CITATION:	*Barbi v The Queen* [2019] NTCCA 19
PARTIES:	BARBI, Damien Paul 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 4 of 2019 (21830914)
DELIVERED:	17 September 2019
HEARING DATES:	19 July 2019
JUDGMENT OF:	Grant CJ, Kelly and Barr JJ

CATCHWORDS:

CRIME — Appeals — Appeal against sentence — Manifest excess

Whether sentence manifestly excessive – supply commercial quantity of cocaine – maximum penalty imprisonment for 25 years – offending objectively serious – applicant engaged in the supply of seven times the threshold commercial quantity of a Schedule 1 drug over a five month period – applicant conspired with international criminals to import cocaine from Colombia and made payments direct to that country – applicant harboured criminals in his home and discussed future commercial drug importations with them – applicant made a considerable amount of money and involved co-offenders in commercial drug dealing operation – sentence not unreasonable or plainly unjust – appeal dismissed.

Adams v The Queen (2008) 234 CLR 143, *Dinsdale v The Queen* (2000) 202 CLR 321, *Emitja v The Queen* [2016] NTCCA 4, *Forrest v The Queen* (2017) 267 A Crim R 494, *House v The King* (1936) 55 CLR 499, *JF v The Queen*

[2017] NTCCA 1, *Melham v The Queen* [2011] NSWCCA 121, *Noakes v The Queen* [2015] NTCCA 7, *The Queen v Meginess* [2019] NTCCA 5, *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) 207 CLR 584, referred to.

REPRESENTATION:

Counsel:

Applicant:	J Tippett QC
Respondent:	W J Karczewski QC

Solicitors:

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

Judgment category classification:	B
Number of pages:	15

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

Barbi v The Queen [2019] NTCCA 19
No. CA 4 of 2019 (21830914)

BETWEEN:

DAMIEN PAUL BARBI
Applicant

AND:

THE QUEEN
Respondent

CORAM: GRANT CJ, KELLY AND BARR JJ

REASONS FOR JUDGMENT

(Delivered 17 September 2019)

THE COURT:

[1] The applicant was sentenced to six years' imprisonment after entering a plea of guilty to the commercial supply of cocaine. He seeks an extension of time within which to appeal the sentence on the ground of manifest excess.

[2] The applicant was charged (jointly with Emma Edbrooke) that, between 22 February and 19 July 2018, at Darwin, he intentionally supplied a commercial quantity of the Schedule 1 dangerous drug cocaine to persons unknown.

The offending

[3] The applicant was born on 12 November 1981, and so at the time of offending was 36 years old. The agreed facts disclosed that he entered into an agreement with two German Nationals (Neils Paff and Nicolai Smith), and a Darwin man named Rick Hall, to import and distribute cocaine in the Darwin area. Paff and Smith had connections to cocaine manufacturers in Colombia and distributors in the United States, and were able to facilitate the supply of cocaine to the applicant and Hall.

[4] The agreed facts in relation to the offending were quite lengthy,[1] and it is unnecessary to set them out seriatim. For the purposes of this appeal, we note that the applicant's conduct included the following:

- On 1 March 2018, the applicant attended at the Winnellie post office to collect a package containing cocaine sent to him from an unknown person in Boston in the United States of America ("the first delivery").
- On 27 March 2018, the applicant received at his home a package containing cocaine which had been sent to him from an unknown person in Miami in the United States of America ("the second delivery").
- On 4 May 2018, Hall collected a package containing cocaine at the Casuarina post office sent from Salem in the United States of America

1 Appeal Book pp. 38 – 41.

("the third delivery"). Hall was acting on behalf of, or in concert with, the applicant.

- A fourth package containing cocaine was sent to the residence of Hall from an unknown person in Miami. However, on 1 June 2018 police intercepted that package. Again, there is no issue that the applicant was the intended beneficial recipient of the package.

[5] The applicant and Hall distributed the cocaine from the first, second and third deliveries in Darwin, or in the Darwin area. There was no evidence as to the method of distribution.

