PARTIES:	BRAHAM, Edward Alfred
	v
	THE QUEEN
TITLE OF COURT:	COURT OF CRIMINAL APPEAL
JURISDICTION:	APPEAL
FILE NO.	CA 24 of 1993
DELIVERED:	22 JUNE 1994
HEARING DATES:	18 MAY 1994
JUDGMENT OF:	MARTIN CJ. ANGEL & THOMAS JJ.

CATCHWORDS:

Criminal Law - Appeal – Appeal against sentence – leave to appeal – Grounds for interference with discretion of Court below – General principles

Criminal Code (NT), s410(c)

McDonald v R (1992) 85 NTR 1, applied.
Cranssen v R (1936) 55 CLR 509 at 519-20, applied.
Harris v R (1954) 90 CLR 652, at 656, applied.

Criminal law – Jurisdiction practice and procedure – Judgment and punishment – Sentence – Additional sentences – Sentences on two or more counts – Treatment as first offender – General rule

Napper v Samuels (1972) 4 SASR 63 at 68-69, applied.
Farrington v Thomson & Bridgland [1959] VR 286, applied.
Gallagher v McKinlay (NTSC, Asche CJ., unreported 27 November 1987), applied.
R v Miller [1986] 2 Qd R 518, at 529 applied.
Jagamara v Hayman (NTSC, Angel J., unreported 27 September 1991), applied.
Oldfield v Chute (NTSC Mildren J., unreported 10 June 1991), applied.

Criminal law – Jurisdiction practice and procedure – Judgment and punishment – Sentence – Additional sentences – Sentences on two or more counts – Principles of proportionality

Veen (No. 2) (1988) 164 CLR 465, applied.
Babui (1991) 1 NTLR 139, applied.
Hunter (1984) 36 SASR 101, applied.

Criminal law – Jurisdiction, practice and procedure – Judgment and punishment – Sentence – Miscellaneous matters – Taking outstanding offences into account – Staleness of previous offence

Murrell (1985) 15 A Crim R 303 at 307, distinguished.
Shore (1993) 66 A Crim R 37 at 47, applied.

Criminal law – Jurisdiction, practice and procedure – Judgment and punishment – Sentence – Factors to be taken into account – Age of offender – Principles of proportionality and hardship

Tartaglia, Spicer, Fotiades, Lilliebridge (CCANT) unreported, 7 April 1994, applied.
Bibi [1980] 1 WLR 1193, applied.
Wihapi [1976] NZLR 422 at 424, applied.
Morlina (1984) 2 FLR 508 at 510, applied.
Waterfall (1976) Crim LR 203, referred to.
Poh and To (1982) Crim LR 132, referred to.
Bazley (1993) 65 A Crim R 154, referred to.
Crowley and Garner (1991) 55 A Crim R 201 at 206, applied.

Criminal law – Jurisdiction, practice and procedure – Judgment and punishment – Sentence – Factors to be taken into account – Miscellaneous matters – Hardship – age of offender

R v Yates [1985] VR 41, doubted.
R v Hunter (1984) 36 SASR 101 at 103, applied.

Criminal law – Jurisdiction, practice and procedure – Judgment and punishment – Sentence – Factors to be taken into account – Purpose of sentence – Deterrence – Age group of offender

Thiele (1986) 19 A Crim R 105 at 109, referred to.
Hurd (1988) 38 A Crim R 454, at 465, referred to.
Ninus Scognamiglio (1991) 56 A Crim R 81, referred to.

Champion (1992) 64 A Crim R 244, referred to.

Criminal law – Jurisdiction, practice and procedure – Judgment and punishment – Sentence – Non-custodial orders – Suspension of sentence – Discretion of Court – General principles –

R v Mulholland (1991) 1 NTLR 1 at 8, applied.
Webb v O'Sullivan (1952) SASR 65, applied.

Criminal law – Jurisdiction, practice and procedure – Judgment and punishment – Sentence – Non-custodial orders – Suspension of sentence – Nature of offence

R v Kruger (1977) 17 SASR 214 at 221, applied.
Shueard (1972) 4 SASR 36 at 43, applied.

Poisons and Dangerous Drugs Act, s62(2)(a)
Misuse of Drugs Act, s7(1)(2)(a)
Criminal Code (NT), s410(c)

REPRESENTATION:

Counsel:

Applicant: Mr Kilvington
Respondent: Mr Wilde QC

Solicitors:

Applicant: Mr McQueen
Respondent: DPP

Judgment category classification: A
Judgment ID Number: mar94007
Number of pages: 44

GENERAL DISTRIBUTION

Mar94007

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

No. CA 24 of 1993

BETWEEN:

EDWARD ALFRED BRAHAM

Applicant

AND:

THE QUEEN

Respondent

CORAM: MARTIN CJ., ANGEL & THOMAS JJ.

REASONS FOR JUDGMENT

(Delivered 22 June 1994)

MARTIN CJ:

I need add nothing to the details of the offences for which the applicant was convicted, nor as to the matters taken into consideration by the learned trial Judge upon sentencing him, than is set out in the reasons of their Honours, Angel J and Thomas J, for which I am grateful.

