CITATION:	*Phillips v The Queen* [2019] NTCCA 18
PARTIES:	PHILLIPS, Michael Edwin 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 1 of 2019 (21745000)
DELIVERED:	6 September 2019
HEARING DATES:	4 June 2019
JUDGMENT OF:	Grant CJ, Blokland and Hiley JJ

CATCHWORDS:

CRIMINAL LAW – DRUG OFFENCES – JUDGMENT AND PUNISHMENT

Whether sentencing Judge erred by imposing a non-parole period rather than a partially suspended sentence – Whether imposition of non-parole period unreasonable, plainly unjust or manifestly wrong –No consideration given to minimum period which should actually be served having regard to objective circumstances of offending – Objective circumstances and the appellant's age, antecedents and prospects of rehabilitation did not call for the fixing of a non-parole period – Appeal allowed.

Sentencing Act 1995 (NT) s 40, s 55

Braham v The Queen [1994] NTCCA 60, *Cook v The Queen* [2018] NTCCA 5, *Daniels v The Queen* [2007] NTCCA 9, *Dinsdale v The Queen* (2000)

2002 CLR 321, *Edmonds v The Queen* [2019] NTCCA 1, *Gare v Firth* [2019] NTSC 24, *House v The King* (1936) 55 CLR 499, *Johnson v The Queen* [2012] NTCCA 14, *Lawrence v The Queen* (2007) 171 A Crim R 286, *Stuart v The Queen* [2010] NTCCA 16, *The Queen v Cumberland* [2019] NTCCA 14, *The Queen v RG* [2018] NTSC 85, *The Queen v Roe* [2017] NTCCA 7, *Tran v The Queen* [2019] NTCCA 12, *Weininger v The Queen* (2003) 212 CLR 629, *Whitehurst v The Queen* [2011] NTCCA 11, *Wong v The Queen* (2001) 207 CLR 584, referred to.

REPRESENTATION:

Counsel:

Appellant:	A Abayasekara
Respondent:	M Nathan SC

Solicitors:

Appellant:	Northern Territory Legal Aid Commission
Respondent:	Office of the Director of Public Prosecutions

Judgment category classification:	B
Number of pages:	21

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

Phillips v The Queen [2019] NTCCA 18
No. 21745000

BETWEEN:

MICHAEL EDWIN PHILLIPS
Appellant

AND:

THE QUEEN
Respondent

CORAM: GRANT CJ, BLOKLAND AND HILEY JJ

REASONS FOR JUDGMENT

(Delivered 6 September 2019)

THE COURT:

[1] On 3 December 2018 the appellant pleaded guilty to two counts presented on indictment. Count 1 was that he supplied a commercial quantity of a Schedule 2 dangerous drug (cannabis) contrary to s 5(1) of the *Misuse of Drugs Act 1990* (NT) ('*Misuse of Drugs Act*'). Count 2 was that he supplied less than a commercial quantity of a Schedule 1 dangerous drug (methamphetamine) contrary to s 5A(1) of the *Misuse of Drugs Act*.

[2] On 6 December 2018 the appellant was sentenced to imprisonment for two years and six months on each count. The sentences for each count were ordered to be served concurrently. The sentencing Judge fixed a non-parole

period of 21 months, being 70 percent of the head sentence as required by s 55(3)(b) of the *Sentencing Act 1995* (NT) ('*Sentencing Act*') if a decision is made to fix a non-parole period rather than other available forms of conditional release.

[3] The sole ground of appeal is that the sentencing Judge erred by imposing a non-parole period rather than a partially suspended sentence.[1]

Material before the sentencing judge

[4] The relevant background and context material which was outlined in the agreed facts is as follows.[2] From 12 April 2017 until early August 2017 the appellant was operating as both a purchaser and supplier of cannabis and methamphetamine in the Darwin and Katherine areas. The appellant used substances himself and did not make substantial proceeds from the enterprise. He was not a large commercial operator but rather a low-mid level dealer, typically purchasing a maximum of one to two pounds of cannabis or methamphetamine in amounts of up to seven grams. His motivation was for both personal use of the drugs and their on-supply for commercial gain.