[6] Payment for the cocaine was effected in the manner explained in [7] to [9] below.

[7] After receiving the first delivery on 1 March 2018, the applicant used the services of Western Union on 8 March 2018 to transfer $5,000 to CE (a named person), in Medellin, Colombia. On 15 March, using the same method, he transferred $5,000 to another person, AC, in Medellin. Both those transfers were payments by the applicant for cocaine received by him.

[8] After receiving the second delivery, the applicant once more used the services of Western Union on 12 April 2018 to transfer $5,000 to CE in Medellin. On a date which was not stated, the co-offender Edbrooke transferred $5,000 to yet another person, JV, in Medellin. She did so on the

instructions of the applicant. Both those transfers were payments by the applicant for cocaine received by him.

[9] Further monies were sent via Western Union to Colombia by the applicant and Hall. On 28 May 2018, Hall arranged for the transfer $3,950 to GN in Medellin. Then on 13 June 2018, while in Perth, the applicant sent $3,804.08 by Western Union to AU in Medellin. The two amounts total $7,754.08. It is unclear whether those amounts were for payment for the third delivery or an advance payment in respect of the intercepted fourth delivery (which had been posted on 25 May 2018).

[10] The applicant's criminal conduct extended to aiding and abetting the two German nationals referred to in [3] above. Those men travelled to Darwin in May 2018. On 10 May 2018 the applicant attended at their hotel room and discussed with them the receipt by the applicant of previous consignments of drugs, their distribution in Darwin, planned future supplies, methods of transfer of proceeds of sale to avoid detection by police, use of Western Union to transfer payment for drugs, and use of Hall as the recipient for past deliveries and his greater engagement for future deliveries to minimise risk to the applicant. The applicant allowed the two Germans to stay at his house from 11 May to 21 May when he was in Western Australia.

Quantities of drug involved

[11] Although there was no direct evidence (or agreement) as to the quantities of cocaine contained in the first, second and third deliveries, it was an agreed fact that each contained a commercial quantity of cocaine.[2]

[12] Senior counsel for the applicant made a concession in the court below that the first and second packages each contained two tubes, with each tube containing an ounce of cocaine.[3] Therefore, each of the first and second deliveries contained 56 grams of cocaine, making a total of 112 grams of cocaine for those deliveries. Senior counsel informed the Court that the applicant "could not speak to the occasions that Mr Hall was involved in collection". That qualification was somewhat disingenuous. It was an agreed fact that, after Hall had collected the third delivery from the post office, the applicant attended at Hall's residence and took possession of some of the cocaine contained in the package.[4] Further, the applicant's stated ignorance seems inconsistent with the discussion between the applicant and the two German nationals referred to in [10] above, in particular the reference to the use of Hall for past deliveries. In the circumstances, it is improbable that the applicant did not have precise knowledge about the contents of the third delivery.

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2 Appeal Book pp. 38 – 38, Agreed Facts pars 3, 5 and 7.

3 Appeal Book p. 10.5.

4 Appeal Book p. 39, par 7.

[13] The intercepted fourth package weighed 945.5 grams. It contained four 40 cm metal tubes, which each contained an ounce (28 grams) of cocaine, making four ounces or 112 grams in all.

[14] On the agreed facts, the gross weight of the first delivery was 1650 grams; of the second delivery 1191 grams; and of the third delivery 2155 grams. However, it would be unsafe to infer a correlation between package gross weight and the quantity of cocaine contained in the packages for the first, second and third deliveries based only on the intercepted fourth package. Nor do the amounts of money paid by or on behalf of the applicant necessarily clarify the quantities of cocaine received.

[15] The learned sentencing judge, after weighing up the facts in relation to drug quantities and payments made, and having heard submissions as to inferences which could properly be drawn, concluded that "a very conservative estimate" of the quantity received by the applicant and co-offender Hall was at least 10 ounces, or 280 grams, seven times the commercial threshold quantity.[5] That factual finding has not been challenged on appeal.