In an unusual and somewhat difficult case like this it is worth recalling the principles to be applied. In *Cranssen v R* (1936) 55 CLR 509, after pointing out that an appeal against sentence is an appeal from a discretionary act of the Court responsible for the sentence, Dixon, Evatt and McTiernan JJ (at 519-520) said:

> "The jurisdiction to revise such a discretion must be exercised in accordance with recognised principles. It is not enough that the members of the court would themselves have imposed a less or

> different sentence, or that they think the sentence over-severe. There must be some reason for regarding the discretion confided to the court of first instance as improperly exercised. This may appear from the circumstances which that court has taken into account. They may include some considerations which ought not to have affected the discretion, or may exclude others which ought to have done so. The court may have mistaken or been misled as to the facts, or an error of law may have been made. Effect may have been given to views or opinions which are extreme or misguided. But it is not necessary that some definite or specific error should be assigned. The nature of the sentence itself, when considered in relation to the offence and the circumstances of the case, may be such as to afford convincing evidence that in some way the exercise of the discretion has been unsound. In short, the principles which guide courts of appeal in dealing with matters resting in the discretion of the court of first instance restrain the intervention of this court to cases where the sentence appears unreasonable, or has not been fixed in due and proper exercise of the court's authority".

In *Harris v R* (1954) 90 CLR 652 the Court, after this citation, at p656 added: "It is not enough in applying those principles that the judges of this Court should regard the sentence as greater than they themselves would have imposed".

First or Second Offence

Although agreeing with his conclusion, I have a little difficulty in agreeing with all that has been said by Angel J in relation to this subject. Cases in which what is being considered is the distinction between penalties which might be imposed for a first offence, or a second or subsequent offence as provided for in statute, provide little guidance in this matter. If, as is suggested, there is a general rule that when a number of charges come before a Court on the one day and

there are pleas of guilty to each, the sentencing Court is not to accumulate the offences as if there were prior convictions, and one of the reasons for the rule is that the accused has not been in any way warned of the severity of punishment which might be produced by his conduct if it is repeated after the initial offence it can be distinguished in this matter. Here, the applicant could not have been in doubt as to the likelihood of his suffering punishment for the second offence. He had been arrested, charged and committed for trial in relation to the first and must have known the seriousness of the position he was then in, and have known that he was fortunate to avoid being convicted and dealt with in relation to the first matter. Certainly he did not know that his luck had run out when he ventured upon the second offence, but it will be recalled that he enlisted Wright to again assist him in relation to setting up the plantation for the second time and Wright had been convicted and sentenced to 4 years imprisonment with an 18 month non-parole period in relation to the first. To suggest that the applicant was unaware of what might befall him if he were caught the second time would be entirely artificial.

I would adopt, with respect, the observations of Bray CJ in *Napper v Samuels* (1972) 4 SASR 63 at 68-69:

> "While fully realising that it is the offending again after the warning of a previous conviction which normally warrants severer punishment on a second conviction, it is true that there is a difference between a man who appears in a criminal court for the first time and is convicted of one offence only and a man who appears in a criminal court for the first time and is convicted of several offences. In the case of the latter his previous immunity may have been due to luck rather than virtue. The weight to be attached to this is a matter for judicial discretion. ..... Obviously when there are several offences and

> no previous conviction, the closer the connection between the offences in time or circumstance the nearer they approximate to one offence only". (See also Mitchell J at p74 with whom Wells J agreed).

I do not understand the learned sentencing Judge to have indicated that he could not, as a matter of discretion, treat the applicant as a first offender when he came to consider the second offence, but, rather, that in the exercise of his discretion he would not. In all the circumstances of this case I agree that his Honour has not been shown to have been wrong.

Staleness of First Offence

Once the *nolle prosequi* had been filed in relation to the first offence, the applicant no longer had the prospect of trial before him in relation to it, and that prospect did not arise again until at about the same time as he was arrested for the second offence. The commission of the second offence is a clear indication that the applicant had not reformed himself after committing the first. The learned sentencing Judge took into account the observation of Fox J in *Murrell* (1985) 15 A Crim R 303 at 307: "If the commission of crime is to be deterred, and punishment is to achieve its purposes, retribution should be as certain and as speedy as possible." and, on that basis, thought that the applicant was entitled to benefit for the delay. With respect, I can not accept that delay, regardless of the reason, for it should confer a benefit on a convicted person when being sentenced. I am in general agreement with Angel J on this issue.

The Age of the Applicant

As the cases referred to by Angel J so cogently demonstrate, the age of a person facing sentence is not

determinative of the outcome. In *R v Yates* (1985) VR 41 the majority, Young CJ Starke, Crockett and Hampel JJ, simply disposed of the question of whether a sentence of 10 years with a minimum of 8 years should be regarded as a "crushing" sentence for a 68 year old male by acting upon the principle that he might have to serve the whole of the term imprisoned, and that the sentence would thus destroy any reasonable expectation of useful life after release. They instead ordered that he be sentenced to imprisonment for a term of 7 years with a minimum of 5 years before he could be eligible to be released upon parole. In dissent, Murphy J took a different view, after taking into account all of the circumstances of the case and said, at p50:

> "To argue that a man of 68 years who commits such serious offences, ordinarily punishable by a sentence such as has been imposed, should be imprisoned for a substantially lesser term solely because of his age, is not in my opinion to do justice. Age is but one relevant consideration".

