CITATION:	*TB v The Queen* [2018] NTCCA 8
PARTIES:	TB v THE QUEEN
TITLE OF COURT:	COURT OF CRIMINAL APPEAL OF THE NORTHERN TERRITORY
JURISDICTION:	CRIMINAL APPEAL from the SUPREME COURT exercising Northern Territory jurisdiction
FILE NO:	CA16 of 2017 (21651207 & 21708901)
DELIVERED:	21 May 2018
HEARING DATE:	5 March 2018
JUDGMENT OF:	Grant CJ, Southwood J and Mildren AJ

CATCHWORDS:

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

Appellant convicted of drug offences committed while a youth – order suspending sentence of detention under *Youth Justice Act* subject to requirements under that legislation – no power to restore sentence held in suspense – no failure to accord procedural fairness in relation to prospects of rehabilitation – sentence imposed for single count of supplying less than a commercial quantity of methamphetamine manifestly excessive – total head sentence manifestly excessive – no failure on part of the sentencing judge to consider principle of totality – appeal allowed and appellant resentenced.

Misuse of Drugs Act (NT) s 5A, s 23, s 37
Sentencing Act (NT) s 43
Youth Justice Act (NT) s 82, s 83, s 121

Carroll v The Queen (2011) 29 NTLR 106, *Gilligan v The Queen* [2007] NTCCA 8, *R v Stubberfield* [2010] SASC 9, *R v Lobban* (2001) 80 SASR 550, *The Queen v Day* (2004) 14 NTLR 218, *The Queen v Gurruwiwi* [2008] NTCCA 2, *The Queen v Le Cerf* (1975) 13 SASR 237, *The Queen v Roe* [2017] NTCCA 7, *Wong v The Queen* (2001) 207 CLR 584, referred to.

REPRESENTATION:

Counsel:

Appellant:	S Cox QC
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:	28

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

TB v The Queen [2018] NTCCA 8
No. CA16 of 2017 (21651207 & 21708901)

BETWEEN:

TB
Appellant

AND:

THE QUEEN
Respondent

CORAM: GRANT CJ, SOUTHWOOD J and MILDREN AJ

REASONS FOR JUDGMENT

(Delivered 21 May 2018)

THE COURT:

[1] On 7 July 2016, following pleas of guilty in the Supreme Court to a number of property offences committed in October 2015, the appellant, who was aged 16 at the time of the offending, was sentenced to an aggregate period of detention for two years, backdated to 30 March 2016. Without proceeding to a conviction, the sentence was suspended forthwith on conditions, including ongoing supervision for the whole period of two years. An operational period of two years was fixed as the period during which the appellant must not commit another offence punishable by imprisonment. At the time of sentence, her Honour warned the appellant that if she committed another such offence during the two year period,

she would almost certainly have to serve the two years of the sentence held in suspense. In imposing sentence, her Honour made it clear that she was exercising her powers pursuant to the *Youth Justice Act* (NT).

[2] On 18 August 2017, the appellant was convicted by the Supreme Court following pleas of guilty to a number of drug offences spread over three indictments, which offending also constituted a breach of the suspended sentence imposed in July 2016. Sentences of imprisonment were imposed (except for one offence which carried only a fine),[1] and the suspended sentence was purportedly restored. This resulted in a total effective sentence of four years, two months and 22 days, backdated to take into account pre-trial custody but suspended on conditions after 12 months. The offending, details of which appear below, occurred during the period between 25 June 2016 and 18 October 2016, and between 1 February and 4 February 2017.

[3] At the time of the offending the appellant was aged 16 and 17. By the time of sentence the appellant was aged 18, having reached that age on 2 August 2017. Her Honour backdated the sentence to 1 February 2017. The effect of this, which her Honour clearly realized, was that the appellant would serve the remaining six months of her sentence in a Youth Detention Centre, rather than in an adult prison. Her Honour fixed an operational period of three years and six months after her release, imposed conditions including supervision for the whole period of her suspended sentence, and ordered the forfeiture of $2050 found in her

1 This was for count 3 on matter number 21648451 referred to in paragraph [7] below. Her Honour found the offence proved and took no further action.

possession at the time of her arrest on 6 October 2016, being the proceeds of the sale of drugs by the appellant.