[5] Against that background and with particular reference to count 1, the facts before the sentencing Judge were that on or about 12 April 2017 the appellant commenced making arrangements for the supply of two pounds

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1 On 19 March 2019 a Judge of this Court granted leave to appeal on the single ground of appeal and granted an extension of time. See Appeal Book at 83.

2 Appeal Book at 32.

(903.60 grams) of cannabis in Darwin to two Katherine men, Braun and Stretton, who drove to Darwin to collect the cannabis in exchange for $11,000 cash.[3] The appellant was in regular phone contact with Braun. He arranged to meet Braun and Stretton either in Darwin city or in Palmerston. Later on the same day the appellant told Braun he was still waiting for the cannabis. That particular attempt to supply cannabis was aborted but was concluded on 18 April 2017 when Braun, Stretton and others again drove to Darwin and the appellant supplied them with two pounds (903.60 grams) of cannabis. After obtaining the cannabis, Braun, Stretton and three others drove towards Katherine but were apprehended by police in Adelaide River. The vehicle was searched and the cannabis discovered and seized. The cannabis had a street value of between $9,000 and $50,000, depending on the location and the quantities in which it was sold.

[6] As a result of the seizure of the cannabis, police analysed Braun's telephone and identified the appellant's number as being connected with the likely supplier. Police were granted a warrant to monitor the appellant's phone and installed a tracking device on his vehicle. Shortly after the monitoring commenced, the appellant moved from Darwin to Katherine where he was employed as a labourer by Ian Symes.

[7] In respect of count 2, on 17 July 2017 the appellant sourced approximately 3.5 grams of methamphetamine in Darwin and supplied it to Symes in

3 Appeal Book at 32.

exchange for $1,800. On 24 July 2017 he sourced 7 grams of methamphetamine and supplied it to Symes in exchange for $3,400. The total quantity of methamphetamine supplied to Symes was approximately 10 grams. The appellant knew Symes sought to purchase the drug for personal use.[4]

[8] Police executed a search warrant at the appellant's residence in Katherine. Among other items, police found a safe containing $820 which the appellant gave them access to and a further $735 in cash, an ice pipe, a small amount of cannabis and a drug ledger.

[9] The appellant's criminal history is limited to traffic matters and three findings of guilt imposed in 2014 for the offences of driving with a prohibited drug in his blood, possessing cannabis and administering a dangerous drug to himself. The Court of Summary Jurisdiction did not proceed to record a conviction for any of those offences, but imposed an aggregate fine of $400.[5] Until the sentences imposed for this offending, the appellant had not previously been sentenced to a term of imprisonment.

[10] A psychological assessment report ("the Report") by psychologist Louise McKenna was tendered on the appellant's behalf.[6] The Report reveals Ms McKenna treated the appellant in 2004 when he was 10 years old. He had been referred to her for counselling following his parents' separation. At

4 Appeal Book at 33.

5 Appeal Book at 35-36.

6 Appeal Book at 37-43.

that time the appellant gave an account of being exposed to regular domestic violence, both as a witness to the violence between his parents and as the victim of physical abuse by them. The abuse was reported to the Department of Children and Families. At that time the appellant was found to display clinically significant levels of anxiety. After his parents separated, he lived with his mother, however the Department of Children and Families were again required to intervene as a result of abuse perpetrated on him by his mother.[7] He then lived with his father until the age of 15 but continued to be subject to harsh physical discipline, enduring what was described in the Report as frightening and intimidating behaviour. He left home at 15 and has since had limited contact with his parents. He had recently re-established a relationship with his stepmother and an uncle who were supportive of him, including by funding psychological treatment for him.[8]

