CITATION:	*Tran v The Queen* [2019] NTCCA 12
PARTIES:	TRAN, Chau Van 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 20 of 2018 (21716781)
DELIVERED:	12 June 2019
HEARING DATE:	29 May 2019
JUDGMENT OF:	Grant CJ, Blokland and Hiley JJ

CATCHWORDS:

CRIMINAL LAW – DRUG OFFENCES – JURISDICTION, PRACTICE AND PROCEDURE – JUDGMENT AND PUNISHMENT

Whether total effective sentence manifestly excessive – whether sentencing judge erred in rejecting evidence of intended personal use of methamphetamine – whether error in fixing non-parole period – sentencing court will fall into error if it proceeds to exercise the discretion under misapprehension concerning the minimum non-parole period which has application – appellant resentenced.

Criminal Code 1983 (NT) s 410, s 417
Misuse of Drugs Act 1990 (NT) s 5
Sentencing Act 1995 (NT) s 40(6), s 43, s 54, s 55, s 103
Supreme Court Rules 1987 (NT) r 86.10

Cook v The Queen [2018] NTCCA 5, *Dinsdale v The Queen* (2000) 202 CLR 321, *DPP v Dalgliesh (a pseudonym)* (2017) 349 ALR 37, *Gooch & Pierce v R* [2002] NTCCA 3, *Green v The Queen* (1989) 95 FLR 301, *Knight v R* [2001] NTCCA 4, *Markarian v The Queen* (2005) 228 CLR 357, *Mawson v Nayda* (1995) 5 NTLR 56, R v *Nagas* (1995) 5 NTLR 45, *R v Oliver* (1980) 7 A Crim R 174, *Rostron v The Queen* (1991) 1 NTLR 191, *The Queen v RG* [2018] NTSC 85, *The Queen v Roe* [2017] NTCCA 7, *Truong v The Queen* (2015) 35 NTLR 186, *Whitehurst v The Queen* [2011] NTCCA 11, *Wong v The Queen* (2001) 2017 CLR 584, referred to.

REPRESENTATION:

Counsel:

Appellant:	P Elliott
Respondent:	M Nathan SC

Solicitors:

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

Judgment category classification:	B
Number of pages:	28

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

Tran v The Queen [2019] NTCA 12
No. CA 20 of 2018 (21716781)

BETWEEN:

CHAU VAN TRAN
Appellant

AND:

THE QUEEN
Respondent

CORAM: GRANT CJ, BLOKLAND and HILEY JJ

REASONS FOR JUDGMENT

(Delivered 12 June 2019)

THE COURT:

[1] The appellant applied for leave to appeal against the sentence of four years and six months imprisonment imposed on 21 September 2018 and for an extension of time for making such application.

[2] The appellant had pleaded guilty to two counts relating to the supply of dangerous drugs, namely:

(a) Count 1 - supplying a commercial quantity (12 kilograms) of a Schedule 2 dangerous drug (cannabis plant material) between 1 March and 4 April 2017, contrary to s 5(1) of the *Misuse of Drugs Act 1990* (NT); and

(b) Count 2 - supplying a commercial quantity (40.54 grams) of a Schedule 1 dangerous drug (methamphetamine) on 4 April 2017, contrary to s 5(1) of the *Misuse of Drugs Act*.

[3] He was sentenced to four years' imprisonment on Count 1, and two years' imprisonment on Count 2, six months of which was to be served cumulatively upon the four year sentence for Count 1. This amounted to a total sentence of four years and six months' imprisonment, commencing on 8 September 2018. The Court ordered a minimum non-parole period of three years and two months, also backdated to 8 September 2018.

[4] The appellant identified the following grounds of appeal, but abandoned ground 3 (re parity) during oral submissions:

1. That the overall sentence imposed was manifestly excessive.

2. That the learned sentencing judge erred in setting a non-parole period rather than a partially suspended sentence.

3. That the learned sentencing judge failed to properly take into account the principle of parity in relation to the applicant's co-offenders.

4. That the learned sentencing judge erred in his reasoning as to why he rejected the applicant's evidence as to his intended use of the methamphetamine.

5. Allied to ground 4 above, that the learned sentencing judge erred in finding that "the fact that, in the Statement of Facts, it is stated that the offender decided to source a commercial quantity of methamphetamine in order to engage in the supply of the dangerous drug" was reason to find that the applicant intended to supply the bulk of the methamphetamine purchased by the applicant.

6. That the learned sentencing judge did not take into account, or if he did, did not place sufficient weight on the effects of the sentence on the applicant's children.