The facts

Matter number 216517207

[4] The appellant pleaded guilty to the following counts:

1. Unlawfully supplied methamphetamine to another person between 25 June and 17 July 2016. Maximum penalty 14 years.
2. Unlawfully supplied cannabis plant material to another person between 7 July and 17 July 2016. Maximum penalty 5 years.
3. Intentionally supplied less than a commercial quantity of methamphetamine to another person between 18 July 2016 and 4 October 2016. Maximum penalty 14 years.
4. Intentionally supplied less than a commercial quantity of cannabis to another person between 18 July and 4 October 2016. Maximum penalty 5 years.
5. Intentionally supplied less than a commercial quantity of MDA to another person on or about 3 October 2016. Maximum penalty 14 years.
6. Possessed less than a trafficable quantity of methamphetamine in a public place on 3 October 2016. Maximum penalty 5 years.

[5] Briefly, the agreed facts were that the appellant, with some friends, visited a unit complex in Coconut Grove on the afternoon of 6 October 2016. There was a vehicle parked outside which police believed contained a stash of money and drugs left behind by a person who had been arrested the previous evening. A number of people were also present who had received the same information. All present were cautioned and the appellant was searched. During the search the

police found two clip seal bags containing 10 pills, later identified as 2.83 grams of MDA; two clip seal bags containing a white crystalline substance, later identified to be 0.19 grams of methamphetamine; $2,050 in cash; a piece of paper with hand written ledger entries; and an iPhone. The appellant was arrested and subsequently interviewed during which she made partial admissions. She was released from custody and told that she would be summonsed at a later date.

[6] Subsequently, when her phone was interrogated, it was revealed that she had been engaged in the supply to others of quantities of cannabis from 7 July to 3 October 2016 and quantities of methamphetamines from 25 June 2016 and 3 October 2016. The down-loaded phone content showed that she had sourced her methamphetamine from an adult individual, well known to the police, and then co-ordinated or actively engaged in the on-supply of those drugs in varying amounts for various prices to 18 different people known by police to be involved in the drug trade, as well as to other unknown individuals. The best estimates of the amounts of drugs supplied were well above the trafficable quantity thresholds. The counts were to be taken as representative counts of the appellant's propensity for committing acts preparatory to supply and actual supply of drugs to persons known and unknown in the Darwin area in the relevant time period, pursuant to s 23(6) of the *Misuse of Drugs Act* (NT).

Matter number 21648451

[7] The appellant pleaded guilty to the following counts:

1. On 18 October 2016 possessed less than a trafficable quantity of cocaine. Maximum penalty 2 years.
2. On 18 October 2016 possessed less than a trafficable quantity of methamphetamine. Maximum penalty 2 years.
3. On 18 October 2016 possessed less than a trafficable quantity of cannabis. Maximum penalty 50 penalty units.
4. On 18 October 2016 knowingly attempted to destroy evidence in a judicial proceeding. Maximum penalty18 months.

[8] The agreed facts were that the appellant was at an address in Wulagi when she saw police arrive at the house. She took two clip seal bags of cocaine, having a combined weight of 1.6 grams, and attempted to flush them down the toilet. A search of the property revealed that the cocaine had not been properly flushed and the bags were retrieved. The police also located 1.41 grams of methamphetamine in the bathroom and 6.23 grams of cannabis in the bedroom. The appellant was arrested and made admissions. Bail was refused by the police.

[9] When the matter came before the Local Court on 19 October 2016, the Judge indicated to counsel for the appellant that the appellant should be considering a period of residential rehabilitation, but she said that she was not drug dependent. Bail was refused until 4 November 2016, when bail was granted. Although there was a plea, it occurred after cross-examination of police witnesses at the committal hearing. Some of the charges she was then facing were withdrawn. At the committal hearing on 6 April 2017 the appellant indicated that the matter would be resolved by way of a plea, and a plea was entered on 13 July 2017.

Matter number 2170891

[10] The indictment in relation to this file contained a single count that between 1 February 2017 and 4 February 2017 the appellant supplied less than a commercial quantity of methamphetamine, contrary to s 5A(1) of the *Misuse of Drugs Act*. The maximum prescribed penalty was imprisonment for 14 years. There are also minimum penalty requirements contained in s 37(2) and (3) of that Act.

[11] The facts and circumstances in relation to this matter are dealt with in paragraphs [44] and [45] below.

Appellant's personal circumstances and matters put in mitigation of penalty in relation to all of the offending

[12] The appellant was 16 and 17 years of age at the time of the offending, and turned 18 on 2 August 2017. She was born and raised in Darwin. Her parents were separated when she was quite young (her age varies between 1, 3 and 7 when this occurred, depending on what document you are reading). She was raised largely by her father, spending some of her early childhood in Queensland residing with his mother and maternal grandparents, before returning to the Northern Territory to live with her father and brother when she was aged nine. She attended Nightcliff Middle School and then Darwin High School and Casuarina Secondary College, but did not complete Year 10. Because her relationship with her father was deteriorating, she went back to live with her grandparents for a while before returning to live with her father again. She did not have a happy relationship with either parent.