[16] His Honour also considered the extent to which the applicant profited from his criminal activities. There was no direct evidence as to the purchase price

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5 Appeal Book p. 59. In setting the estimated quantity of "at least 10 ounces", the sentencing judge accepted the applicant's admission or concession that a total of only four ounces had been received from the first and second deliveries. His Honour thus accepted that the quantity from the first two deliveries was equal to the quantity in one delivery, the fourth delivery. Moreover, his Honour has only attributed two ounces to the third delivery, even though the gross weight of the package was 2155 grams (see [14] above), considerably more than all the other packages.

of cocaine, but, taking into account evidence of payments made by the applicant to various persons in Medellin, his Honour concluded that the applicant paid about $1,000 an ounce, although it may have been as high as about $2,000. Based on evidence of the sale price of cocaine,[6] his Honour concluded that the sale price of an ounce was between $9,600 and $12,000, which made for a substantial profit whether the purchase price was $1,000 or $2,000 per ounce.

[17] In written submissions, Mr Tippett QC, senior counsel for the applicant, contended that the applicant was sentenced on the basis of a profit of $8,000 per 28 grams or $80,000 profit in total. In the course of the appeal hearing, Mr Tippett calculated the projected receipts (not profits) at $120,000, if all of the cocaine was sold at the upper level price of $400 per gram. The applicant himself did not give evidence in the court below. To the extent that profits are relevant, and if one accepts the very conservative estimate of quantities adopted by the sentencing judge, the applicant made or stood to make a profit in the vicinity of $80,000 to $100,000 for the first, second and third deliveries and the intercepted fourth delivery.

The applicant's personal circumstances and prior offending

[18] The applicant was brought up in Port Hedland, where he attended secondary school to the end of year 11. After leaving school he successfully completed a four-year electrical apprenticeship with BHP. He was then employed by

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6 Taken from the Australian Criminal Intelligence Commission Illicit Drug Data Report (2016-2017) that cocaine was selling in the Northern Territory for $350-$400 per gram, or $1,200-$1,500 per 3.5 grams (1/8 of an ounce).

major electrical construction companies for a number of years. He later went into business with his sister and brother-in-law installing solar panels under the business name Solaris Solar Installation Services.

[19] The applicant was convicted in April 2002 for assault occasioning bodily harm. He also had two convictions for drink-driving: one low range and one medium range. In August 2003, aged 21, he was convicted of possession of a prohibited drug and possession of a prohibited drug with intent. He received fines of $400 and $3,000 respectively.

[20] The applicant engaged in recreational drug use over many years, but by 2012 his drug use had increased. His counsel told the sentencing judge that his drug problems were partly responsible for his business failing. The applicant's criminal record included drug-related offending in December 2012 for which he was convicted in June 2013: possessing a utensil for smoking a prohibited drug and possession of methamphetamine.

[21] After reviewing a number of character references, the learned sentencing judge noted that the applicant had demonstrated his capabilities as a competent electrician and a good worker. His Honour also noted that the applicant was said to be a loving and caring person to his family and friends, and that he was kind and trustworthy. However, his Honour concluded that the applicant had a long history of drug addiction; that he had made numerous attempts to break the habit, but had relapsed on several

occasions.[7] His Honour assessed prospects of rehabilitation as "moderate", observing that the applicant's history of relapses into drug addiction made it difficult to make a realistic assessment of his rehabilitation prospects.

The sentence

[22] After undertaking a very comprehensive consideration of the evidence, including as to the applicant's subjective circumstances, the learned judge sentenced the applicant to six years' imprisonment, backdated to reflect time in custody on remand. His Honour stated that, if the applicant had not pleaded guilty and shown remorse, he would have received a sentence of eight years' imprisonment.

[23] His Honour fixed a non-parole period of just over 70% of the head sentence, arriving at a non-parole period of four years, two months and two weeks.