[5] At the conclusion of argument we made orders in relation to ground 2, namely that time was extended for making that part of the application for leave and allowing that part of the appeal. We requested the parties to provide any further material in relation to the question as to whether a non-parole period should be fixed or whether the appellant should be given the benefit of a suspended sentence, and we ordered a supervision report under s 103 of the *Sentencing Act*. We indicated that we would provide written reasons for allowing that part of the appeal. Those reasons are provided here, together with our reasons in relation to the balance of the grounds.[1]

1 For convenience we will use the term "appellant" to refer to the applicant for leave and extension of time, and the term "appeal" to refer to the appeal the subject of the applications for leave and extensions of time.

Sentencing remarks

[6] The sentencing judge found the facts of the offending as follows:

> Between 1 March and 4 April 2017, the offender engaged in the commercial supply of cannabis in the Darwin region, utilising on occasions Ms Glenda Walsh who is well-known to the courts. The offender would source cannabis from persons unknown and supply it to Ms Walsh to on-sell. This activity generated a significant amount of cash for the offender, which he would collect from time to time from Ms Walsh.
>
> On 17 March 2017, police obtained a telephone intercept warrant for one of the offender's mobile telephones and started monitoring his calls and texts. As a result, police were able to ascertain that the offender was planning to purchase a commercial quantity of methamphetamine.
>
> Towards the end of March 2017, the offender decided to source a commercial quantity of methamphetamine in order to engage in the supply of the dangerous drug. He used the services of Nerice Mallon as an intermediary to purchase the drug on his behalf. On 31 March 2017, the offender made inquiries through Ms Mallon about purchasing two ounces of methamphetamine. Text messages between Ms Mallon and the offender showed that he specifically asked her to enquire about the cost of "one" and the cost of "two". The response was that it would be $10,000 per one, to which the offender responded by text, "Sold! U want 2, try 4, but. Me try? Not you! Lol." However, Ms Mallon's contact, Tyrone Kerslake, did not come through on that occasion and the deal was abandoned.
>
> On 4 April 2017, Mr Kerslake contacted Ms Mallon in the early hours of the morning to advise her that the deal was back on. Ms Mallon arranged to taste the product with Mr Kerslake and then contacted the offender shortly after 7 am to let him know the deal was back on.
>
> Later that morning, police started mobile surveillance of the offender.
>
> The offender dropped his children at school, then around 9:30 am drove a Toyota Land Cruiser that he owns with his mother and picked up Ms Mallon. They then travelled to […] and collected some money from Ms Walsh.
>
> The offender drove to the Hibiscus Shopping Centre and parked his car. Mr Kerslake then arrived. The offender gave Ms Mallon $15,000 to purchase 1.5 ounces of methamphetamine. Ms Mallon

got into Mr Kerslake's car and they travelled to Lee Point Resort where she was supplied with 40.54 grams of methamphetamine in a plastic bag, which is slightly more than the commercial quantity of that drug.

Mr Kerslake then drove Ms Mallon and the drugs back to the Hibiscus Shopping Centre and she got back into the offender's car. Police then arrived to apprehend the offender and Ms Mallon, but the offender locked the doors of his car. The police officer held his police badge up to the window of the car and banged loudly on the windows to get the offender to unlock the doors. However, the offender kept the doors locked for a sufficient amount of time to allow Ms Mallon to hide the drugs inside her vagina. He then unlocked the doors.

Police searched the offender's car and the offender and Ms Mallon. They found $3,000 belonging to the offender. Ms Mallon was taken away by a female police officer to a private area and eventually she produced the methamphetamine from her vagina. The substance was later weighed and analysed and confirmed as being 40.54 grams of the Schedule 1 dangerous drug, methamphetamine. As I have said, a commercial quantity of methamphetamine is 40 grams. Methamphetamine sells for around $100 per point, or around $700 per gram, giving the total quantity of the drug a conservative street value of between $28,000 and $42,000, depending on the size of the deals the drug was sold for. Both the offender and Ms Mallon were arrested. Ms Mallon has already pleaded guilty for her part in the offending. She was sentenced to 4 years and 5 months imprisonment which was suspended upon her entering into a home detention order for 12 months, partly because she had a young child.

On 4 April 2017, the offender was subjected to a drug saliva test which returned a positive result for methamphetamine and amphetamine.

Late in the day, police executed a search warrant of the offender's and his mother's adjoining houses at […]. They found 353.4 grams of cannabis in a cryovac bag which was still attached to a cryovac machine in the offender's kitchen. At his mother's house, they found 11,744.9 grams of cannabis packaged in 26 cryovac bags which were placed in a duffle bag and stored on the back seat of a utility. The cannabis was later analysed and weighed and confirmed as the Schedule 2 dangerous drug, in the quantities stated. A commercial quantity of cannabis is 500 grams and the offender was in possession of approximately 24 times the deemed commercial amount of the dangerous drug cannabis. The conservative street value of the cannabis was between $130,000

and $187,000, depending upon the size of deals for which the cannabis was sold.