[13] She began a long term relationship with a boyfriend from 13 years of age. This person, John Micairan, was a lot older, having been born on 10 December 1992. At age 14 she began experimenting with cannabis with her boyfriend, who was a regular user. She also started using methamphetamine at aged 14 on weekends, but in the following years her use progressed to being more frequent and intense.

[14] Between 10 and 15 October 2015, the appellant, then aged 16, her boyfriend Micairan, then aged 22, and her brother ZB, then aged 17, were jointly charged with committing property offences. There were a number of counts including aggravated unlawful entry of a dwelling house at night with intent to steal; stealing; aggravated unlawful use of a motor vehicle; causing damage to property; causing damage to a car by using fire; and attempting to steal. Micairan was the principal offender, and was sentenced to a term of imprisonment for four years with a non-parole period of two years. On 7 July 2017 the appellant was sentenced to a period of suspended detention for that offending, as described in paragraph [1] above.

[15] When she was still aged 16, the appellant formed a relationship with a new boyfriend, DD. It is not clear how old he was. At some stage he decided to move to Tasmania and invited her to come with him. In order to fund the move, in mid-2016 she began selling drugs, mainly methamphetamine. Her boyfriend was unaware of this. Shortly afterwards, she and her boyfriend were involved in a car crash. After this the boyfriend moved to Tasmania and refused to allow her to come with him because he did not approve of her dealing in or using drugs. Her illicit substance abuse then increased, as it did whenever she was having

personal relationship issues with her family members or her boyfriend at the time.

[16] According to the pre-sentence report, the appellant had developed relationships prior to the offending in 2016 with people involved in drugs, because these people were having issues themselves which she could identify with. She described them only as associates and not persons with whom she wanted to forge long-term relationships. In the period between mid-2016 and when she entered detention in 2017, it was noted by Community Corrections that the individuals she associated with were significantly older males she had met when using illicit substances. Community Corrections were advised by Police during this period that these older men had histories of violent offending and were known drug users and suppliers. The premises the appellant was frequenting were addresses identified by the police as places in which it was known to find disorientated young females with sex toy paraphernalia displayed around the property.

[17] In June 2016, the appellant attended an assessment with a forensic psychologist who reported that the appellant suffered from severe depression and moderate anxiety symptoms. She also exhibited clear indications of problematic and insecure attachment, probably stemming from early parental conflict and the failure to develop a secure attachment to one primary caregiver. She told the psychologist that she used cannabis but that she had only used methamphetamine once.

[18] The pre-sentence report records that the appellant had a history of non-suicidal self-harming (cutting her arms) and self-medicating with illicit substances. In December 2016 she over-dosed on medication and an ambulance was called. The ambulance officers forcefully regurgitated her stomach contents. Apparently her father was unaware of this until she told him later. She engaged sporadically with Amity Community Services in 2016, and whilst on supervision was regularly tested for illicit substances with no positive results; however, it was suspected that she was tampering with the samples.

[19] The appellant had an employment history of working in the retail industry for short periods of time but was mainly either supported by her father or in receipt of Centrelink benefits.

[20] After she had been placed in detention, the appellant's institutional report described her as a quiet detainee, who was for the most part well-behaved, respectful towards staff and generally interacted well with other detainees. She was polite and cooperative during all case management appointments and happy to complete all assessments that were undertaken. She helped out with chores and often offered to do extra chores around the block. She was forthcoming with information about her offending behaviour. She had been referred to the primary health care psychologist and had attended weekly sessions, 19 in total.

[21] A report was tendered from the owner of the "Balanced Choice Program", which uses theatre fitness and hope therapy to make a difference to young people's lives. The author noted that, at first, the appellant did not want to engage with

the program, but over time he had noticed her change into a young woman with leadership potential. She helped the author run programs for some of the other girls, led sessions with him and encouraged the young women to keep going. He considered that she had grown in her ability to locate positive pathways in her life, and he believed that she was making the right choices to turn her life around.

[22] A report was also tendered from a Youth Social Worker and a drug and alcohol counsellor for Catholic Care's Drug and Alcohol Intensive Support for Youth program. The report indicated that the appellant had entered the program on 21 March 2017 and was attending sessions monthly, and that she would continue to engage with the program after her release.

