Briscoe v Firth [2018] NTSC 18

PARTIES:	BRISCOE, Arnold v FIRTH, Justin Antony
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE NORTHERN TERRITORY EXERCISING APPELLATE JURISDICTION
FILE NO:	LCA 47 of 2017 (21716066)
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JUDGMENT OF:	KELLY J
APPEAL FROM:	LOCAL COURT

CATCHWORDS:

CRIMINAL LAW - appeal against sentence - supply kava - sentence not manifestly excessive - appeal dismissed

CRIMINAL LAW - appeal against sentence - supply kava - dangerous driving - accumulation of sentences - total sentence not manifestly excessive - totality principle - cumulative or concurrent sentences - appeal dismissed

CRIMINAL LAW - sentence - approaches to sentencing - dangerous driving - two-tiered approach - instinctive synthesis approach – appeal dismissed

Kava Management Act 1998 (NT) s 12(1)
Sentencing Act 1995 (NT) s 50
Traffic Act 1987 (NT) ss 30(1), 33(1)(a), 34(1)

Carroll v The Queen [2011] NTCCA 6; *Forrest v The Queen* [2017] NTCCA 5; *Markarian v The Queen* [2005] HCA 25, applied

AB v The Queen [1999] HCA 46, (1999) 198 CLR 111; *Denham v Hales* [2003] NTSC 87; *Latu v McPherson* [2010] NTSC 14; *Pearce v The Queen* (1998) 194 CLR 610; *R v Gerald Binymuralawuy* SCC 21205278, 16 April 2013; *R v Gallagher* (1991) 23 NSWLR 220; *R v Thomson* (2000) 49 NSWLR 383; *R v Sateki Tuitupou* SCC 21425411, 21428072 and 21425406, 27 November 2014; *R v David Tupou* SCC 21422154, 6 February 2015; *R v Langiila Uasi* SCC 21535706 and 21539706, 13 April 2016; *Wauchope v Musgrave* [2006] NTSC 77*Wong v The Queen* [2001] HCA 64, (2001) 207 CLR 584, referred to

REPRESENTATION:

Counsel:

Appellant:	T Jackson
Respondent:	L Hopkinson

Solicitors:

Appellant:	North Australia Aboriginal Justice Agency
Respondent:	Director of Public Prosecutions

Judgment category classification:	B
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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

Briscoe v Firth [2018] NTSC 18
No. LCA 47 of 2017 (21716066)

BETWEEN:

ARNOLD BRISCOE
Appellant

AND:

JUSTIN ANTONY FIRTH
Respondent

CORAM: KELLY J

REASONS FOR JUDGMENT

(Delivered 19 March 2018)

[1] On the morning of Sunday 2 April 2017, the appellant, Arnold Briscoe, drove an unregistered, uninsured Toyota Land Cruiser loaded with 50 kg of kava out of the McDonalds takeaway outlet at Coolalinga onto Girraween Road and then onto the Stuart Highway, driving towards Palmerston. Mr Briscoe did not have a licence[1] to possess or sell kava and 50 kg is a commercial quantity (defined as 25 kg or more). The Land Cruiser had not been registered since 24 September 2015.

[2] Police saw the unregistered vehicle and signalled it to stop using sirens and flashing lights. Mr Briscoe declined to stop. He kept driving at around 80 kph, and turned into Temple Terrace. Police followed. Mr Briscoe moved

[1] Under the *Kava Management Act*, it is an offence to possess or supply kava without a licence.

into the left lane and activated his left indicator, signalling his intention to turn left onto Farrar Boulevard but this was a ruse; he swerved back sharply across two lanes and continued straight ahead cutting off another car and narrowly avoiding a collision. Then he turned left onto Roystonea Drive.