[7] Police also recovered a number of other items. These included rolls of unused cryovac bags, a cryovac machine, an ice pipe, a pistol and ammunition and cash.

[8] The appellant was charged and granted bail on 6 April 2017. On 17 May 2017, while still on bail, the appellant went around to Ms Walsh's house to collect some outstanding cash from his previous cannabis supply activities. Police apprehended him and found and seized $8850 in an envelope that he had hidden in his underwear.

[9] The appellant was 38 years of age at the time of his offending. He lived in Darwin with his Vietnamese parents from the age of about four. He was sent to England when he was nine and lived there with relatives who were cruel to him. He returned to Darwin when he was 16 and has lived in the Northern Territory ever since. He went to school in Darwin and then worked in a family business which involved mango farming and crabbing.

[10] In 2005 he entered into a domestic relationship with SB and they had three children. They separated in 2011. The children lived with the appellant from 2012. In 2014 the appellant entered into a relationship with EE. EE was not good with the children and was extremely cruel to the appellant's son. That relationship ended at the beginning of

2017. The appellant stopped working in order to provide more support his children. He no longer received income from the family business and his only income was in the nature of child support benefits he received as a sole parent. His barrister informed the sentencing judge that those benefits were insufficient to support the appellant and his children and that he began supplying cannabis on a commercial scale in order to obtain more money. References provided to the sentencing judge indicated that the appellant was a devoted father. The appellant had a criminal record showing relatively minor offences but no prior convictions for drug offending.

[11] The appellant gave evidence. He said that he was introduced to methamphetamine by his ex-partner SB and he used methamphetamine on a recreational basis from time to time between 2005 and 2017. In January 2017, shortly after EE left him and the children, his son had been physically abused by EE. He felt that he had failed his children, in particular his son, and began to consume a lot more amphetamine "to numb his pain." He said he was using half a gram to over a gram of methamphetamine per day at that time.

[12] The sentencing judge considered that the purpose of the appellant's evidence-in-chief was to support a submission that there was a crisis in his life in early 2017 which resulted in him consuming much greater amount of amphetamine that he normally did. Consequently he did not

intend to supply the whole of the 40.5 grams of methamphetamine for commercial gain.

[13] His barrister contended that his supply of cannabis was motivated by his desire to look after and provide the best he could for his children, and the supply of methamphetamine was motivated by his drug addiction.

[14] His Honour noted that the appellant made a number of admissions in the course of his cross-examination. These included that his cannabis supply business was purely for commercial purposes, that he purchased the methamphetamine for his own use and for re-selling, that he was not addicted to methamphetamine and that he could control his consumption of methamphetamine.

[15] The sentencing judge rejected the appellant's evidence about his levels of consumption in early 2017 and about the quantities of the 40.54 grams of methamphetamine that he said he intended to consume. That evidence was inconsistent with other evidence given by the appellant to the effect that he was not dependent or addicted to methamphetamine and could control his consumption. The sentencing judge found that the appellant did not purchase the amphetamine to feed an addiction to that dangerous drug. His Honour said:

> While it is likely that the offender would have consumed some of the 40.54 grams of methamphetamine, I find, as a consequence of

the following factors, that the bulk of methamphetamine purchased by the offender would have been sold for commercial gain.[2]

[16] Those factors included the manner in which the appellant went about acquiring the methamphetamine; the quality required; the commercial nature of SMS text exchange between the appellant and Ms Mallon; the context in which the methamphetamine was purchased, namely his ongoing cannabis business; the fact that none of his friends and associates who provided references never saw any signs of him being affected by methamphetamine or other dangerous drugs; and the fact that the agreed facts included his acknowledgement that he "decided to source a commercial quantity of methamphetamine in order to engage in the supply of the dangerous drug."

[17] His Honour also rejected contentions that the sole reason for supplying the cannabis was to support his children and that consequently his moral culpability was not very high.