[23] Neither of these reports made any adverse comments on the appellant's progress. A positive report was also received from the senior youth engagement officer employed by Danila Dilba Health Service.

[24] The other material tendered during the sentencing proceedings comprised handwritten letters to the sentencing judge from the appellant and the appellant's "adopted grandmother", addressing *inter alia* the appellant's hopes and plans for the future. Altogether, the impression was that the appellant had matured significantly, had benefited from the support she had received, and was keen to stay off drugs, to pursue employment opportunities and to avoid other drug users.

[25] Whilst in detention the appellant was able to attend courses at the Tivendale School. The reports in evidence suggested that for term 2 of 2017, the appellant's results for English, Maths and Art were exceptionally good, and that she did quite well in the other subjects. She also participated in a Certificate I course in food processing, a Certificate I course in Agriculture/Rural operations offered through Charles Darwin University, and a school-based domestic and family violence and sexual assault prevention program.

Ground 1

[26] The appellant complains that her Honour erred in restoring in full the suspended sentence when that option was not available to her.

[27] Section 121(6) of the *Youth Justice Act* provides that if a youth has breached an order, the Court may, if the order is still in force, confirm or vary the order or revoke the order and deal with the youth under s 83 as if it had just found her guilty of the relevant offences. The restoration of a suspended sentence, although available under s 43 of the *Sentencing Act* (NT), is not an available option under the *Youth Justice Act*. The provision in s 82 of the *Youth Justice Act* empowering the Supreme Court to exercise both its powers and the powers of the Youth Justice Court did not operate to make a disposition under s 43 of the *Sentencing Act* available in these circumstances.

[28] As noted at the outset, the learned sentencing judge made it plain that the *Youth Justice Act* was being utilised as the source of power for the sentence imposed on 13 July 2017. Her Honour stated relevantly:

> Now, I am going to sentence you under the *Youth Justice Act* and in the interest of fairness I am going to impose the same head sentence on you as I did on your brother, because your level of culpability for those offences is, I think, about the same.

[29] In sentencing the appellant to an aggregate period of detention for two years and suspending that sentence forthwith on conditions, the sentencing judge was clearly invoking the power under s 83(1)(i) of the *Youth Justice Act* to "order that the youth serve a term of detention or imprisonment that is suspended wholly or partly". The source of the power exercised at the time of sentence is significant, as it may give rise to accompanying requirements. As Martin (BR) CJ observed in *The Queen v Gurruwiwi*:

> It is common ground that the legislative scheme of the *Youth Justice Act* is designed to provide the Supreme Court with flexibility and a range of powers wider than those contained in the *Sentencing Act* when dealing with youths. Hence the ability of the Court to draw upon the powers found in both the *Sentencing Act* and the *Youth Justice Act*. Care must be exercised, however, in identifying the source of power for a particular sentencing order because the exercise of a particular power might be accompanied by a requirement such as the fixing of a non-parole period under the particular Act providing the source of power.[2]

[30] The accompanying requirements in this case appear in Divisions 7 and 10 of Part 6 of the *Youth Justice Act*, including the requirement in s 121(6) that if on breach the order is still in force the options available to the court are to confirm or vary the order or revoke the order and deal with the youth under s 83 as if it had just found him or her guilty of the relevant offence or offences.

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2 *The Queen v Gurruwiwi* [2008] NTCCA 2 at [8].

[31] Mr Nathan SC for the respondent conceded that it was in error to deal with the appellant under s 43 of the *Sentencing Act*, but in his submission the error was only a technical one. He submitted that her Honour clearly intended that the appellant serve the balance of 20 months and 22 days of the two year sentence which remained outstanding, and if she had proceeded under s 83 that is the sentence which she would have imposed. However, if specific error is established in that respect the appellant is entitled to be re-sentenced if this Court concludes a less severe sentence is warranted and should have been passed.[3] As Mildren J observed in *Gilligan v The Queen*:

> The fact that error has been disclosed does not automatically have the consequence that "some other sentence ... is warranted in law": see *Damaso* [2002] NTCCA 2; (2002) 130 A Crim R 206 at 217 [53]. I accept the submission ... that if error is disclosed, the Court must consider for itself what is the appropriate sentence and if the Court forms a positive opinion that some other lesser sentence is warranted, the Court must impose it.[4]

[32] The question whether some other sentence is warranted in law is more conveniently addressed following a consideration of the other grounds of appeal.