[3] At this point, police turned off the lights and sirens as it was obvious that Mr Briscoe was not going to obey their signal to him to stop. Other, unmarked police cars followed Mr Briscoe surreptitiously as he drove to Firefly Court in Bakewell. Firefly Court is a cul-de-sac. As Mr Briscoe drove into the cul-de-sac, three unmarked police cars followed him in to try to stop him from leaving. They activated their sirens and lights. However, Mr Briscoe drove onto the nature strip and around the police cars narrowly missing two of them. He drove out of Firefly Court at speed on the wrong side of the road and without giving way to traffic on the main road (Maurice Terrace). A car on Maurice Terrace had to brake suddenly before the intersection.

[4] After a few more incidental activities, acting on advice, police went to an address in Gray where they found the 50 kg of kava divided up into hundreds of clip seal bags weighing about 50 to 100 gm each. (Mr Briscoe had offloaded it there and was intending to take the small bags of kava to Ramingining and Milingimbi to sell.)

[5] Police waited at the Gray address and when Mr Briscoe went to that address to retrieve the kava, police were waiting for him. Mr Briscoe saw the police

as he walked up to the back door and he ran away on foot yelling out, “It’s not mine! It’s not mine!” as he ran. Two police officers chased after him, caught him and arrested him.

[6] Mr Briscoe was later charged with driving an unregistered vehicle, driving an uninsured vehicle, dangerous driving and supplying a commercial quantity of kava. He pleaded guilty and received the following penalties.

(a) For driving the uninsured and unregistered vehicle, he was convicted and fined $800 plus two $150 victims’ levies.

(b) On the dangerous driving charge, he was convicted and sentenced to 12 months imprisonment.

(c) On the charge of supplying a commercial quantity of kava he was sentenced to two years imprisonment. The sentencing judge directed that six months of that be served concurrently with the sentence for dangerous driving and 18 months cumulatively. In sentencing Mr Briscoe for this offence, the sentencing judge recited that the maximum penalty was imprisonment for 14 years. In fact the maximum penalty for this offence, under s 12(1) of the *Kava Management Act* is imprisonment for eight years.

[7] In addition, the sentencing judge dealt with Mr Briscoe for breach of a suspended sentence of imprisonment which was current at the time he committed the offences. The sentence had been imposed for a previous

charge of supplying kava and the outstanding balance of that sentence was five months and 11 days. His Honour restored the sentence in full and ordered it be served cumulatively on the fresh sentences bringing the total sentence to just under three years imprisonment (ie two years 11 months and 11 days) backdated to 2 April 2017. He fixed a single non-parole period of 26 months.

[8] Mr Briscoe filed a notice of appeal appealing against this sentence on the following grounds.

(i) The sentence of 24 months imprisonment imposed on count 6 (supplying kava) was manifestly excessive.

(ii) The total effective sentence of (nearly) 36 months was manifestly excessive.

(iii) The learned sentencing judge failed to consider the principle of totality when he ordered the restored sentence to be served wholly cumulatively.

[9] Mr Briscoe was later given leave under s 165 of the *Local Court (Criminal Procedure) Act* to add two more grounds of appeal:

(iv) that the sentencing judge erred in law in stating that the maximum penalty available at law in relation to the kava charge was 14 years; and

(v) that his Honour erred in law in adopting a two tier/two stage sentencing process when sentencing in relation to the dangerous driving charge.

Grounds (i) and (iv)

[10] Grounds (i) and (iv) were argued together. There can be no doubt that, as was properly conceded by the respondent, the sentencing judge made a mistake when reciting that the maximum penalty for the kava offence was imprisonment for 14 years. It is in fact eight years. The question is whether this mistake led his Honour to impose a sentence that was manifestly excessive in all the circumstances. The appellant contends that it did and relied on a number of sentences which the appellant submitted were for broadly comparable offences and in which lighter penalties were imposed.

[11] In *R v David Tupou,*[2] an offender who had been found guilty of supplying 30 kg of kava was sentenced to 14 months imprisonment.