With respect, I prefer that view, which had been earlier reflected in *The Queen v Hunter* (1984) 36 SASR 101, by King CJ at p103:

> "The difficult aspect of the respondent's case is his age. A sentencing judge cannot overlook the fact that each year of the sentence represents a substantial proportion of the period of life which is left to him. It may be that when that consideration is borne in mind, it can be said that the sentence of five years' imprisonment, which at first sight seems very lenient for the respondent's criminal conduct, is nevertheless within the scope of the judge's sentencing discretion. I am unable to feel the same way, however, about the non-parole period. In fixing a non-parole period, a sentencing judge must direct his attention to the minimum period for which the offender must, if the purposes of punishment are to

> be served, remain in prison. He must then turn his attention to the factors which bear upon the particular offender as a candidate for parole. The respondent is undoubtedly an excellent candidate for parole. There is every reason to believe that he would not offend again. It is necessary, however, that the time required to be spent in prison be adequate punishment for the crime committed. The basic concepts of justice which underlie the criminal law require that the punishment be fairly proportionate to the crime in accordance with the prevailing standards of punishment".

The respondent in that case, a solicitor, had been sentenced to 5 years imprisonment on each of 19 counts of fraudulent conversion to be served concurrently, with a non-parole period of 14 calendar months. In allowing the Crown appeal, there was imposed a sentence of 5 years imprisonment on each count to be served concurrently with a non-parole period of 3 years and 6 calendar months. Jacobs and White JJ agreed. At p105 Jacobs J indicated that such grave offences must be within a range of imprisonment of 12 years with a non-parole period of 4 1/2 years and that it was only the age of the respondent, who was then 74, which caused the learned sentencing Judge to impose a head sentence of 5 years only, and the non-parole period of 14 months.

This is not a case in which the applicant suffers from any ill health which is likely to place any greater burden upon him during his term in prison, a consideration which might otherwise be brought to bear in his favour. Nor do I accept an argument that was put that questions of personal and general deterrence should have little weight, because he should be treated upon the same basis as intellectually handicapped people or those suffering from mental disorder or abnormality, who have the misfortune to come before the Courts to be dealt

with for criminal conduct. The applicant fully appreciated what he did.

The second of these offences carries a maximum penalty of 25 years imprisonment, amongst the most serious of offences which can be committed in the Northern Territory. The Court must take notice of that, and in so doing, particularly bear in mind the requirement of general deterrence. With respect, I reject the proposition that in that context the Court is here only concerned about deterring other octogenarians from organising substantial cannabis crops for commercial purposes. One would expect it would have a much wider impact than that.

The authorities relating to the fixing of a non-parole period were extensively reviewed by this Court in *R v Mulholland* (1991) 1 NTLR 1 where at p8 Gallop J, with whom Asche CJ. and Angel J. agreed, said:

> "In *Bugmy* (supra) the majority allowed an appeal by a person sentenced to life imprisonment against the allocation of a minimum term of 18 years 6 months and remitted the matter to the Court of Criminal Appeal of Victoria for further consideration. In their dissenting judgment, Mason CJ and McHugh J, approving the observations of Jenkinson J in *Morgan and Morgan* (1980) 7 A Crim R 146, said that considerations relevant to the interest of the community which the imprisonment of offenders is designed to serve, as well as circumstances which mitigate punishment, will be taken into account in determining the head sentence and again in fixing the minimum term, and that the considerations that the sentencing judge must take into account when fixing a minimum term will be the same as those applicable to the head sentence. Their Honours discussed the factors for the sentencing judge to take into account in fixing a minimum term, including rehabilitation, the nature of the crime because a more serious offence will warrant

> a greater minimum term due to its deterrent effect upon others, the need to give close attention to the danger which the offender presents to the community, and the prospects as assessed by the sentencing judge of the future progress of the offender and the danger he or she would present to the community.
>
> I do not understand the majority (Dawson, Toohey and Gaudron JJ) to have disagreed in any way with those observations.

Much the same considerations must apply when a sentencing judge is considering whether or not to wholly or partly suspend a sentence. Which ameliorating course ought to be adopted once a head sentence has been determined is always a matter of discretion in all the circumstances of the particular case. In this case, the learned sentencing Judge allowed considerable benefit to the applicant on account of his advanced years in fixing that sentence. He took the view that the seriousness of the offending outweighed other factors which might lead to the total suspension of the sentence and in doing so his discretion did not miscarry. His Honour's choice was then to consider partly suspending the sentence or fixing a period prior to which the applicant would not be eligible to be released on parole. Speaking generally, automatic release upon an order partially suspending a sentence of imprisonment is only appropriate where the time to be spent in prison is short, the longer that period the more appropriate it is to leave the release to the Parole Board. With respect, I do not agree that it was inconsistent of the learned sentencing Judge to reduce the head sentence on account of the applicant's age, and then not order that it be wholly suspended, or fix but a short period of actual imprisonment. The fixing of the merciful head sentence necessarily meant that that mercy would be reflected in the non-parole period. The times fixed prior to which prisoners will not be eligible for release on parole are

usually proportionate to the head sentences (Mulholland, supra), and in this jurisdiction take into account automatic executive remissions of prison sentences. His Honour's approach to the non parole period was consistent with that applied to the fixing of the head sentence. To have given more weight to age at that stage of the sentencing process would have been to downgrade the seriousness of the offending to the detriment of the general deterrence objective. Bearing in mind those considerations, and those which must be applied when considering an appeal against the exercise of a sentencing discretion, I am unable to say that any error was made by the learned sentencing Judge which would cause me to set aside the sentence and non-parole period ultimately fixed by him.