Ground 2

[33] This ground is a fresh ground on which leave to appeal is required.[5] It raises a complaint of a lack of procedural fairness in the sentencing process. During the sentencing hearing, a considerable amount of information was placed before her

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3 *Criminal Code*, s 411(4).

4 *Gilligan v The Queen* [2007] NTCCA 8 at [12]

5 The original ground 2 on which leave to appeal was granted by a single Judge pursuant to s 429(1) of the *Criminal Code* was abandoned and replaced by this ground.

Honour which indicated that during the five months that the appellant had been in youth detention before the sentencing hearing, the appellant had made a real effort to rehabilitate by displaying motivation to change and reform. The evidence consisted of a pre-sentence report, an institutional report, an educational report, a letter from Balanced Choice Programme, a letter from NTLAC Social Worker, a letter from Catholic Care NT, a letter from Danila Dilba's Senior Youth Engagement Officer, three documents authored by the appellant to the learned sentencing judge and a letter from the appellant's adopted grandmother. The general content and conclusion of those documents has already been described above.

[34] On the basis of this evidence, the appellant's counsel at the sentencing hearing submitted that the appellant had displayed a significant change in attitude demonstrative of increased maturity and a realization that she could not continue living her life in the way that she was; that she had made significant efforts to further her rehabilitation whilst in detention; and that she had good prospects of rehabilitation. It was submitted that none of this material was challenged by the prosecutor at the sentencing hearing, and the learned sentencing judge gave no indication that she did not accept it. Had she done so, three of the authors of the letters were in court at the time of the hearing and could have been called to give *viva voce* evidence. It was put that the learned sentencing judge should have indicated that she did not accept the submission and given the appellant's counsel an opportunity to be heard in relation to it.

[35] Mr Nathan SC for the respondent submitted that counsel for the prosecution did in fact take issue with the appellant's prospects of rehabilitation at the sentencing hearing. The written submissions of the prosecutor referred to the fact that the appellant had repeatedly committed fresh offences whilst under a suspended sentence order, under a summons to appear, and whilst on bail. Moreover, the appellant had denied that drug use, and particularly methamphetamine use, had been an operative factor in the offending considered during the previous sentencing proceedings. Yet, on the very day of her sentence on 7 July 2016, the appellant was engaged in the supply of drugs. It was with reference to these matters that the Submissions on Sentence made by the Crown during the sentencing proceedings in August 2017 stated:

> [T]he offender has a complex set of underlying behavioural issues that will make the process of rehabilitation difficult. There can be no doubt that the offender is a drug dependent person and without proper psycho-therapeutic treatment, will continue to be so.

[36] The prosecutor's ultimate submission was that the offender's history of non-compliance suggested that she was a poor candidate for supervision. These submissions were provided to her Honour the day before the sentencing hearing on 18 August 2017. By that time the evidence relied upon by counsel for the appellant at the sentencing hearing had already been tendered at the sentencing hearing on 13 July 2017, and the appellant's written submissions on sentence and the pre-sentence report were available by the time of the adjourned hearing on 11 August 2017. There is nothing in the transcripts to indicate that the

prosecutor changed his position when her Honour resumed the hearing on 18 August 2017 and ultimately sentenced the appellant.

[37] At the hearing on 11 August 2017, her Honour had observed, after quoting from the pre-sentence report, that "it doesn't sound as though the writer of the report has a great deal of confidence in [the appellant's] ability to refrain from further drug-related activity altogether." Her Honour invited any further submissions from counsel that day, but none were forthcoming.

[38] Clearly there was an issue joined between the parties at the sentencing hearing as to the appellant's prospects of rehabilitation.

[39] When sentencing the appellant on 18 August 2017, her Honour referred in some detail to the facts and the history of the previous offending, the offences and the facts relating to them falling for sentence, and the appellant's personal circumstances. After referring to the material that had been tendered on the appellant's behalf as to her prospects of rehabilitation, with reference to the possibility of her entering into a residential rehabilitation program and the appellant's stated desire to maintain a drug free future, her Honour said:

> I have to say I am extremely sceptical. You have told many lies when it is convenient for you to do so. You lied to the police. You lied to corrections officers when you were on bail. You lied to this Court. You gave instructions to your lawyer to stand up and say that you were motivated to change and determined to change and matters of that nature, and you signed an order agreeing to the suspension of your sentence and agreeing to a condition of that suspended sentence that you abstain from possessing and consuming drugs, all the time knowing very well that you were engaged in a criminal enterprise selling drugs carrying out at least one transaction on that very day.