The applicant's case on appeal

[24] The applicant contends that the sentence was manifestly excessive, and that there was a miscarriage of justice insofar as the sentence imposed on the applicant was the same as the sentence imposed by the Court of Criminal Appeal in *The Queen v Roe*,[8] notwithstanding that the applicant's offending was objectively less serious than the offending in *Roe*.

[25] In support of the contention, senior counsel submitted that *Roe* involved the supply of a commercial quantity of methamphetamine, whereas the applicant

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7 Appeal Book p. 65.

8 *The Queen v Roe* [2017] NTCCA 7 at [115], per Grant CJ and Southwood J.

engaged in the commercial supply of cocaine. In addition, senior counsel made reference to a number of matters which were said to demonstrate the lesser objective seriousness of the applicant's offending: that he did not engage couriers to transport the drug, or drug dealers to sell the drug; that he did not establish a network of drug users in Darwin; and that he did not take hundreds of thousands of dollars in receipts as was the case in *Roe*. Senior counsel referred to the significantly lower turnover in the present case, said to be only $16,000 per month, compared with $100,000 per month in *Roe*.

The respondent's submissions

[26] The Director submits that the sentencing principles discussed in *Roe* are equally applicable to the offence of supplying a commercial quantity of cocaine, and that the sentencing judge was entitled to refer to the decision in *Roe* to inform himself of any existing sentencing standards, and as to whether there was an existing range of sentences for similar offending.

[27] In relation to the principle of consistency in sentencing, the Director relies on observations of this Court, for example, in *Forrest v The Queen*:[9]

> That a case involving more serious features may have in the past attracted a similar sentence cannot, without more, support a conclusion that the sentence was manifestly excessive. Consistency in sentencing is an important outcome, but does not resolve to "numerical equivalence". Like cases are to be treated in like manner whilst preserving the legitimate breadth of the sentencing discretion.

9 *Forrest v The Queen* [2017] NTCCA 5; (2017) 267 A Crim R 494 at 508 [66]

[28] Notwithstanding that consistency does not resolve to numerical equivalence, the Director nonetheless referred in written submissions to the fact that the quantity of drug trafficked in *Roe* was approximately five times the threshold for a commercial quantity: 200 grams of methamphetamine. In the present case, the applicant was sentenced on the basis that he supplied 280 grams of cocaine, seven times the commercial threshold quantity. In *Roe*, the offending took place over a period of three months; in the present case, the offending took place over a period of almost five months. In both cases, drugs were sourced from outside the Northern Territory: in the case of *Roe*, from Melbourne, and in the present case, from overseas.

Analysis

[29] We would observe firstly that the applicant's criminality is not to be assessed only by reference to the proven quantities of cocaine sourced by him and supplied by the applicant and Hall in Darwin, nor by the receipts from drug dealing in Darwin.

[30] We bear in mind that the applicant conspired with international criminals to import cocaine from overseas, for which he made a number of direct payments to persons in Medellin, Colombia. His offending not only involved harm to the Darwin community but contributed to the misery, dysfunction and criminal violence that trade in cocaine causes in Colombia, and neighbouring South American and Central American countries. Moreover, on the agreed facts, he harboured his international criminal associates during

their stay in Darwin, permitting them to live in his home. It should be noted finally that he involved the co-offender Ms Edbrooke in his criminal activities.

[31] As this Court observed in *The Queen v Meginess*[10] (following the approach by the High Court in *Adams v The Queen*),[11] in the *Misuse of Drugs Act* the Northern Territory legislature has adopted a quantity-based penalty regime. Dangerous drugs considered more serious are listed in Schedule 1, and the Act sets defined "commercial" quantities for each drug. For supply offences, the Act creates separate offences depending on whether a commercial quantity or a less than commercial quantity is supplied, and makes no distinction in maximum penalties between any of the drugs listed in Schedule 1. Therefore, *prima facie*, supply of a commercial quantity of any Schedule 1 drug should be treated as equally serious as supply of any other Schedule 1 drug; supply of five times the commercial quantity of any Schedule 1 drug should be treated as equally serious as possession or supply of five times the commercial quantity of any other Schedule 1 drug; and supply of seven times a commercial quantity should be treated as more serious than supply of five times a commercial quantity (other things being equal).