I would grant the application for leave to appeal, but dismiss the appeal.

ANGEL J: This is an application for leave to appeal against sentence.

On 23 November 1993, the applicant, whom the learned sentencing Judge described as "one of the oldest men ever to be sent to prison by this Court", pleaded guilty to two charges. He first pleaded guilty to a charge that between 10 May 1984 and 5 June 1984, at Dorisvale Station in the Northern Territory of Australia, he produced cannabis contrary to s62(2)(a) of the Poisons and Dangerous Drugs Act. The maximum penalty fixed by that Act, now repealed, was seven years imprisonment. At the time of this offence the applicant was 70 years old.

The second charge was that between 1 October 1992 and 13 November 1992, near Wombunji Homestead in the Northern Territory of Australia, the applicant unlawfully cultivated a prohibited plant specified in Schedule 2 of the Misuse of Drugs Act, namely, cannabis, and the number of prohibited plants was a commercial quantity, contrary to ss7(1) and (2)(a) of the Misuse of Drugs Act. The maximum penalty for that offence is 25 years imprisonment. At the time of the second offence the applicant was 78 years old.

On 25 November 1993, having convicted the applicant of each offence, the learned sentencing Judge sentenced the applicant to 18 months imprisonment in respect of the first offence and to three years imprisonment in respect of the second offence and ordered that 12 months of the second sentence be served concurrently with the 18 months sentence in respect of the first offence making a net effective head sentence of three years and six months. The learned sentencing Judge fixed a non-parole period of 21 months.

Leave to appeal pursuant to s410(c) of the Criminal Code (NT) was sought on the following grounds:

> "The learned sentencing Judge erred in law in that he failed to sufficiently take into account facts which went to mitigation namely:-
>
> (i) the age of the Applicant;
> (ii) the pleas of guilty;
> (iii) that the Applicant was a first offender;
> (iv) parity as between the co-offenders with extensive bias;
> (iv) no offences had been committed between 1985 and 1992;
> (v) the applicant had lead a life of active employment and service to the country;
> (vi) the staleness of the first offence; ..."

When the matter came before the court, counsel for the applicant submitted that the respective head sentence of 18 months and three years imprisonment were within the permissible acceptable range of sentences for the respective offences and that no challenge was made to those head sentences. Counsel submitted, however, that the learned sentencing Judge erred in three respects, first, in not making the whole of the sentences concurrent, that is, that the effective head sentence ought to have been for three years; secondly in fixing a minimum term, that is, in setting a non-parole period rather than fully suspending the sentences, and thirdly, and alternatively to not fully suspending the head sentence, in fixing an excessive non-parole period. Counsel did not argue that the learned sentencing Judge's disposition offended the parity in sentencing principle as regards the sentence imposed on the applicant's co-offenders in each offence.

The circumstances of the first offence were as follows. In 1983, one Mackie was involved in cultivating

cannabis at Borroloola. His arrest for that activity gave rise to a good deal of publicity which attracted the attention of the applicant. The applicant, who, at the time was 70 years of age, sought Mackie out in order to procure his services to grow a cannabis crop. He engaged Mackie and Mackie's fiancee, Lynette Howard, as well as a man named Wright. He took Wright and Wright's Aboriginal wife to Dorisvale Station in 1984 in a Toyota four wheel drive which he owned. The applicant supplied fertilisers, fuel, jiffy bags, food, a tent and other paraphernalia. The applicant subsequently took Mackie and Howard to the site. The equipment used for the venture included a post-hole digger, two Briggs and Stratton pumps, plastic bags with seedlings and poison for white ants. The applicant supplied all these items and cannabis seeds also. The applicant was the ring leader, the financier and the organiser of the operation. He instructed the others to grow the crop and left them at the site saying he would pick them up in November that year, once the crop was harvested.

Due to some unexpected mustering activities in the area, the people on the site left the area in June 1984 and were arrested by police. The police searched the crop site on 5 June 1984 when they found 1500 cannabis seedlings in plastic bags, another 100 seedlings in the ground, a number of jiffy bags, fertiliser, the motorised post-hole digger and several 60 litre fuel drums. The plantation was plainly undertaken as a commercial enterprise though his Honour the learned sentencing Judge noted that "it was somewhat amateurish and it is not clear that the crop would have been successful". The applicant was subsequently arrested and committed for trial, but the others involved would not identify him as being involved. It appearing to the Crown that there was no good evidence fit to

put the accused on his trial, a nolle prosequi was filed on 28 April 1985.