> In short, while I hope that what you say is true and that you do indeed change your ways, I do not in fact believe you. I believe that you are an intelligent person who is well able to say what you want people to hear in order to get what you want and, at the moment, what you want is not to stay in detention or to go to prison when you turn 18.

[40] Her Honour then referred to the conflicting principles of general and personal deterrence pulling in one direction, and the appellant's age and need for rehabilitation as pulling in the other direction. She then observed that "when offending is of an adult-like nature, then rehabilitation is generally put, often to one side and a person is sentenced as though they were an adult, and I consider that your offending in this case is of an adult-like nature". Her Honour then announced the head sentences that she intended to impose and had this to say about whether or not to impose a non-parole period:

> Now I am extremely tempted to give you a non-parole period because you have persistently offended. These are serious offences and, as I say, I consider it to be adult-like offending. However, you are extremely young and I am going to, one more time, give you the benefit of the doubt and assume that you will keep on the path of rehabilitation.

[41] In our opinion, the learned sentencing judge did not err. Her Honour did not altogether dismiss the appellant's prospects of rehabilitation, despite her scepticism. Even if she had outright rejected the submissions of counsel for the appellant, she was not obliged in these circumstances to indicate that she proposed to reject the broad thrust of her counsel's submissions. There was no agreed position between counsel either as to a matter of fact, or a matter of law. The appellant's counsel was on notice that the submissions made in mitigation were not accepted by the Crown. In those circumstances there was no

requirement that her Honour must give an indication that the matter advanced in mitigation might not be fully accepted. Once on notice, it was a matter for counsel for the offender to decide whether or not to call evidence to support the submission being made.[6]

[42] There was no breach of the requirement to provide procedural fairness. Leave to appeal in respect of this ground of appeal must be refused.

Ground 3

[43] The appellant's submission on this ground is that the sentence in respect of matter number 21708901 was, in all the circumstances, manifestly excessive.

[44] The facts relating to this count, to which the appellant pleaded guilty, were that the appellant, then 17 years of age and having been kicked out of her father's home, had been residing at various places around Palmerston and Darwin. On 17 February 2017, the appellant was at an apartment in Palmerston when police executed a search warrant. She was in the apartment only because she had arranged to meet one of the occupants who had offered to give her a lift into the Darwin CBD and had arrived only 10 minutes earlier. During the course of the search, the police seized the appellant's mobile phone.

[45] The appellant's phone was subsequently interrogated by police forensic technicians. SMS chat messages and notes revealed that she was involved in the supply of methamphetamine to a person called "Mummy Webster" between 1

6 *R v Stubberfield* [2010] SASC 9 at [15]; *R v Lobban* (2001) 80 SASR 550 at [20]-[24].

February and 4 February 2017. On 2 February 2017, she arranged for the supply of .02 grams of methamphetamine to Mummy Webster for $200. Later that day, she had been asked to supply Mummy Webster .05 grams of methamphetamine for $45. On 3 February 2017, Mummy Webster asked the appellant if she could supply an 8 ball (3.5 grams) and the appellant replied that she could only supply her with a G (1 gram) or "half a ball" (1.75 grams). The appellant was arrested and bail was refused. She refused to participate in an electronic record of interview.

[46] It was submitted on the appellant's behalf during the sentencing proceedings that she did not supply the drugs herself, and nor did she receive any money in respect of that supply. All she did was to ask "a mate" if the .02 grams was available, and then arranged for that person to meet the purchaser. It was not suggested by the prosecution that she actually facilitated the further supplies of drugs (the .05 grams and the G or "half a ball"). The appellant's plea of guilty to this single count was based on the extended definition of "supply" in s 3(1) of the *Misuse of Drugs Act*, which includes doing, or offering to do, an act preparatory to, or in furtherance of, or for the purpose of selling or supplying, whether or not for fee or reward. The impression gained from the prosecution's written submissions to the sentencing judge is that the appellant's culpability for this offending was low.

[47] At the time of this offending, the appellant was subject to the suspended sentence imposed on 7 July 2016, was on bail for more serious drug charges in

relation to matter number 21648451, and was subject to a summons to appear in relation to matter 216651207, which also contained more serious drug charges.

[48] It was submitted by Ms Cox QC for the appellant that the objective gravity of the offending was at the very lower end of the scale of seriousness for the offence of supplying less than a commercial quantity of methamphetamine. Moreover, the appellant was 17 years of age at the time of the offending, drug dependent and had pleaded guilty at an early stage. In the appellant's submission, a sentence of imprisonment for two years and six months in those circumstances was not duly proportionate to the objective gravity and was plainly unjust.