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10 *The Queen v Meginess* [2019] NTCCA 5

11 *Adams v The Queen* (2008) 234 CLR 143 at [10], [11], per Gleeson CJ, Hayne, Crennan and Kiefel JJ.

[32] We do not consider that the applicant's approach of adopting *Roe* as a starting point and searching for points of similarity or distinction is an appropriate way to deal with an appeal of this nature. The applicant's submissions appear to confuse the principle of consistency with the principle of parity.

[33] Parity applies in the sentencing of co-offenders. The "parity principle" requires that like offenders should be treated in a like manner and that different sentences be imposed on co-offenders to reflect different degrees of culpability and/or different circumstances. In the case of co-offenders application of this principle often does require a detailed comparison of the kind sought to be performed by the applicant on this appeal.

[34] "Consistency" in sentencing across different cases, on the other hand, requires consistency in the application of the relevant legal principles, as distinct from some numerical or mathematical equivalence. We refer to the discussion of consistency by this Court in *Truong v The Queen*.[12]

[35] The exercise of the sentencing discretion is not to be disturbed on appeal unless error is shown. The presumption is that there is no error. Appellate intervention is not justified simply because the result arrived at below is markedly different from other sentences that have been imposed in other cases. Intervention is warranted only where the difference is such that in all the circumstances the appellate court concludes there must have been some

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12 *Truong v The Queen* [2015] NTCCA 5; 35 NTLR 186 at [23]-[30]

misapplication of principle, even though where and how is not apparent from the statement of reasons.[13]

[36] A sentence will only be found to be manifestly excessive if the appeal court concludes that the sentence is unreasonable or plainly unjust.[14] It must be shown that the sentence was clearly and not just arguably excessive.[15] In determining whether a sentence is unreasonable or plainly unjust, the appeal court recognises that there is no one single correct sentence, and that there may have been compliance with the appropriate sentencing principles at first instance notwithstanding that there may also be differences of judicial opinion concerning the result.[16]

Conclusion

[37] We do not consider that the sentence imposed on the applicant was manifestly excessive. The maximum penalty for this offence is imprisonment for 25 years. The offending was serious. The applicant was engaged in the supply of seven times the threshold commercial quantity of cocaine, a Schedule 1 drug, over a five month period. He conspired with international criminals to import cocaine from Colombia and made payments direct to that country. He harboured those criminals in his home and

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13 *Wong v The Queen* [2001] HCA 64; 207 CLR 584 at [58] per Gaudron, Gummow and Hayne JJ.

14 *House v The King* (1936) 55 CLR 499; *Dinsdale v The Queen* [2000] HCA 54; 202 CLR 321 at [6].

15 *Whitehurst v The Queen* [2011] NTCCA 11 at [12]; *Noakes v The Queen* [2015] NTCCA 7 at [23]; *Emitja v The Queen* [2016] NTCCA 4 at [39]; *JF v The Queen* [2017] NTCCA 1 at [49]; *Forrest v The Queen* [2017] NTCCA 5 at [64]

16 *Melham v The Queen* [2011] NSWCCA 121 at [85]; *Forrest v The Queen* [2017] NTCCA 5 at [64]

discussed future commercial drug importations with them. He made a considerable amount of money and he involved co-offenders in his commercial drug dealing operation. A sentence of six years' imprisonment for this offence with a non-parole period of four years, two months and two weeks (just over the 70% statutory minimum) was not unreasonable or plainly unjust. The appeal should be dismissed.

[38] ORDERS: (a) An extension of time within which to appeal is granted.

(b) The appeal is dismissed.