[11] The appellant's history recorded in the Report indicates the appellant started using cannabis recreationally at 13 years old. This continued until he was charged with the current offences. He started using methamphetamine from about the age of 17, initially infrequently but he became addicted and was using the drug several times per day in the period leading up to his arrest. While the appellant maintained ongoing employment, his income was not sufficient to support his drug use and he started to sell cannabis and

7 Appeal Book at 39.

8 Appeal Book at 14, 42.

methamphetamine. At the time of her assessment,[9] Ms McKenna observed the appellant's mood was generally flat and consistent with moderate levels of depression and severe anxiety. The Report concluded the appellant met the diagnostic criteria for a substance use disorder with reference to his dependence on cannabis and methamphetamine despite his attempts to reduce drug usage.[10] The only time the appellant was able to abstain from cannabis and methamphetamine use was when he was reporting to community corrections while on bail for three months.[11]

[12] Ms McKenna had counselled the appellant since October 2017. The counselling was directed to assisting him to understand how his trauma was related to his substance abuse, and to provide strategies to assist him managing his moods other than by using substances.[12] The Report also noted the appellant engaged well in the sessions and made significant efforts to remain substance-free. It was observed that he had complex needs which would require access to ongoing psychological counselling. The appellant told Ms McKenna that he had not used methamphetamine since he was charged with the current offences and had used limited amounts of cannabis. The Report states that if under stress and not coping, the appellant would be at a high risk of relapse, however if he is able to obtain successful treatment

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9 The psychological assessment and treatment of the appellant took place on 19 October 2017, 26 October 2017, 9 November 2017, 29 November 2017, 13 December 2017, 10 January 2018, and 17 August 2018: Appeal Book at 38.

10 Appeal Book at 41-43.

11 Appeal Book at 42.

12 Appeal Book at 44-45.

for his drug dependence the likelihood of reoffending would be reduced and the risk of reoffending was rated as moderate.[13]

[13] The Report listed the factors which were considered to reduce his risk of recidivism. These included a stable history of employment, support from his stepmother and paternal uncle, no significant previous criminal convictions, a history of stable accommodation, acknowledgement of his substance use disorder and commitment to seeking treatment and friendships with those who are not involved in criminal activity.[14] The stated vulnerability factors included his extensive drug history and reduced emotional control and self-monitoring.[15]

[14] Thirteen references were tendered on the appellant's behalf, including those from family friends, members of his extended family and his employer at Humpty Doo Barramundi Pty Ltd.[16] The reference from his employer included an offer of ongoing employment and residential/pastoral support as required.[17]

[15] Before the sentencing Judge the Crown submitted the facts relevant to Count 1 demonstrated the appellant was engaged in nothing less than a commercial deal from which he profited. It was not an isolated incident. The amount of the drug was double the commercial quantity. Count 2 covered

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13 Appeal Book at 45.

14 Appeal Book at 43.

15 Appeal Book at 44.

16 Appeal Book at 46.

17 Appeal Book at 46.

two instances of methamphetamine supply. While the amount of the drug was not large in relative terms, it was still five times the traffickable quantity. The Crown submitted that the agreed facts demonstrated the appellant was in the lower to middle tier of a drug supply network operating in Darwin.[18] His level of moral culpability was said to be high given the planned commercial nature of the activity involving two types of drugs, and given the negative social consequences of that activity described in authorities such as *The Queen v Roe*.[19] Further, the Crown pointed out the plea was very late and although the appellant had accepted responsibility, in the circumstances the plea was not indicative of remorse.[20]

[16] Counsel for the Crown acknowledged that weight was to be given to the appellant's relatively young age, while at the same time emphasising he had been living a drug affected lifestyle throughout the offending period.[21] Counsel also acknowledged the appellant appeared to have kept out of trouble while on bail.[22] Notwithstanding the need for the principles of punishment, denunciation and deterrence to prevail, the Crown submitted that the Court was required to give weight to rehabilitation because of the appellant's relative youth, and that an order suspending part of the sentence 'would be appropriate to promote rehabilitation in this case with a focus on

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18 Appeal Book at 64.