In March 1985, Wright had pleaded guilty to the charge brought against him and he was sentenced to two years and six months imprisonment and an eight month non-parole period was fixed. He had prior convictions for related offences, including a conviction for cultivating cannabis and when sentenced he faced a maximum of 14 years imprisonment. Later in 1985, when Mackie and Howard decided to plead guilty, they made statements to the police implicating the applicant. Howard, who had no prior convictions was sentenced to 14 months imprisonment and a non-parole period of five months was fixed. Mackie was sentenced to four years imprisonment for the Borroloola plantation and sentenced to two years and six months for the Dorisvale Station plantation to be served cumulatively. A non-parole period of 20 months was fixed in his case. There now being evidence implicating the applicant, in January 1986 the Attorney-General issued an ex-officio indictment against the applicant. However, in the meantime the applicant, thinking the matter was over, went to live in the Philippines, where he remained for some five years. The learned sentencing Judge found that there was no suggestion that the applicant left Australia in order to escape criminal proceedings. He said it was common ground that the applicant was not aware of the ex-officio indictment until November 1992 when he was arrested by police at Katherine for the Wombunji Homestead plantation. The applicant was 70 years of age at the time of the Dorisvale Station offence and 78 years of age at the time of the Wombunji Homestead offence. He was 80 years of age at the time of the hearing of the application for leave to appeal.

The circumstances regarding the Wombunji Homestead

crop offence were as follows. Having returned to Darwin from the Philippines, the applicant lived at the Salvation Army Red Shield Hostel in Darwin. In September 1992 he met Wright and informed Wright he was interested in growing cannabis again. He and Wright met on about five occasions over three or four weeks. The applicant agreed to organise to supply cannabis seeds, the necessary equipment, including pumps and the post-hole digger, food and transport. The applicant and Wright and others drove out to Wombunji Homestead and stayed over night. In early October 1992, Wright and his defacto, having camped for about one week at Dorisvale Crossing, were met by the applicant who drove a white Toyota troop carrier loaded with food and equipment to the site. Wright took a swag, camping gear, a gas cooker and a rifle. Everything else was supplied by the applicant. Most of the hard manual labour at the plantation site was done by Wright, though the applicant helped germinate some seeds and was on the site for some weeks. The plan was that Wright was to remain on the camp site for about six months. No financial arrangement was apparently struck between the applicant and Wright, but some 3000 plants were expected from the site and each participant expected to make, in the words of the learned sentencing Judge, "a lot of money". The applicant remained at the crop site for some four or five weeks before leaving to pick up further supplies. The applicant left on 8 November 1992, five days before the site was located by police. During the week commencing 9 November 1992, the applicant went to various places to purchase items for use at the plantation site. There is no need to list the items purchased. Suffice to say, the applicant went to commercial premises in both Katherine and Darwin. Having travelled from Katherine to Darwin by bus on a ticket in the false name of J Cole, the applicant placed an order for 2,000 poly bags in the

name of John Coles.

The applicant was finally arrested on 12 November 1992 in relation to the Dorisvale Station offence. The police went to the Wombunji site plantation site on 13 November 1992, where they seized a total of 1,619 cannabis plants, 800 plants approximately 25cm high in the ground and 819 cannabis plants approximately 15cm high in jiffy pots. The police also seized water pumps, a post-hole digger and other equipment. Having been arrested in relation to the Dorisvale matter, the applicant was bailed on 15 November 1992. He was subsequently arrested in relation to the Wombunji Homestead offence. He was interviewed by police. He denied having any knowledge of the plantation, denied knowing Wright and said he had never heard of Wombunji. Thereafter he exercised his right of silence.

Wright made full admissions and pleaded guilty and on 4 March 1993, he was sentenced to four years imprisonment with an 18 months non-parole period.

The second offence was planned by the applicant. He was the organiser, the ring leader. It was his idea, he provided the money, the food, the equipment, the vehicle. The learned sentencing Judge said that clearly the applicant's motive was one of greed.

With respect to the first offence the learned sentencing Judge said, inter alia, as follows:

> "The circumstances of this matter involved a number of factors which are relevant to sentencing. It's obvious from the matters that have been put to me that you were the principal offender. You planned the offence - the crop, rather; you organised it and you

financed it. Your intention was to reap this crop for commercial profit or gain. I expect that you were trying to recoup the losses that you had suffered in recent years and that you were trying to rebuild some of your lost fortune.

This places your criminality at a more serious level than the others that were involved. It was a serious offence. I note that all the others were given gaol terms and I consider that imprisonment for you for this offence is inevitable. There are, however, a number of mitigating factors. Firstly, I take into account your plea of guilty. It's what I might call an honest plea and demonstrates what the former Chief Justice called, resipiscence in your case. You've realised that you've done wrong and you've saved the community the expense of a trial, but I do not note any contrition. I give you some discount but not the full discount that you would otherwise have got if I had noticed any contrition.

I have taken into account the principles of parity of sentencing which require that like offenders received like imprisonment, but because you are the principal, you deserve a more severe punishment than the others. But then there are a number of important mitigating factors that require me to deal with you on a different basis for them, and perhaps in a more lenient way.

Firstly, I note that you are a first offender. You have lived a very long and active and useful life. You've been in work all of your life. You are now a pensioner. You have served your country in World War II. These are all important matters. The next matter I note is the staleness of this offence. This offence was committed over nine years ago. It is a recognised sentencing principle that where a prisoner has had a charge hanging over his head for a long time, that is a mitigating factor - see the decision of the Court of Criminal Appeal of Victoria in the case of Guy, G-U-Y, (1991) 57 A Crim R 21 at 32.