[18] His Honour then made the following remarks about the seriousness of the offending:[3]

> Count 1 is a serious example of the supply of Schedule 2 dangerous drugs. The supply was part of an ongoing drug supply business conducted by the offender for a period of time. It involved using another party to distribute the drugs. It involved planning and organisation. The offender was a distributer of commercial quantities of cannabis and used his family home for that business operation. It would appear that he was caught in the

2 Appeal Book (**AB**) 127.

3 AB 128-9.

middle of distributing about 12 kilograms of cannabis into the community when he was picked up by police. The ongoing operation included picking up $15,000 used to purchase the methamphetamine and the $8,850 he later obtained from Ms Walsh in May 2017 while he was on bail. The offender was in possession of 24 times, or thereabouts, the commercial quantity of the dangerous drug. His level of moral culpability is very high indeed. The offender made a deliberate decision to engage in the drug trade at a significant level. The offender was a commercial drug-supplier who sought to make money for the supply of cannabis.

As to count 2 on the indictment, it is important to note that all the offender had done was purchase 40.5 grams of methamphetamine, which is just over the commercial quantity of that dangerous drug. He did not have the opportunity to do anything with it after he acquired it. While it is apparent that the methamphetamine was mainly acquired for commercial gain, the offender had not yet started to on-sell the Schedule 1 dangerous drug, nor had he acted as a courier in respect of that dangerous drug. Nonetheless, the offending is serious offending because methamphetamine is such an insidious and highly dangerous drug. The criminal act of the offender amounted to the first step in the process of the offender on-supplying that dangerous drug. The acquisition of the drug was planned. It again involved the use of an intermediary. The drug was acquired with the proceeds of illicit dealing in another dangerous drug and represented an escalation in the level of the offender's drug offending. Further, when police came to apprehend the offender and his co-offender, they tried to hide the dangerous drug from them. Methamphetamine is a particularly dangerous and insidious drug which causes great harm in our community. The offender's moral culpability of count 2 is again high.

The main sentencing objectives for counts 1 and 2 on the indictment are punishment, protection of the community, and both personal and general deterrence. The offender must be punished for the crimes he has committed, and he and others must be discouraged from committing the same or similar crimes in the future. Apart from the offender's pleas of guilty, there is in reality not a lot by way mitigation.

Application for extension of time within which to seek leave to appeal

[19] Section 410 of the *Criminal Code 1983* (NT) requires leave of the Court before a person can appeal against a sentence. Section 417 requires any such application for leave to appeal to be made within 28 days of the date of such sentence except where extension is granted by the Court.

[20] Time for seeking leave to appeal expired on 19 October 2018. On 24 October 2018 the appellant filed an application for leave to appeal and supporting affidavit,[4] and an application for extension of time within which to appeal and an affidavit in support of that application.[5] The affidavit in support of the application for leave to appeal asserted three grounds of appeal: (i) error based on lack of parity; (ii) manifest excess; and (iii) failing "to give appropriate cumulation to the sentence." The affidavit relating to the extension of time identified some difficulties experienced by Mr Elliott of counsel in obtaining access to and instructions from the appellant after 14 October 2018.

[21] The respondent opposed the application for leave to appeal beyond the statutory limitation period of 28 days. It submitted that not only was the statutory timeframe not complied with, but the form and substance of the filed documents were not in accordance with the *Supreme Court*

4 AB 188-193.

5 AB 198-206.

Rules 1987 (NT). Rule 86.10(2) requires an application for leave to appeal to be accompanied by an affidavit stating:

(a) the nature of the appeal;

(b) the questions involved; and

(c) the reasons why leave should be granted.

[22] As this Court previously stated in *Rostron v The Queen*:[6]

> One purpose of the rule is to provide to the court sufficient information for the court to understand the issues of fact and/or fact and law involved, and to quickly form a view as to whether or not to grant leave. The other purpose of the rule is to provide the respondent with sufficient information so that it knows the case it is called upon to meet …

[23] On 29 January 2019 the appellant filed an application to amend the grounds of his application for leave to appeal,[7] together with a supplementary affidavit identifying the six grounds of appeal listed in [4] above and providing some further particulars in relation to each of those grounds.

[24] In order to obtain leave, the applicant must show that he has at least an arguable case.[8] An arguable case denotes something more than a case

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6 (1991) 1 NTLR 191 at 195 per Nader, Martin and Mildren JJ.

7 AB 212-3.

8 *Rostron v The Queen* (supra) at 196.

where argument may be presented indicating appellable error. The argument must be sufficiently strong to call for a response.[9]

[25] The relevant principles applicable to the granting of an extension of time were set out in *Green v The Queen*.[10] The respondent contended that the appellant has not demonstrated exceptional circumstances or even substantial reasons why an extension should be granted. The respondent stressed the fact that finality of criminal litigation serves the community's interests and legitimate expectations. The respondent contended that there was no identifiable appellable error by the sentencing court, let alone a manifest miscarriage of justice necessary to overcome the non-compliance with the *Supreme Court Rules* when determining the grant of leave.