19 [2017] NTCCA 7 at [47] and [48] per Grant CJ and Southwood J with specific reference to methamphetamine, a Schedule 1 drug. See also *Daniels v The Queen* [2007] NTCCA 9 at [25], [36]-[40] with reference to cannabis, a Schedule 2 drug.

20 Appeal Book at 64.

21 Appeal Book at 65.

22 Appeal Book at 65.

addressing previous drug use and childhood issues referred to in the character reference material'.[23]

[17] Counsel for the appellant relied substantially on the Report and the references tendered. In addition to the Report, the appellant's counsel told the sentencing Judge that after consultation with Ms McKenna, it was clear that the 'further counselling' referred to in the Report meant counselling with any suitably qualified person.[24] The sentencing Judge was informed the appellant's stepmother and uncle had paid for his counselling to date and were prepared to fund further counselling.[25]

[18] The appellant's counsel also outlined the appellant's attempts to reduce his drug use and drug dealing prior to his arrest for the current offending.[26] In response to the sentencing Judge's questions about how long the appellant had been dealing in drugs given his drug use commenced when he was 13, his counsel acknowledged the appellant's drug dealing commenced a considerable time before the period between April and August 2017 covered by the charges.[27] He said it commenced gradually in order for the appellant to sustain his own habit, but conceded that the activity also paid for the appellant's lifestyle, which was described as 'not extravagant'.[28] It was

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23 Appeal Book at 66.

24 Appeal Book at 14.

25 Appeal Book at 14.

26 Appeal Book at 15.

27 Appeal Book at 15.

28 Appeal Book at 15.

pointed out there were no assets seized associated with the offending.[29] In terms of assessing the gravity of the offending, counsel told the Court that although the appellant was paid $11,000 for the subject cannabis in count 1, he had paid $9,000 himself for the cannabis and consequently made very little profit.[30]

[19] The appellant's counsel emphasised his relatively young age of 25, his substantial employment history, the offer of employment, accommodation and pastoral care, the strong support of his stepmother and the lack of previous relevant convictions. The accommodation offered was said to include facilities that would be suitable for home detention.[31] If released on conditions, it was submitted the appellant could reside at the accommodation provided by the employer. In answer to the sentencing Judge's concern raised with the appellant's counsel about the late plea, counsel said it was 'partly because [of] his advice as such and partly because of his own reluctance to do so'.[32]

The Sentencing Remarks

[20] The sentencing Judge referred to the maximum penalty of imprisonment for 14 years for both offences. When summarising the agreed facts, the sentencing Judge remarked it was clear the drug dealing commenced before

29 Appeal Book at 15.

30 Appeal Book at 15.

31 Appeal Book at 16-17.

32 Appeal Book at 18.

the dates on the indictment.[33] It started off in a very small-time way, by the appellant obtaining drugs largely for himself and later, to feed his habit, he sold drugs to other people.[34] His Honour acknowledged the description of the appellant as a low to mid-level dealer for a mixture of personal use and on-supply for commercial gain.

[21] The sentencing Judge accepted the Crown submission that count 1 was a straight commercial drug deal which the appellant had admitted was not an isolated incident and that he was in the business of drug-dealing and supply at the time.[35] It was noted that the plea was indicated only after the Crown served a tendency notice together with telephone intercept evidence and the co-accused had pleaded guilty.[36] This went to the appellant's absence of remorse and late acceptance of responsibility. The sentencing Judge took into account the appellant's personal antecedents, principally his age, the material in the references and his previous good character.[37] His Honour also noted the Report and the opinion that the appellant suffered from anxiety and depression, with a moderate prospect of re-offending. His Honour remarked it was troubling that the appellant did not consider himself drug-