You were unaware that these proceedings were outstanding and therefore didn't have the anxiety of having these matters hanging over your head, for the simple reason that you were simply unaware of them. But I think the authorities also suggest that

staleness is a factor regardless of what the reason for it may have been and regardless of whether or not you were aware that you had these proceedings hanging over your head.

The reason for that is, and I quote from the judgment of Fox J in the case of Murrell (1985) 15 A Crim R 303 at 307 when he delivered the main judgment of the Federal Court of Australia in that case. 'If the commission of crime is to be deterred and punishment is to achieve its purposes, retribution should be as certain and as speedy as possible.' So I think I am entitled to and obliged to give you some benefit for that.

Another important factor is your advanced years. I've been referred to two cases. In the case of R v Yates (1985) VR 41 at 48, the Full Court there recognised that for people of advanced years the court should not impose a crushing sentence. That is to say, a sentence which is in effect a life sentence and one involving the destruction of any reasonable expectation of useful life after release.

The second case to which I've been referred is the case of R v Hunter (1984) 36 SASR 101. In that case, King CJ, at page 103, referred to the fact that in cases like this, each year of a sentence represents a substantial portion of the period of life which is left, and the courts, because of old age, must make full allowance for considerations of mercy based on age. Nevertheless, the punishment must be proportionate to the crime and the courts must satisfy the sense of justice of the community which is expressed in the criminal law and in the practice of the courts in applying the criminal law.

So advanced age can be relevant in two ways: (a) to ensure a sentence is not a crushing one, and (b) even if the sentence is not otherwise crushing, to accord mercy to a person with not many years left to live. These principles are also relevant to the deterrent aspects of punishment, both general and personal, and they are widely recognised, not only in this country but also overseas. In the United Kingdom see Thomas's Principles of Sentencing at pages 196 to 197, and in Canada see Ruby's Principles of Sentencing at page 169.

> You are, so far as I've been able to find out, one of the oldest men ever to be sent to prison by this court. Indeed, in none of the many books on sentencing that I read or the cases to which I've been referred or I've been able to find for myself, have I ever found a case for a man nearly 80 having been sent to a term of imprisonment. I am told that you have some health problems, but there is no medical evidence to suggest this, and such problems as you appear to have appear, at best, to be probably treatable whilst in prison, if they in fact exist.
>
> You appear to be generally in good health. I bear in mind that according to the latest life expectancy tables available to me, published in the third edition of Luntz Assessment of Damages at page 556, that your present life expectancy is in the order of a little over six years. Bearing all of those matters in mind, I consider that you should be imprisoned for 18 months."

In relation to the second offence, the learned sentencing Judge said, inter alia:

> "I turn now to the relevant factors. Clearly this was a matter which was planned by you and in which you took great steps to ensure secrecy, to ensure that you were not detected, by using false names in purchasing equipment and using others to collect equipment and things for you. You did everything you could to cover your tracks. You were the ring-leader, it was your idea, you provided the money, the food, the equipment, the vehicle. You selected the location. You provided all the resources.
>
> Clearly your motive was one of greed. It's a serious offence and principles of parity of sentencing suggest that I should not give you any less than Wright and, because of your being a principal in the matter, I should probably give you more. There are a number of mitigating factors which I should mention. Well, I'll mention what they are.
>
> Firstly, there is the plea of guilty. I note the resipiscence but again there was no contrition.

Secondly, I note that the length of time between the two offences is some eight years and that you apparently lived an honest lifestyle in the meantime. On this occasion I can't treat you as a first offender and there is no element of staleness. The only real mitigating factor is your advanced age. Taking into account all of these matters, I would've thought, but for the fact of your advanced age, that a proper sentence for this offence would be 5 years imprisonment. But having regard to your advanced age I now reduce that to three years. The total of these sentences are therefore 4.5 years imprisonment, but I have to consider what is called the totality principle.

I have to take a last look and ask myself: 'Is that too much?' I have to make sure that when I look at that total sentence that the total would not be a crushing sentence, bearing in mind your probable life expectancy. I do think a total sentence of 4.5 years in all of the circumstances, and for a man of your years, is too long. I therefore have decided to adjust the sentence by making the first 12 months of this sentence concurrent with the 18 month sentence on the other matter. That gives you a total effective sentence of 3.5 years.

I've been asked by your counsel to consider whether or not to suspend the whole or some portion of that sentence. In my view it is not appropriate to suspend that sentence. The offences are too serious. Your prospects of rehabilitation are hard to judge. You are not contrite and, even at the age of 78, you've been able to carefully plan and execute a serious offence. Obviously, as you get older, one would hope that you will not offend again. I note that you have not been in prison before.