Ground 1 - manifestly excessive

[26] The principles governing appeals on the ground that a sentence is manifestly excessive in all the circumstances are well-known and do not need repetition.

[27] We agree with the sentencing judge's assessment of the seriousness of the offending as extracted above. The only matter with which counsel for the appellant took issue was the sentencing judge's assessment of the appellant's moral culpability as very high in relation to the offending the subject of Count 1 and high in respect of the offending

9 *Gooch & Pierce v R* [2002] NTCCA 3 at [6] per Martin (BF) CJ, Bailey & Riley JJ.

10 (1989) 95 FLR 301 at 312.

the subject of Count 2. We see no reason to disagree with his Honour's assessments of the appellant's moral culpability.

[28] As counsel for the respondent pointed out, the appellant was engaged in commercial cannabis supply activities in Darwin which involved a third person whom the appellant used to distribute the cannabis. He received large amounts of cash in return for that. The appellant progressed from supplying cannabis to supplying methamphetamine. As recorded in the agreed facts tendered as exhibit P1: "Towards the end of March 2017 the [appellant] had decided to source a commercial quantity of methamphetamine in order to engage in the supply of the drug."[11]

[29] We accept the respondent's submission that the aggravating features of the offending included the following:

(a) The supply which was the subject of Count 1 formed part of an ongoing business conducted by the appellant over a period of time. It included using a third party to distribute the drugs (Walsh) and to this extent involved planning and organisation.

(b) The appellant was a distributor of commercial quantities of cannabis and used his family home for the operation.

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11 AB 56.

(c) It would appear that the appellant was in the process of distributing approximately 12 kilograms of cannabis into the community at the time he learned the methamphetamine deal the subject of Count 2 was to proceed.

(d) The supply the subject of Count 2 was the initial step in a process of supply which was fortunately intercepted before the drugs were distributed to users. It was a step which was orchestrated and financed by the appellant. He used an intermediary (Mallon) to carry out the actual purchase transaction on his behalf. It was planned and organised over a number of days and was not something conducted on a whim.

(e) These were deliberate, planned, commercial activities and only ceased when police were able to detect the offending.

[30] The effective head sentence of four years and six months' imprisonment falls well below the maximum penalty for each of Counts 1 and 2, notwithstanding the serious nature of the offending. The importance of the maximum penalty should not be underestimated as a "yardstick" against which a comparison of the appropriateness of a sentence should be made.[12] The seriousness of this type of offending is clear from the substantial maximum penalties applicable. Those penalties reflect the concern that is held by the community and the

12 *DPP v Dalgliesh (a pseudonym)* (2017)349 ALR 37. See also *Markarian v The Queen* (2005) 228 CLR 357 at 1048; *R v Oliver* (1980) 7 A Crim R 174 at 177.

legislature as to the impact of the introduction of these drugs into the Northern Territory. The harm caused by cannabis and methamphetamine in the community are well known and the supply of both drugs is prevalent.[13]

[31] The quantity of methamphetamine involved in the present matter was not at the higher end of the scale of quantities often seen in this Court, but the quantity of cannabis supplied was. The quantity of the drug supplied is usually important because it is an indicator of the amount of the drug that is likely to find its way into the community and the offender's expected financial reward. However, quantity is not necessarily the principal factor in determining sentence.[14] Factors to be taken into account when sentencing in relation to methamphetamine were set out by Grant CJ and Southwood J in *The Queen v Roe* (***Roe***)[15], where focus was also placed on the role played by the offender and the commerciality of the operation, including the expected financial rewards, amongst other factors. The significant impact that the introduction of methamphetamine has on the community formed the basis of this Court's statement in *Roe* that "[as] a consequence, punishment, denunciation and deterrence are the main sentencing

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13 *Cook v The Queen* [2018] NTCCA 5 at [29]; *The Queen v Roe* [2017] NTCCA 7 at [35], [47] per Grant CJ and Southwood J.

14 *Wong v The Queen* (2001) 2017 CLR 584 at [56] and [73] per Gaudron, Gummow and Hayne JJ; *Truong v The Queen* (2015) 35 NTLR 186 at [29] per Riley CJ, Barr and Hiley JJ.

15 [2017] NTCCA 7 at [49].

objects."[16] Similarly, in *The Queen v Cook*[17] this Court discussed the harmful effects of cannabis on not just indigenous communities but also the broader community.