[49] Mr Nathan SC submitted that the head sentence was not manifestly excessive. It was well below the maximum penalty of imprisonment for 14 years. The offending had to be seen in the light of the appellant's other offending, in respect of which the learned sentencing judge concluded: (a) that throughout the period covered by the facts the appellant was engaged in a commercial drug dealing operation; (b) that the operation involved dealing a number of different drugs over an extended period of time; (c) that the operation involved an extensive customer base, many of whom were also engaged in the drug trade; and (d) that despite her youth the appellant was not at the bottom of the organisational ladder for that operation. Mr Nathan submitted that her Honour was entitled to draw these inferences.

[50] It was put by the respondent that the harm caused by methamphetamine in the community is well known and supply of this drug is prevalent. It was submitted

that the quantity of the drugs involved is not the principal factor in determining sentence.[7] Nevertheless it is a relevant factor, as is the amount of money which the appellant expected to gain out of the transactions.[8] Counsel for the respondent also referred to the well-known observations of Wells J in *The Queen v Le Cerf*[9] that someone who participates at any level in the organized distribution of drugs can expect to receive a heavy penalty. As well, the respondent relied upon the aggravating factors that the offending was committed whilst on bail and whilst serving a partly suspended sentence for similar offending.

[51] In our opinion, the objective circumstances placed this particular offending very much at the low end of the scale of seriousness. The facts showed that the appellant's involvement in the distribution of a quite small amount of methamphetamine was relatively minor. If she got any benefit out of it, it was not much, even assuming that she did in fact receive some of the money, and there was no express finding that she did. Taking into account the objective seriousness of the offending and the appellant's personal circumstances, together with her plea of guilty, we are of the opinion that the sentence imposed in respect of this single count was excessive, and manifestly so. We reach that conclusion allowing for the fact that the aggravating circumstances identified by

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7 *Wong v The Queen* [2001] HCA 64; 207 CLR 584 at [56], [73].

8 *The Queen v Roe* [2017] NTCCA 7 at [50]-[51].

9 (1975) 13 SASR 237 at 239-240; cited with approval in *R v Day* (2004) 14 NTLR 218 at [66-[67].

the respondent warranted a more severe penalty than would otherwise have been the case. We would allow the appeal on this ground.

Ground 4

[52] This ground challenged the total sentence imposed on the basis that it was manifestly excessive.

[53] The structure of that sentence was as follows.

(a) The period of imprisonment for 20 months and 22 days that had previously been imposed on 13 July 2017 and held in suspense was restored in its entirety.

(b) In matter number 21651207, an aggregate term of imprisonment for two years and six months was imposed, with one year of that sentence to be served cumulatively on the restored sentence.

(c) In matter number 21648451, an aggregate term of imprisonment for one year was imposed, with six months of that sentence to be served cumulatively on the first two sentences.

(d) In matter number 21708901, a term of imprisonment for two years and six months was imposed, with one year of that sentence to be served cumulatively on the other sentences.

(e) The total effective period of imprisonment was four years, two months and 22 days.

(f) The sentence to imprisonment was backdated to 1 February 2017 and suspended after the appellant had served 12 months in prison.

[54] Ms Cox QC submitted that, assuming an early plea discount of 25 percent, the starting point was six years and four months. That does not follow. A discount of 25 percent on a starting point of six years and four months would yield a sentence of four years and nine months. The additional problem with this submission is that her Honour did not indicate the level of discount she had in mind for the value of the plea. The impression gained from her Honour's scepticism is that she may not have given the full discount if she did not think that the appellant was remorseful.

[55] Nevertheless, and regardless of the starting point, we consider that the total head sentence was manifestly excessive in all the circumstances. In *Carroll v The Queen* this Court made the following broad statement of principle in relation to cumulation and concurrency in sentencing (footnotes omitted):

> 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.
>
> ….
>
> However, the overriding concern is that the sentences for the individual offences and the total sentence imposed be proportionate to the criminality

> of each case. Concurrency may be appropriate because the crimes which gave rise to the offender's convictions are so closely related and interdependent. What is necessarily required in every case is a sound discretionary judgment as to whether there should be cumulation or concurrency.[10]

[56] In addition to the finding of manifest excess in relation to matter number 21708901, the manner in which the sentences in this case were cumulated yielded a the total effective period of imprisonment which was manifestly excessive having regard to the total criminality involved and its character, the appellant's personal circumstances, and her age at the time of the offending.