Whilst it is hard to estimate your prospects of rehabilitation, I think that on the balance of probabilities that they are reasonably good. I think that because of the fact that you have not been in prison before, and because as you get older one would hope that you would see the sense of your ways. But nevertheless, I think that the people best able to judge whether you in fact see the error of your ways will be the Parole Board who, I think, will be in a better position than I am to decide when it is

> appropriate for your release. I therefore must fix a minimum term.
>
> Regarding the minimum term, I bear in mind the seriousness of the offences, your advanced age, your prospects of rehabilitation as I have been able to assess them. I take into account also your prospects of your earning early remissions and, as well, I bear in mind the requirements of deterrence, both general and special. Bearing in mind all of those matters, I fix a non-parole period of 21 months. I order that the sentences and non-parole period are to date from 24 November 1993."

Counsel for the applicant submitted that the learned sentencing Judge erred in saying that in relation to the second offence the applicant could not be treated as a first offender. Before the learned sentencing Judge, counsel for the applicant had submitted that "in relation to the second offence you must take into account the first as being a prior offence." It has been held in a number of cases that when a number of charges come before a court on one day and there are pleas of guilty to each, the sentencing court is not to accumulate the offences as if there were prior convictions; all the offences are to be treated as first offences for the purpose of ascertaining the maximum penalty applicable thereto where there are no convictions prior to the day of hearing. Where there are convictions prior to the date of hearing all the offences heard on that day are to be treated on an equal footing, having regard to the history of the offender prior to the day that the court is dealing with the offences, see eg *Farrington v Thomson and Bridgland* (1959) VR 286, *Gallagher v McKinlay* NT SC Asche CJ, unreported, 27 November 1987, *R v Miller* (1986) 2 QR 518, *Jagamara v Hayman*, NT SC, Angel J, unreported 27 September 1991; *Oldfield v Chute* NT SC, Mildren J, unreported, 10 June 1991. As Asche CJ said in *Gallagher v McKinlay*, supra, one rationale for that rule may be that the accused has not been in

any way warned of the severity of punishment which might be produced by his conduct if it is repeated after the initial offence.

However, the principle referred to does not mean that the conduct constituting the first offence is without relevance to sentencing for the second offence. It at least reflects upon the general criminality demonstrated by the conduct constituting the second offence such that the applicant can not deserve the mitigation that would ordinarily be accorded to him had he not conducted himself as he had earlier. The principles of proportionality referred to in *Veen (No 2)* (1988) 164 CLR 465 and *Babui* (1991) 1 NTLR 139 still apply. In *Hunter* (1984) 36 SASR 101 where the court dealt with nineteen counts of fraudulent conversion and took account of another 182 offences, the later offences were regarded as more grave than the earlier offences - see at 110, per White J. The learned sentencing Judge did place weight on the fact that the applicant had never been in prison before. I do not consider the learned sentencing Judge erred in not treating the second offence as a first offence in the sense the applicant had not offended before. 18. It was also argued that the learned sentencing Judge had not given sufficient weight to the staleness of the first offence. I can not accept this submission. The learned sentencing Judge expressly referred to staleness and took account of it in reducing the sentence with respect to the first offence. I respectfully agree with the following remarks of the Court of Criminal Appeal in Shore (1993) 66 A Crim R 37 at 47:

> "There is a clear distinction on the one hand between cases such as Todd where delay occurs because of circumstances entirely outside the offender's control ... and on the other hand, cases such as the present where the only cause of delay was the applicant's

> flight to avoid the consequence of his admitted criminality. To allow leniency because of delay alone would be, as the learned sentencing Judge pointed out, to place a premium of absconding and would be entirely contrary to the public interest. The proper course is that adopted by the sentencing Judge in *Kukonoski* and approved in this Court, which allows the sentencing Judge to recognise the unhappy condition of an accused person living as a fugitive with always the fear that his crime might be brought against him but not to encourage absconding by affording any additional leniency in relation to it."

Staleness and delay can be significant sentencing factors but are not always so. Delay alone does not require leniency. Delay may be caused because in the interval an offender is serving a sentence in another state for another crime. Delay may be caused, as in the present case - at least partly, by the reluctance of co-offenders to assist the police to bring the applicant to account. Delay may be caused by an offender absconding. Courts are careful not to encourage absconding by affording leniency in relation to it. I am of the view that the learned sentencing Judge has not been shown to have erred in taking into account the staleness of the first offence in the way he did. The commission of the second offence amply demonstrated the applicant had not reformed during the interval and he lost little sleep worrying about the future disposition of the first offence - he thought he had escaped the clutches of the law.

It was further submitted that the learned trial Judge did not take sufficient account of the age of the applicant. The learned sentencing Judge expressly took into account the age of the applicant in respect of each offence. The age of an offender is often a relevant sentencing circumstance. Youth and advanced age often call for some leniency, though not always

so. Whether leniency on account of youth or advanced age is called for in any particular case depends on the circumstances of the case. Undoubtedly there are some offences so heinous that long sentences of imprisonment are appropriate what ever the age of the offender. Aggravated armed robberies carried out with loaded firearms, particularly in dwelling houses at night (see *Tartaglia, Spicer, Fotiades and Lilliebridge* CCA NT, unreported 7 April 1994), offences involving serious violence, the unlawful use of firearms to maim, planned crime for wholesale profit and active large scale trafficking in dangerous drugs are examples of crimes where ordinarily, little, if any, account is taken of age in mitigation of penalty; cf the leading English case of *Bibi* (1980) 1 WLR 1193. That said, a sentencing Judge has the right and responsibility, in an appropriate case, to allow the promptings of mercy to operate and, even in cases which normally call for a heavy deterrent sentence, a Judge may conclude that the public interest is best served by taking action calculated to encourage reform; *Wihapi* (1976) 1 NZLR 422 at 424(CA), *Morlina* (1984) 2 FLR 508 at 510; 13 A Crim R 76 at 77. 21.