[32] Whilst the appellant was not a large scale distributor or manufacturer, his role was a substantial one as a commercial drug-supplier of cannabis. The fact that the appellant was able to access over 12 kilograms of cannabis at one time is an indication of the size and financial worth of his ongoing commercial enterprise. It is in this context that the appellant's decision to expand his commercial operation to the supply of methamphetamine should be viewed. Indeed, the learned sentencing judge's conclusion that the offender's moral culpability was very high was no more than an appropriate reflection of the material before him and a proper assessment of the appellant's conduct.

[33] The appellant has not demonstrated that the sentence imposed for each count sits outside the acceptable range of penalties or are inconsistent with an applicable sentencing standard. The individual sentence imposed for Count 1 is less than one third of the maximum penalty for that offence, whilst the sentence for Count 2 is less than one twelfth of the applicable maximum penalty.

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16 Ibid at [47].

17 *Cook v The Queen* [2018] NTCCA 5 at [29].

[34] Further, when the significant degree of concurrency imposed for each sentence is taken into account, the appellant has failed to show that the total effective sentence is so manifestly excessive as to demonstrate error in point of principle worthy of appellate intervention.

[35] We dismiss this ground.

Ground 2 - fixing of non-parole period instead of partially suspended sentence

[36] It is well established that a sentencing judge has a wide discretion when deciding whether to fix a non-parole period or to suspend a sentence where that option is available, namely for a sentence of imprisonment for five years or less.[18]

[37] During oral submissions before the sentencing judge, counsel for the appellant submitted that the appellant's sentence should be partially suspended but no request was made for an assessment of his suitability for supervision pursuant to s 103 of the *Sentencing Act 1995* (NT). The prosecutor did not indicate a position on that matter, either in written submissions[19] or in the course of oral submissions. Accordingly this issue was not ventilated before the sentencing judge. His Honour did not provide any reasons for fixing a non-parole period instead of suspending the appellant's sentence.

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18 *Whitehurst v The Queen* [2011] NTCCA 11 at [27]-[29]; *Cook v The Queen* [2018] NTCCA 5 at [34].

19 Crown Submissions on Sentence dated 17 August 2018.

[38] Nor did the sentencing judge indicate why a non-parole period of two years and three months was initially fixed, but changed to three years and two months after the prosecutor drew attention to the requirement in s 55 of the *Sentencing Act* that the non-parole period fixed for these offences must be at least 70 per cent of the period of imprisonment that the appellant is ordered to serve under the sentence. The sequence of events makes it plain that his Honour initially fixed the non-parole period of two years and three months on the assumption that the 50 per cent minimum required under s 54 of the *Sentencing Act* was applicable, but increased it to three years and two months to conform to the minimum required by s 55.

[39] One of the matters informing the exercise of the discretion whether to fix a non-parole period or make an order suspending sentence is the minimum period of imprisonment which must be actually served to reflect the seriousness of the offending. That consideration was described by Grant CJ in *The Queen v RG* in the following terms:[20]

> [18] … where an order suspending sentence is an available option, the immediately anterior determination is whether to make an order suspending sentence or to fix a non-parole period. In *Whitehurst v The Queen* [[2011] NTCCA 11] that process was described by Riley CJ (Mildren and Martin JJ concurring) as follows:
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> > [27] The first task of the sentencer is to impose a sentence which is appropriate to the offending in light of all of the relevant circumstances of the offence and the offender. Thereafter it is necessary to determine

20 *The Queen v RG* [2018] NTSC 85.

whether to wholly or partially suspend the sentence or, alternatively, to set a non-parole period. If a non-parole period is to be set then the sentencer must consider the duration of that period. If the sentence is to be partially suspended then the sentencer must consider the actual term of imprisonment, to be served prior to the suspension of the sentence.

[28] In choosing whether to proceed by way of a suspended sentence or a non-parole period the sentencing Judge must consider many things including any relevant legislative provisions, the nature of the offending, the minimum period of imprisonment which must be actually served to reflect the seriousness of the offending, and the personal circumstances of the offender including any prospects for rehabilitation. Consideration of the personal circumstances of the offender and his prospects for rehabilitation is likely to involve determining how any prospects for rehabilitation may be addressed and enhanced; whether there is a need for supervision and, if so, the nature of that supervision; the existence of, and the nature of, any support mechanisms available to the offender outside the custodial setting; the identification of impediments and risks to rehabilitation and so on.