Ground 5

[57] This ground alleges that the learned sentencing judge failed to apply the principle of totality in arriving at the total effective period of imprisonment.

[58] The way her Honour approached the sentencing exercise, as appears from the transcript, is that, having ordered the balance of the suspended sentence to be served, her Honour imposed aggregate sentences for the offending in relation to each separate indictment, and made orders for partial cumulation and concurrency. Her Honour then asked counsel to calculate the total sentence and, having been advised of that total, said, "That is your sentence".

[59] Her Honour made no mention of whether or not she had applied the totality principle. Whilst her Honour did not expressly look at the total offending and then take another look to see if the total effective period of imprisonment was

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10 *Carroll v The Queen* [2011] NTCCA 6; 29 NTLR 106 at [42] and [44].

proportionate to the total criminality, we think it most unlikely that her Honour did not have regard to the principle of totality, particularly when regard is had to the manner in which this matter progressed before her Honour.

[60] During the course of proceedings on 11 August 2017, her Honour referred to the fact that she had only just received the pre-sentence report and the statement of facts for the "third file" (matter number 21708901), and said that she needed to consider this material to add to the sentence that she had already "partially crafted". The matter was then adjourned for sentence until 18 August 2017. The fact that her Honour ordered that some of the sentences be served concurrently and others cumulatively or partly cumulatively indicates, we think, that her Honour had a particular total in mind, and when she was told how much that all totalled, and said "that is your sentence", it is quite likely that the total was about what her Honour intended the total to be.

[61] We do not find that this ground is made out. Nevertheless, as the appellant will have to be resentenced, the total sentence will be revisited in any event as part of the resentencing process.

Resentencing

[62] The appellant was released from the Don Dale Detention Centre on 31 January 2018, having completed the 12 months of the total sentence held in suspense. There is no challenge to the suspended part of the sentence, nor to any of the conditions imposed. No appeal was lodged in relation to the head sentence

imposed in relation to the original sentence of two years imposed on 7 July 2016 in relation to matters 21551721 and 21616887.

[63] In addition to the previously mentioned programs which the appellant completed whilst in detention, she has completed a barista course, obtained her white card, completed a Certificate II in construction, and completed a first aid and a beauty course. She has also completed her Responsible Serving of Alcohol and Responsible Gambling Service Certificates through Youthworx, and continues with gymnasium and personal training sessions with Balanced Choices.

[64] Since being released, the appellant has obtained casual employment in a hospitality position and works approximately five days a week. She resides with her godparents in Rosebery and pays rent of $100 per week. She reports and completes drug tests regularly and has enjoyed a good relationship with her Community Youth Justice Officer until that officer left the position on 15 March 2018. There is no suggestion that she has breached the conditions of her current suspended sentence.

[65] In relation to the original sentence of two years imposed on 7 July 2016, 20 months and 22 days were outstanding at the time of sentencing on 18 August 2017. We think that although the preferable course would have been for her Honour to have resentenced the appellant to two years and backdated the sentence to take into account the time served, in the present circumstances that is not feasible. Although there were two files, we note that all of the counts were on the same indictment. We would therefore resentence the appellant pursuant to

s 83 of the *Youth Justice Act* to an aggregate sentence of imprisonment for 20 months and 22 days without recording a conviction.

[66] As to the sentence in relation to matter number 21708901, we would record a conviction and sentence the appellant to imprisonment for nine months pursuant to the provisions of the *Sentencing Act*.

[67] Having regard to the totality principle, we would arrive at a total sentence of imprisonment for three years as follows:

1. The sentence of 20 months and 22 days in relation to matter numbers 21551721 and 21616867 is backdated to commence on 1 February 2017.
2. The sentence in relation to matter number 21651207 imposed by her Honour of an aggregate sentence of two years and six months is ordered to be served concurrently with the sentence imposed in relation to matters numbered 21551721 and 21616867.
3. The sentence imposed by her Honour in relation to matter number 21648451 of one year is ordered to be served cumulatively as to six months on the sentence imposed in relation to matter number 21651207.
4. The sentence imposed in relation to matter number 21708901 of nine months is ordered to be served concurrently with matter number 21648451.
5. The order of her Honour that the sentences be suspended after having served 12 months on the conditions which her Honour imposed are not disturbed except as are necessary to reflect the alterations to the head sentence. These are as follows:
    a. The period of supervision is reduced to two years from the date of her release.

b. The operational period is also reduced to two years from the date of her release.