[12] Mr Tupou's circumstances were most unusual. He had no prior convictions of any kind and the Court accepted that the offending was out of character. He originally went to Nhulunbuy as a missionary and he had an extremely impressive history of community service and in particular of voluntary service to the Aboriginal communities in the region. He had been a Minister of the Yirrkala Parish, Free Wesleyan Church of Tonga in Australia since 2004 and had held a number of high offices within the church. Mr Tupou was awarded the Medal of the Order of Australia in the Queen's Birthday Honour List of 2010 for service to the Uniting Church in Australia, and the community of Yirrkala Dhanbul in Eastern Arnhem Land. He had been the

[2] *R v Tupou* SCC 21422154, 6 February 2015

Volunteer Captain of the Yirrkala Volunteer Fire Brigade and Chair of the Youth Brass Band Committee, since 2007, and in 2011, he received the Northern Territory Fire and Rescue Service medal for 20 years continuous meritorious service to the Northern Territory Fire and Rescue Services. Mr Tupou had also performed other voluntary community activities and was on the Friends Working Committee of the Nhulunbuy Christian School. He had glowing references from church members and members of the Aboriginal community. His motivation for the offending was that he had been asked by a brother-in-law in Tonga to provide financial support for two nephews, who were students at the University of the South Pacific in Fiji. This placed him under a financial obligation which he was not easily able to meet from his modest salary as manager of the IGA store in Yirrkala.

[13] Mr Briscoe's situation is not comparable. In any event, the head sentences are within a similar range, given that Mr Briscoe supplied nearly twice as much kava as Mr Tupou.

[14] In *R v Gerald Binymuralawuy*,[3] Mr Binymuralawuy was sentenced to nine months imprisonment for supplying 74.6 kg of kava. Again, the circumstances of the offending were very different from that of Mr Briscoe.

[15] Mr Binymuralawuy was a resident of Milingimbi, the community in which the kava was to be supplied. He was not a principal in the supply operation and it was not alleged he had anything to do with the prior packaging or

[3] *R v Binymuralawuy* SCC 21205278, 16 April 2013

planning of the transport of the kava to Milingimbi. Someone gave him a vehicle and $100 for fuel to drive the vehicle containing the kava to another person. Mr Binymuralawuy was drunk when he agreed to do this. As it happens, when the time came, he asked another person to drive the vehicle because he did not have a licence and, in any case, he had been drinking. He had never been in any serious trouble before. Further, when he was caught, he co-operated fully with police and provided them with useful information.

[16] In *Wauchope v Musgrave*,[4] Mr Wauchope was sentenced to 18 months imprisonment for his part in supplying 67 kg of kava in Ramingining. On appeal, that was found to be manifestly excessive. He was resentenced to imprisonment for seven months (reduced from nine months on account of his guilty plea).

[17] Again, the circumstances were different. The case was decided in 2006 at a time before licences to supply kava were withdrawn altogether. The supply took place during a period when the licence to supply kava in Ramingining had been suspended. Mr Wauchope was not a principal in the supply. His part in the offending was to recruit his nephew to supply the kava for the principal in exchange for a share of the profits. The court accepted that Mr Wauchope was a person of prior good character with a good work record. He was born and grew up on Croker Island where his father was a traditional owner. He had spent ten years in the military where he became a full corporal and was an indigenous mentor to younger soldiers. Later he was an

[4] [2006] NTSC 77

ATSIC chairman for three years and then worked for the Northern Territory Government on a voluntary basis furthering Aboriginal land rights issues. He became involved in the offending through a desire to obtain funds to help his 15 year old niece who was dying of leukaemia. The court found that he had excellent prospects of rehabilitation.

[18] Counsel for the respondent also referred the Court to a number of previous sentencing dispositions for kava offences.

[19] In *Latu v McPherson*,[5] the Court of Appeal dismissed an appeal by Mr Latu against a sentence of imprisonment for five months for possession of 119 kg of kava. His sole part in the offending had been to load one bag onto the back of a utility and then go along for the ride. He had no involvement in organising the operation, no involvement in financing it, and was to make no profit out of it. However, he was on a suspended sentence for the supply of kava at the time. His motive for becoming involved was that he had been asked to accompany the people suppling the kava and it would have been rude to refuse.