33 Appeal Book at 21.

34 Appeal Book at 21.

35 Appeal Book at 22.

36 Appeal Book at 22.

37 Appeal Book at 23.

dependent until arrested.[38] His Honour made the point that the appellant might have been a user but that this did not excuse his actions.[39]

[22] In the assessment of the gravity of the offending, the sentencing Judge remarked:

> Clearly he is at the lower end of the scale. Nevertheless, he is part of the system. He is able to gain access to drugs from higher-end sources, so as to deal to the public. This makes these offences very serious.[40]

[23] His Honour's more specific remarks relevant to the question of whether any part of the sentence should be suspended are as follows.[41]

> There can only be one penalty and that is prison. The question I have to determine is whether any of the term at all should be suspended. In coming to a conclusion about this, in the first place, I need to consider personal deterrence.
>
> On his own psychological assessment, he has a moderate [risk] of offending again. It does seem, on listening to the submissions and reading the various documents that he has little insight into his problems and little insight into the harm he does to others by selling drugs to them.
>
> As I previously indicated, the plea was at the last minute and only after the Crown indicated they were in possession of strong tendency evidence and evidence from the co-accused. In dealing with the co-accused, as far as he is concerned, I do not consider that parity of sentence has significance in this case. The co-accused was a buyer for his own use.
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> The issue of general deterrence is also of great significance. The public realise and has to realise that if you sell drugs and are caught, there are going to be substantial penalties.

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38 Appeal Book at 22-23.

39 Appeal Book at 24.

40 Appeal Book at 24.

41 Appeal Book at 24.

> As far as rehabilitation is concerned, he is young enough and clearly bright enough to be able to rehabilitate himself. He has clearly had difficulties in his youth, but at some time, some point in his life, he is going to have to take responsibility for his own actions. I conclude there are moderate prospects of rehabilitation, but no more than that in the light of the psychological report particularly.
>
> Finally, punishment or denunciation is a significant factor. If you sell drugs, you need to be punished for it. Deeds have ramifications. Now, within the scale of drug dealers, the offender is at the lower end. But, nevertheless, he is part of what can be described as an evil chain.
>
> Without low-end drug dealers, the kingpins could not operate. Drugs are destroying communities and the community itself, as I have said before, wants and requires that drug dealers be dealt with severely; though I accept in this case we are dealing with a low-end dealer.

[24] Those remarks are directed principally to the question of the appellant's insight, and to the sentencing purposes of general and personal deterrence, punishment, denunciation and rehabilitation. They do not directly address the sentencing choice between the fixing of a non-parole period and an order suspending sentence.

Consideration of the Arguments on Appeal

[25] 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 when that option is available.[42] Section 40 of the *Sentencing Act* provides that a sentence of imprisonment may be suspended in whole or in part and on such conditions as the court thinks fit, provided the term of imprisonment is not more than five years. The exercise of the discretion on the question of the appropriate sentencing disposition will not be interfered with lightly. It is

42 *Cook v The Queen* [2018] NTCCA 5 at [34]; *Tran v The Queen* [2019] NTCCA 12 at [36].

not for an appellate court to substitute its own discretion for that of the sentencing judge's discretion. While it is rare for an appeal court to overturn the exercise of this particular discretion, it may be found to have miscarried even in the absence of identifiable error.[43]

[26] Before an appeal court will intervene in the exercise of a discretion, an appellant must establish error in the terms stated by Dixon, Evatt and McTiernan JJ in *House v The King* ('*House*'):[44]

> The manner in which an appeal against an exercise of discretion should be determined is governed by established principles. It is not enough that the judges composing the appellate court consider that, if they had been in the position of the primary judge, they would have taken a different course. It must appear that some error has been made in exercising the discretion. If the judge acts upon a wrong principle, if he allows extraneous or irrelevant matters to guide or affect him, if he mistakes the facts, if he does not take into account some material consideration, then this determination should be reviewed and the appellate court may exercise its own discretion in substitution for his if it has the materials for doing so. It may not appear how the primary judge has reached the result embodied in his order, but, if upon the facts it is unreasonable or plainly unjust, the appellate court may infer that in some way there has been a failure properly to exercise the discretion which the law reposes in the first instance. In such a case, although the nature of the error may not be discoverable, the exercise of the discretion is reviewed on the ground that a substantial wrong has in fact occurred.