[29] The question of whether to impose a non-parole period or to suspend a sentence must be answered in light of all of the circumstances surrounding both the offence and the offender. Such considerations do not give rise to an expectation (as was suggested here) that for a particular type of offence a suspended sentence would result. [21]

[19] The minimum period of imprisonment which must be actually served to reflect the seriousness of the offending forms a crucial part of the complex of considerations properly taken into account in making the determination whether to proceed by way of suspended sentence or non-parole period. The importance of that consideration is reflected in the following observation by Deane, Dawson and Toohey JJ in *The Queen v Shrestha* (1991) 173 CLR 48 at 67-69:

> … the legislative intent to be gathered from the terms of the parole legislation applicable in that case ... was to provide for possible mitigation of the punishment of the prisoner only when the stage is reached where "the prisoner has served the minimum time that a judge

21 *Whitehurst v The Queen* [2011] NTCCA 11 at [27]-[29].

> determines justice requires that he must serve having regard to all the circumstances of his offence". This approach has been consistently accepted in subsequent cases in this court.
>
> [20] The effect of the identified legal error in this case was not simply that the mandatory minimum non-parole period was not applied to the head sentence. It was that the sentencing court determined to fix a non-parole period ignorant of the application of s 55A of the *Sentencing Act* to the circumstances, and under the consequent misapprehension that the minimum period determined appropriate to reflect the seriousness of the offending would be available under either an order suspending sentence or a non-parole period.
>
> [21] The effect of the legal error was to infect not only the length of the non-parole period fixed but also the determination whether to fix a non-parole period or make an order suspending sentence.
>
> (Emphasis added)

[40] We consider that the sentencing judge in the present matter fell into similar error. This is not to say that the minimum period of imprisonment which must be actually served will govern the question of whether to fix a non-parole period or make an order suspending sentence. There will be circumstances in which a non-parole period will clearly be the only option properly available regardless of the statutory minimum which has application. It is also not to say that considerations requiring the fixing of a non-parole period will be displaced if the statutory minimum requires a period of actual imprisonment beyond that which the Court considers the minimum necessary having regard to the circumstances of the offending. That is only one of the matters which must be considered, and the weight to be attributed to it will vary depending on the circumstances. It is only to

say that the sentencing court will fall into error if it proceeds to exercise the discretion under a misapprehension concerning the minimum non-parole period which has application to the offence or offences in question.

[41] Accordingly, we upheld this ground of appeal. It will be necessary therefore for us to consider afresh whether a non-parole period should be fixed or whether the appellant's sentence should be suspended, and is so when and on what conditions.

Grounds 4 and 5

[42] These grounds involve a challenge to the sentencing judge's partial rejection of the appellant's evidence concerning his intended use of the methamphetamine and his Honour's conclusion that "the bulk of [the 40.54 grams of] methamphetamine purchased by the [appellant] would have been sold for commercial gain."[22]

[43] During the hearing of the appeal, counsel for the appellant argued that none of the reasons given by the sentencing judge, and in particular none of the six factors identified in the sentencing remarks, warranted the finding that the bulk of the methamphetamine the subject of Count 2 would have been sold for commercial gain. We do not accept those contentions. In making those findings the sentencing judge did not act on some error of principle, or take into account irrelevant

22 AB 127.8.

considerations, or fail to take into account relevant considerations, or act on mistaken facts. The conclusions which his Honour reached in relation to the intended use of the methamphetamine were all open on the facts.

[44] In our opinion there is no error demonstrated by the appellant in relation to the sentencing judge's exercise of his discretion. These grounds are not made out.

Ground 6

[45] Counsel for the appellant drew attention to the fact that the appellant had been the sole carer for his three children since about 2012 after their mother abandoned them. It was contended that the sentencing judge did not take into account that the applicant had remained abstinent from drugs from the time of his apprehension to the time of the sentencing proceedings, nor that extended separation from the children would have a detrimental effect on their welfare.

[46] Counsel referred to the decision of this Court in *R v Nagas* (***Nagas***).[23] As the Court of Criminal Appeal observed in that case, family hardship is not ordinarily a circumstance taken into account in the sentencing calculus, subject to three recognisable exceptions. The first is that family hardship may be a ground for mitigation where the particular circumstances of the family are such that the degree of hardship is

23 (1995) 5 NTLR 45. See too *Knight v R* [2001] NTCCA 4 at [8].

exceptional and considerably more severe than the deprivation that would be suffered by a family in normal circumstances as a result of imprisonment. The second exception is where the offender is a mother of a very young child or children. The third exception is where both parents are imprisoned simultaneously, or where the imprisonment of one parent effectively deprives the children of parental care altogether.[24]

[47] While it may be accepted that the appellant had caring responsibilities for his children, it could not be said that his particular circumstances were such that the degree of hardship that would be suffered by the family would be exceptional and considerably more severe than the deprivation suffered by a family in normal circumstances. Nor could it be said that the imprisonment of the appellant effectively deprived the children of parental care, for reasons discussed further below.