[20] In *R v Langiila Uasi*,[6] Mr Uasi was sentenced to imprisonment for four years and six months with a non-parole period of three years for his part in the supply of 219.63 kilograms of kava. Although he had a good work history, Mr Uasi also had a prior criminal history which included two prior convictions for kava offences.

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5 [2010] NTSC 14

6 *R v Uasi* SCC 21535706 and 21539706, 13 April 2016

[21] In *R v Sateki Tuitupou,*[7] Mr Tuitupou pleaded guilty to 13 charges of supplying kava over a period of approximately a year and a half. Seven of those charges related to the supply of commercial quantities and four to the supply of traffickable quantities – most towards the upper end of the scale. A traffickable quantity is between 2 and 25 kilograms and supply of a trafficable quantity carries a maximum penalty of imprisonment for two years. The other two charges of supply simpliciter were punishable by a fine only. The total amount supplied in commercial quantity amounts was 440 kg. The final offence was committed just days after he was granted bail on the other 12 charges. Mr Tuitupou was the principal of the operation and recruited numerous Indigenous people to assist him. He made a considerable profit. He had prior convictions but none of them were kava or drug related. He had a good work history and had donated money and time to a Tongan community organisation in Sydney supporting the activities of the organisation's youth group. He was sentenced to a term of imprisonment for four years for the supply of commercial quantities – a total of four and a half years for all offences.

[22] I agree with the submission of counsel for the respondent that all that can really be ascertained from these cases is that offences of this nature are committed in widely different circumstances – of both the offences and the offenders - and that accordingly a broad range of sentences has been imposed. Given the objective seriousness of the present offence and the

[7] *R v Tuitupou* SCC 21425411, 21428072 and 21425406, 27 November 2014

surrounding circumstances, Mr Briscoe's prior history of similar offending, including the fact that he was on a suspended sentence for similar offending when he committed the offence, I do not think the sentence of imprisonment for two years can be said to be manifestly excessive. Notwithstanding the error made by his Honour in nominating the wrong maximum penalty, I do not think there has been a serious miscarriage of justice and I decline to interfere with the sentence imposed.

Grounds (ii) and (iii)

[23] Grounds (ii) and (iii) are inter-related. The appellant's contention that the total sentence was manifestly excessive depends in part upon the contention (which I have rejected) that the sentence of two years for the kava offending was manifestly excessive; partly upon the contention that the application of the totality principle required a greater degree of concurrence between the sentence on the kava charge and the sentence on the dangerous driving charge; and partly on the contention that the restored balance of the suspended sentence should not have been made fully cumulative with the sentence for the fresh offending.

[24] One of the complaints made by the appellant is that the learned sentencing judge did not give reasons for the orders for cumulation of the sentences. The appellant relied on s 50 of the *Sentencing Act* which provides:

> Unless otherwise provided by this Act or the court imposing imprisonment otherwise orders, where an offender is:

(a) serving, or has been sentenced to serve, a term of imprisonment for an offence; and

(b) sentenced to serve another term of imprisonment for another offence;

the term of imprisonment for the other offence is to be served concurrently with the first offence.

[25] The appellant also relied on the following passage from *Carroll v The Queen*:[8]

> The following principles are well established. First, s 50 of the Sentencing Act creates a prima facie rule that terms of imprisonment are to be served concurrently unless the court "otherwise orders". *There is no fetter on the discretion exercised by the Court and the prima facie rule can be displaced by a positive decision.* Secondly, it is both impractical and undesirable to attempt to lay down comprehensive principles according to which a sentencing judge may determine, in every case, whether the sentences should be ordered to be served concurrently or consecutively. The assessment is always a matter of fact and degree. Reasonable minds might differ as to the need for cumulation. Often there will be no clearly correct answer. Thirdly, an offender should not be sentenced simply and indiscriminately for each crime he is convicted of but for what can be characterised as his criminal conduct. The sentences for the individual offences and the total sentence imposed must be proportionate to the criminality in each case. [citations omitted] [The emphasis by underlining has been taken from the appellant's submissions. The emphasis by italicization has been added in this judgment.]