[27] The appellant does not contend there has been specific error of the kind referred to as the first limb in *House*. The appellant seeks to establish error in the second sense recognised by *House*, namely, that sentencing error may be inferred if upon the facts the sentence is unreasonable or plainly unjust or

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43 See, for example, *Stuart v The Queen* [2010] NTCCA 16 at [65]-[68]; *Gare v Firth* [2019] NTSC 24 at [21-[22].

44 [1936] HCA 40; 55 CLR 499 at 504-5.

is manifestly wrong. In *Wong v The Queen*,[45] Gaudron, Gummon and Hayne JJ held intervention is warranted under the second category of error only where 'in all the circumstances the appellate court concludes that there must have been some misapplication of principle, even though where and how is not apparent from the statement of reasons'.[46] Those same considerations have application to the determination whether to fix a non-parole period or make an order suspending sentence where available.[47]

[28] Senior counsel for the respondent drew attention to *Cook v The Queen*[48] ('*Cook*') where this Court discussed the exercise of the discretion to impose a non-parole period or a partially suspended sentence. The Court confirmed a sentencing judge retains a discretion to impose either a fully or partially suspended sentence or a non-parole period. When exercising the discretion the following principles are to be applied:[49]

> In deciding whether or not to fix a suspended sentence, the court is required to consider again all of the factors relevant to the imposition of the term of imprisonment. These must be revisited in determining whether to suspend that term. This means that it is necessary to look again at all the matters relevant to the circumstances of the offence as well as those personal to the offender. However, there is no warrant for concentrating attention only on matters relevant to the particular circumstances of the offender, such as issues of the offender's rehabilitation and the court's mercy. As Kirby J went on to observe in *Dinsdale v The Queen*:

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45 [2001] HCA 64, 207 CLR 584.

46 *Wong v The Queen* [2001] HCA 64; 207 CLR 584 at 605 [58].

47 See generally *Johnson v The Queen* [2012] NTCCA 14.

48 [2018] NTCCA 5.

49 [2018] NTCCA at [35].

> …what is required by a proposal that a term of imprisonment should be suspended is a reconsideration of "all the circumstances". This reinstates the attribution of "double weight" to all of the factors relevant both to the offence and to the offender – whether aggravating or mitigating – which may influence the decision whether to suspend the term of imprisonment.[50]

[29] Further, in *Whitehurst v The Queen*[51] the exercise of the discretion was described as follows:

> 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 actually be 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.
>
> 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.

[30] Counsel for the respondent argued before us it was 'tolerably clear', in the sense that the phrase was used in *Johnson v The Queen*,[52] why the sentencing Judge imposed a non-parole period rather than a partially suspended

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50 *Dinsdale v The Queen* [2000] HCA 54; (2000) 2002 CLR 321 at [85]; see also *Braham v The Queen* [1994] NTCCA 60.

51 [2011] NTCCA 11 at [28]-[29]; applied in *The Queen v RG* [2018] NTSC 85; *Tran v The Queen* [2019] NTCCA 12.

52 [2012] NTCCA 14.

sentence. We do not agree. While properly acknowledging the seriousness of offending of this kind, his Honour found that the offending was 'at the lower end'[53] and the appellant a 'low-mid level dealer'.[54] The head sentence of two years and six months clearly indicates the appellant was sentenced in the lower level range of sentences generally imposed for offending of this kind. Recent reviews of sentences imposed on drug dealers illustrates that this is the case.[55] There was no single factor or combination of relevant sentencing factors which pointed to the imposition of a non-parole period rather than a partially suspended sentence.

