short of the threshold amount for a commercial quantity of the drug, namely 25 g. It should nonetheless not be overlooked that the supply and possession of four different drugs is itself evidence of an offender setting himself up as a 'one-stop shop' or polysubstance supplier.

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22 See, for example, *Truong v The Queen* [2015] NTCCA 5 at [29] and the authorities cited.

[32] The sentencing considerations of the primary judge are summarised in [12] above. His Honour was properly entitled to take into account the respondent's youth, lack of prior convictions and an informed assessment of the respondent's prospects of rehabilitation. However, in coming to the conclusion that there was "nothing to be gained" by sending the respondent to prison, his Honour overlooked the prime importance of general deterrence in sentencing for offences of this nature.[23] An emphasis on general deterrence is intended to benefit the community by a potential reduction in the number of individuals prepared to engage in commercial drug dealing.

Conclusions

[33] Although the head sentence was very lenient, the appellant abandoned any contention that it was manifestly inadequate, and we decline to interfere with it. However, because of the error identified in [29], the exercise of the discretion to fully suspend the sentence resulted in a manifestly inadequate sentence which failed to reflect the true criminality of the offending, and placed undue emphasis on rehabilitation at the expense of punishment, denunciation and general deterrence.

[34] We therefore allow the appeal on ground 3. In those circumstances, it is not necessary to decide grounds 1 and 2.

[35] We now proceed to re-sentence. We affirm the aggregate sentence of three years imprisonment. The sentence is to commence from the time the

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23 See, for example, *Clarke v The Queen* [2009] NTCCA 5 at [46].

respondent is received into a custodial correctional facility, pursuant to s 425(3) *Criminal Code*. We direct that the respondent surrender himself within seven days of today. We order that the sentence be partially suspended after the respondent has served six months imprisonment. Pursuant to s 40(6) *Sentencing Act*, we fix an operational period of two years and six months from the date of the respondent's release. The suspended sentence shall be subject to the same conditions as those imposed by his Honour, save that we specify that supervision by a probation and parole officer is to be for 18 months from the date of the respondent's release from prison.