[48] Contrary to counsel for the appellant's contentions, the sentencing judge did refer to and consider the children and how they would be cared for while the appellant was incarcerated. The evidence led in that respect did not amount to the kind of hardship required by the authorities such as *Nagas*. Moreover, in order to establish one of the exceptions set out in *Nagas* it will ordinarily be necessary for a defendant to produce "cogent evidence" of those matters.[25] No cogent

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24 *R v Nagas* (1995) 5 NTLR 45 at 54.

25 *Mawson v Nayda* (1995) 5 NTLR 56 at 57.

evidence directed to those matters was placed before the sentencing court.

[49] This ground is dismissed.

Resentence

[50] Following the hearing of the appeal the court received further information for the purpose of the resentencing exercise in relation to the current position with the appellant's children. Under the terms of orders made by the Federal Circuit Court the appellant and the mother of the children have equal shared parental responsibility for the children. The children spend every second weekend with the appellant's sister during his incarceration. There have been some difficulties with the children's attendance at school. The children visit the appellant in prison and miss his presence in their lives. There has been some disruption to their extracurricular activities during his incarceration.

[51] We have already referred to passages in *Whitehurst v The Queen*[26] where this Court identified the factors which should be considered when deciding whether to impose a suspended sentence or a non-parole period. It is important to acknowledge that a decision on whether to suspend a sentence is not confined to considerations relating wholly or

26 [2011] NTCCA 11.

mainly or specially to the rehabilitation of an offender.[27] Thus, the question of whether to impose a non-parole period or a suspended sentence must be answered in light of all of the circumstances surrounding both the offence and the offender.[28]

[52] We have determined in this case to make an order suspending sentence. We do so for a number of reasons. First, the nature of this offending and the appellant's personal circumstances do not require the fixing of a non-parole period. In particular, he has no relevant prior convictions and no previous breaches of court orders. Further, an order suspending sentence will still accommodate the requirement that the appellant spend the minimum period in imprisonment which the nature of his offending requires. Second, we consider that the conditions which we will be imposing on that order suspending sentence will go some way to ensuring that the appellant does not reoffend in the future in the same or a similar way. Third, we consider that the appellant's prospects for rehabilitation are reasonable given his work history and the matters which have been addressed by his referees. He has support mechanisms available to him outside the custodial setting. Fourth, we consider that the appellant is to some degree dependent on methamphetamine and an order suspending sentence will allow him earlier access to some form of rehabilitation, with a facility for

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27 *Dinsdale v The Queen* (2000) 202 CLR 321 at [18] per Gleeson CJ and Hayne J, [26] per Gaudron and Gummow JJ, [84] per Kirby J.

28 *Whitehurst v The Queen* [2011] NTCCA 11 at [29]; *Dinsdale v The Queen* (2000) 202 CLR 321 at [85] per Kirby J.

Community Corrections to direct him to undertake treatment and counselling. The period for which the appellant will be imprisoned prior to release is not of such duration as to preclude the Court determining at this point in time what conditions are appropriately adapted to facilitate his rehabilitation on release. Finally, although for the reasons we have described there is no *Nagas* circumstance made out in this case, the public interest does not require or benefit from the appellant's separation from his children for the time which would be mandated by the fixing of a non-parole period.

[53] The orders made by the sentencing judge on 21 September 2018 will otherwise remain undisturbed.

[54] Accordingly, we make the following orders:

1. An extension of time and leave to appeal is granted for that ground of appeal in relation to the fixing of a non-parole period.
2. An extension of time and leave to appeal in relation to each of the other grounds of appeal is refused.
3. The order fixing a non-parole period of three years and two months is set aside.
4. The sentence to imprisonment will be suspended after the appellant has served two years commencing on 8 September 2018, subject to supervision for two years on the following conditions:

(a) the offender must not, during the period of the order in force, commit another offence (whether in or outside the territory) punishable on conviction by imprisonment;

(b) the offender is under the ongoing supervision of a probation and parole officer from the date of his release, must obey all reasonable directions from a probation and parole officer, and must report to a probation and parole officer within two days after the order comes into force;

(c) the offender must tell a probation and parole officer of any change of address or employment within two clear working days after the change;

(d) the offender must not leave the Territory except with the permission of a probation and parole officer;

(e) the offender will not consume a dangerous drug, and will submit to testing as directed by a probation and parole officer for the purpose of detecting the presence of dangerous drugs;

(f) the offender will participate in assessment for residential rehabilitation, counselling and/or treatment as directed by a probation and parole officer.

5. We fix an operational period of two years and six months from the date of release for the purposes of ss 40(6) and 43 of the *Sentencing Act*.

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