[31] Counsel for the respondent submitted that it was clear that the appellant had been dealing drugs for some time prior to the subject offending, and this had some bearing on the assessment of the gravity of the offending. As explained in *Edmonds v The Queen*,[56] it may be appropriate for a sentencing judge to draw inferences from the admission of uncharged acts to show the subject charges were not isolated instances, to place the offending in its proper context, and as matters going to character. However, there are limits on the extent to which inferences drawn from uncharged acts may inform the sentencing calculus.[57]

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53 Appeal Book at 24.

54 Appeal Book at 32.

55 *The Queen v Roe* [2017] NTCCA 7 and *The Queen v Cumberland* [2019] NTCCA 14.

56 [2019] NTCCA 1 at [32]-[34].

57 *Lawrence v The Queen* (2007) 171 A Crim R 286, applying *Weininger v The Queen* [2003] HCA 14; 212 CLR 629 at 640 [32] as discussed in *Edmonds v The Queen* [2019] NTCCA 1 at [31]-[35].

[32] Even taking those inferences into account, it is apparent that the sentencing Judge was troubled throughout the plea hearing by the absence of s 103 *Sentencing Act* report before him on the suitability of supervision. Section 103 of the *Sentencing Act* requires a court, before ordering supervision, to have regard to a report from the Director of Correctional Services as to the person's suitability for supervision. It is then a matter for the court to determine whether to proceed with supervision in the light of the report. Although the appellant's counsel referred to home detention being available,[58] no application was made for either a supervision report or a home detention report. It seems his Honour considered that an order suspending sentence subject to supervision may have been an appropriate disposition, but was not assisted by a request from counsel for a report to be ordered.

[33] As this Court observed in *Tran v The Queen*,[59] 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 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. As the Court made clear, however, this is not to say that the minimum period of imprisonment which

58 Appeal Book at 16.

59 [2019] NTCCA 12 at [39], citing *The Queen v RG* [2018] NTSC 85 and *Whitehurst v The Queen* [2011] NTCCA 11.

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.[60]

[34] Allowing for those qualifications, we have concluded that there was a failure properly to exercise the discretion in this case. First, it seems that the sentencing Judge gave no consideration to the minimum period which should actually be served having regard to the circumstances. Secondly, having regard to the objective circumstances of the offending, and the appellant's age, antecedents and prospects of rehabilitation, there was no obvious call for the fixing of a non-parole period. Thirdly, the Crown had submitted that a suspended sentence would be an appropriate disposition in the circumstances, but no consideration was given to ordering a report pursuant to s 103 of the *Sentencing Act* to determine whether the appellant was suitable for supervision.

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60 *Tran v The Queen* [2019] NTCCA 12 at [39], citing *The Queen v RG* [2018] NTSC 85 and *Whitehurst v The Queen* [2011] NTCCA 11.

Re-sentencing

[35] To inform the Court as part of the re-sentencing exercise a report was ordered pursuant to s 103 of the *Sentencing Act*. The report found the appellant is suitable for supervision on the conditions recommended by the author of the report. The head sentence of imprisonment for two years and six months is undisturbed by the finding on appeal.

[36] The orders of the Court are as follows:

1. The appeal is allowed.

2. The order made on 6 December 2018 fixing a non-parole period of 21 months is quashed.

3. The sentence to imprisonment for two years and six months is suspended after the appellant has served 12 months' imprisonment from 6 December 2018, subject to supervision for a period of 18 months following his release on the following conditions:

   (i) 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;

   (ii) The offender is under the ongoing supervision of a probation and parole officer, must obey all reasonable directions from a probation and parole officer, and must report to a probation and parole officer when the order comes into force;

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

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

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

(vi) The offender will participate in counselling and/ or treatment as directed by a probation and parole officer.

4. An operational period of 18 months from the date of release is fixed pursuant to ss 40(6) and 43 of the *Sentencing Act*.