[26] Counsel for the appellant placed emphasis on the sentences underlined. Equal weight needs to be placed on the following sentence (in italics) and indeed to the rest of the paragraph.

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8 [2011] NTCCA 6 at [42]

[27] The appellant also relied on this passage from *Denham v Hales.*[9]

> His Worship was bound by the provisions of s 50 of the Sentencing Act in that the sentences imposed were to be served concurrently unless otherwise ordered. I consider that if a court intends to depart from the statutory direction in s 50, then reasons ought to be given so that the offender will know why he is being punished to a greater degree than might have been expected and so that due consideration can be given to the reason should the matter be subject to appeal. No reasons were given by his Worship. [emphasis added]

[28] It would clearly have been desirable for the sentencing judge to have given reasons for his decision to direct that the restored balance of the suspended sentence be fully cumulative with the sentence for the fresh offending and, to a lesser degree, for the degree of concurrence which his Honour ordered between the sentence on the kava charge and the sentence on the dangerous driving charge for the reasons set out in the passage from *Denham v Hales* set out above. However, I do not think the decision to direct that six months of the sentence for the kava offence be served concurrently with the sentence for dangerous driving and 18 months cumulatively and the decision to direct that the restored sentence be served wholly cumulatively with the sentences for the fresh offending resulted in a total sentence that was manifestly excessive.

[29] Although the sentencing judge failed to articulate his reasons for these orders, it seems to me that the orders themselves were justifiable. The dangerous driving offence was committed in the course of commission of the kava offence and was no doubt at least partly motivated by a desire to

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9 [2003] NTSC 87 at [15]

escape detection of the kava offence. However, it was separate offending of a different kind and merited some additional penalty and in my view it was entirely appropriate to order partial cumulation of the two sentences.

[30] Similarly, the suspended sentence was for separate offending committed at a different time, involving separate criminality and the sentence imposed for that offending was, on the face of it, the appropriate penalty for that offending and it was appropriate for the two sentences to be served wholly cumulatively unless the application of the totality principle required partial concurrency so as to reflect the overall criminality of the Appellant's conduct and avoid a sentence that was crushing. That involves a consideration of whether the total sentence was manifestly excessive.

[31] The principles applying to an appeal for manifest excess are well settled.

> 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 misapplication of principle, even though where and how is not apparent from the statement of reasons.
>
> Manifest excess is a conclusion which does not depend upon attribution of specific error in the reasoning of the sentencing judge. The relevant test is whether the sentence is unreasonable or plainly unjust. It must be shown that the sentence was clearly and not just arguably excessive. In approaching the task of determining whether a sentence is unreasonable or plainly unjust, the appeal court does so within the context that there is no one single correct sentence. The process of sentencing comprehends 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.[10]

[32] In this case, I do not think that the overall sentence of nearly three years is manifestly excessive. In my view it is not disproportionate to the overall criminality of Mr Briscoe's conduct, and the application of the totality principal did not require it to be adjusted by making the restored sentence partially concurrent with the sentence for the fresh offending.

Ground (v)

[33] In ground (v), the appellant argued that the sentencing judge erred in law in adopting a two tier/two stage sentencing process when sentencing in relation to the dangerous driving charge. In sentencing Mr Briscoe for the offence of dangerous driving his Honour said:

> Nevertheless, in my view, an appropriate starting point for this offence, which has a maximum penalty of 2 years gaol … is one where, notwithstanding a lack of prior traffic history, a sentence of actual imprisonment is absolutely called for. The starting point here is 20 months prison. I reduce that to 16 months, which is a little less than 25% discount for the plea, being an early plea, and I reduce it further to 12 months because of, in terms of driving in the past, no history – that is of character and also rehabilitation prospects when it comes to driving. So, on that count, he is convicted and sentenced to 12 months prison.

[34] The appellant does not object to the learned sentencing judge's approach in nominating a starting point and then applying a percentage reduction on account of the appellant's early guilty plea. However, the appellant contends that in the underlined passage, his Honour impermissibly adopted a two tier

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10 *Forrest v The Queen* [2017] NTCCA 5 at [63] and [64]

approach contrary to the "instinctive synthesis" approach to sentencing determined by the High Court to be the appropriate approach to sentencing. The appellant relied on the following passage from *Markarian v The Queen*:[11]

> No universal rules can be stated in those terms.[12] As was pointed out earlier, much turns on what is meant by a "sequential or two-tiered" approach and, likewise, the "process of instinctive synthesis" may wrongly be understood as denying the requirement that a sentencer give reasons for the sentence passed. So, too, identifying "instinctive synthesis" and "transparency" as antonyms in this debate misdescribes the area for debate.
>
> In general, a sentencing court will, after weighing all of the relevant factors, reach a conclusion that a particular penalty is the one that should be imposed. As Gaudron, Gummow and Hayne JJ said in *Wong*:[13]
>
> > Secondly, and no less importantly, the reasons of the Court of Criminal Appeal suggest a mathematical approach to sentencing in which there are to be 'increment[s]' to, or decrements from, a predetermined range of sentences. That kind of approach, usually referred to as a 'two-stage approach' to sentencing, not only is apt to give rise to error, it is an approach that departs from principle. It should not be adopted.
> >
> > It departs from principle because it does not take account of the fact that there are many conflicting and contradictory elements which bear upon sentencing an offender. Attributing a particular weight to some factors, while leaving the significance of all other factors substantially unaltered, may be quite wrong. We say 'may be' quite wrong because the task of the sentencer is to take account of *all* of the

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11 [2005] HCA 25 at [36] and [37] (*'Markarian')*

12 The words in [36], "No universal rules can be stated in those terms," refer back to para [35]: "The appellant's next submission invited the Court to reject sequential or two-tiered approaches to sentencing taking as their starting point the maximum penalty available, and to state as a universal rule to the extent that legislation does not otherwise dictate, that a process of instinctive synthesis is the one which sentencing courts should adopt."

13 [2001] HCA 64; (2001) 207 CLR 584, at 611-612, [74]-[76]

relevant factors and to arrive at a single result which takes due account of them all. That is what is meant by saying that the task is to arrive at an 'instinctive synthesis'. This expression is used, not as might be supposed, to cloak the task of the sentencer in some mystery, but to make plain that the sentencer is called on to reach a single sentence which, in the case of an offence like the one now under discussion, balances many different and conflicting features.

In *R v Thomson*,[14] Spigelman CJ reviewed the state of the authorities in Australia that deal with the 'two-stage' approach of arriving at a sentence, in which an 'objective' sentence is first determined and then 'adjusted' by some mathematical value given to one or more features of the case, such as a plea of guilty or assistance to authorities. As the reasons in *Thomson* reveal, the weight of authority in the intermediate appellate courts of this country is clearly against adopting two-stage sentencing and favours the instinctive synthesis approach. In this Court, McHugh and Hayne JJ, in dissenting opinions in *AB v The Queen*[15] expressed the view that the adoption of a two-stage approach to sentencing was wrong. Kirby J expressed a contrary view. We consider that it is wrong in principle. The nature of the error can be illustrated by the approach adopted by the Court of Criminal Appeal in these matters. Under that approach, the Court takes, for example, the offender's place in the hierarchy and gives that a particular significance in fixing a sentence but gives the sentencer no guidance, whatever, about whether or how that is to have some effect on other elements which either are to be taken into account or may have already been taken into account in fixing the guideline range of sentences. To take another example, to 'discount' a sentence by a nominated amount, on account of a plea of guilty, ignores difficulties of the kind to which Gleeson CJ referred in *R v Gallagher*[16] when he said that:

> It must often be the case that an offender's conduct in pleading guilty, his expressions of contrition, his willingness to co-operate with the authorities, and the personal risks to which he thereby exposes himself,

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14. (2000) 49 NSWLR 383

15 [1999] HCA 46; (1999) 198 CLR 111

16 (1991) 23 NSWLR 220

> will form a complex of inter-related considerations, and an attempt to separate out one or more of those considerations will not only be artificial and contrived, but will also be illogical.
>
> So long as a sentencing judge must, or may, take account of *all* of the circumstances of the offence and the offender, to single out some of those considerations and attribute specific numerical or proportionate value to some features, distorts the already difficult balancing exercise which the judge must perform. [emphasis in original]

[35] The respondent, on the other hand, relied on the following passages from *Markarian* and submitted that it is not necessarily an error of law for a sentencing judge to mention the extent of the discount which has been given for a particular mitigating factor:

> Following the decision of this Court in *Wong* it cannot now be doubted that sentencing courts may not add and subtract item by item from some apparently subliminally derived figure, passages of time in order to fix the time which an offender must serve in prison. That is not to say that in a simple case, in which, for example, the circumstances of the crime have to be weighed against one or a small number of other important matters, indulgence in arithmetical deduction by the sentencing judges should be absolutely forbidden. An invitation to a sentencing judge to engage in a process of "instinctive synthesis", as useful as shorthand terminology may on occasions be, is not desirable if no more is said or understood about what that means. The expression "instinctive synthesis" may then be understood to suggest an arcane process into the mysteries of which only judges can be initiated. The law strongly favours transparency. Accessible reasoning is necessary in the interests of victims, of the parties, appeal courts, and the public. There may be occasions when some indulgence in an arithmetical process will better serve these ends. This case was not however one of them because of the number and complexity of the considerations which had to be weighed by the trial judge.[17]

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[17] *Markarian* at [39]

> Just as on occasions, albeit that they may be rare ones, it may not be inappropriate for a sentencing court to adopt an arithmetical approach, it may be useful and certainly not erroneous for a sentencing court to make clear the extent to which the penalty for the principal offence has been increased on account of further offences to which an offender has admitted guilt.[18]

[36] I agree. Reference might also be made to these additional passages from *Markarian*:

> It is not useful to begin by asking a general question like was a "staged sentencing process" followed. That is not useful because the expression "staged sentencing process" may mean no more than that the reasoning adopted by the sentencer can be seen to have proceeded sequentially. Or it may mean only that some specific numerical or proportional allowance has been made by the sentencer in arriving at an ultimate sentence on some account such as assistance to authorities or a plea of guilty. Neither the conclusion that a sentencer has reasoned sequentially, nor the observation that a sentencer has quantified the allowance made, for example, on account of the offender's plea of guilty, or the offender's assistance to authorities, of itself, reveals error. Indeed provisions like s 21E of the *Crimes Act 1914* (Cth) may require the sentencer, in some circumstances, to identify the amount by which a sentence has been reduced on some account.[19]
>
> Express legislative provisions apart, neither principle, nor any of the grounds of appellate review, dictates the particular path that a sentencer, passing sentence in a case where the penalty is not fixed by statute, must follow in reasoning to the conclusion that the sentence to be imposed should be fixed as it is. The judgment is a discretionary judgment and, as the bases for appellate review reveal, what is required is that the sentencer must take into account all relevant considerations (and only relevant considerations) in forming the conclusion reached. As has now been pointed out more than once, there is no single correct sentence.[20] And judges at first instance are to be allowed as much flexibility in sentencing as is consonant with

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18 *Markarian* at [43]

19 *Markarian* at [24]

20 *Pearce v The Queen* (1998) 194 CLR 610 at 624 [46]

consistency of approach and as accords with the statutory regime that applies.[21][22]

[37] While the sentencing judge's approach in making a specific reduction from a notional starting sentence because of the appellant's lack of prior driving convictions was unorthodox, in my view it did not amount to an error of law. Nor was the resulting sentence manifestly excessive.

[38] The appeal is dismissed.

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[21] *Johnson v The Queen* [2004] HCA 15; (2004) 78 ALJR 616 at 618 [5] per Gleeson CJ, 624 [26] per Gummow, Callinan and Heydon JJ; [2004] HCA 15; 205 ALR 346 at 348, 356

[22] *Markarian* at [27]