Mercy is sometimes afforded offenders of advanced age because sentencing Judges recognise that each year of a sentence represents an unusually substantial proportion of the period of life left to an aged offender, *R v Hunter* (1984) 36 SASR 101 at 103, and undoubtedly the rigour of imprisonment is, generally speaking, a harsh experience for elderly offenders. Nevertheless, as Jacobs J said in *Hunter*, supra, at 106 "... the exercise of mercy cannot ignore, or be allowed to imperil, the proper protection of the public according to law." In *Yates* (1985) VR 41, a sixty-eight year old man pleaded guilty to five counts of buggery and other counts of indecent assault of boys

aged between eleven and thirteen years. He was sentenced to a total effective term of ten years with a minimum term of eight years before he would be eligible for parole. An appeal against the severity of sentence was allowed by a majority and an effective term of seven years imprisonment with a minimum term of five years substituted. The court said that the sentence appealed from was crushing in the sense that it connoted the destruction of any reasonable expectation of useful life after release. The Court acknowledged that in so holding it was interfering with the proportionality principle. That was the point of the dissent of Murphy J, and of the dissent of White J in *Hunter*, supra.

In *Waterfall* (1976) Crim LR 203, the English Court of Appeal confirmed a two year sentence of imprisonment for forgery upon a 70 year old offender who suffered from diabetes. In *Poh and To* (1982) Crim LR 132, two offenders aged sixty-four and fifty-eight were sentenced to fourteen years imprisonment for importing heroin with a street value of 5m pounds sterling. In that case, the English Court of Criminal Appeal, consisting of Lord Lane LJ, Roskill LJ and Skinner J, held that the appellant's involvement in large scale drug running forfeited any rights to humanitarian consideration. In *Bazley* (1993) 65 A Crim R 154, a sixty-seven year old had been convicted of two counts of murder, one count of conspiracy to murder and one count of theft in 1986 and was sentenced to nine years imprisonment on the conspiracy count, four years imprisonment on the theft count, both to be served concurrently with each other and concurrently with life sentences with respect to each count of murder. In 1992, upon an application before a Judge to fix a minimum term, the Judge directed that the offender serve a minimum of eleven years before being eligible for parole. The

Director of Public Prosecutions appealed, arguing that the minimum term was manifestly inadequate and that the Judge had placed too much weight on the age and state of health of the applicant. On appeal, the Victorian Court of Criminal Appeal said that but for the offender's age the minimum term fixed would have been at least double. The court said that age was a relevant sentencing consideration and that in some cases it may be of considerable significance but that it could never be a justification for "an unacceptably inappropriate sentence". The court expressly approved the following statement of Crockett J in *Crowley and Garner* (1991) 55 A Crim R 201 at 206:

> " ... it does not follow that every sentence which justifiably deserves that epithet (ie 'crushing') must on that account and on that account alone be held to be manifestly excessive. There will, in my view, be cases in which the offender has by his criminal act or acts forfeited his right to any such hope or expectation."

The court allowed the appeal and substituted a minimum term of fifteen years imprisonment. The court said that it would be inappropriate to approach the selection of a proper minimum term from the view that because of the offender's age there was a need to grant some measure of life after release. Such an approach would mean that general deterrence and retribution would receive insufficient weight.

As can be seen from this brief survey of some reported cases of sentencing offenders of advanced age, there is a tension between the principle of proportionality and humanitarian considerations in the sentencing of such offenders.

Turning to the present case, the learned sentencing

Judge in the exercise of his discretion expressly and substantially reduced each head sentence on account of the offender's age. As I have said, no complaint is made by the applicant about either head sentence. There is no Crown cross application for leave to appeal against the head sentences. The real complaint of the applicant is that the head sentences were not made fully concurrent and that they were not fully suspended. The learned sentencing Judge in rejecting a submission that the sentences should be fully suspended said:

> "In my view it is not appropriate to suspend that sentence (meaning the total effective sentence of 3.5 years). The offences are too serious. Your prospects of rehabilitation are hard to judge. You are not contrite and, even at the age of 78, you've been able to carefully plan and execute a serious offence."

It seems to me, with respect, that in so saying, the learned sentencing Judge fell into error, or at least failed to acknowledge or pay appropriate regard to a tension in the applicable sentencing principles sufficient for us to interfere. In the unusual circumstances of the applicant's advanced age and antecedents, and of the low head sentences fixed on that account, I do not think the intrinsic nature of the offences, of themselves, justified a refusal to suspend the head sentences. In *R v Kruger* (1977) 17 SASR 214, Bray CJ said at 221:

> "Speaking for myself, I would think that a suspended sentence is imposed only when by eliminating all other alternatives, the court thinks the case is one for imprisonment, and, though it be a case for imprisonment, an immediate custodial sentence is not required in the circumstances of the particular case. In my view, a suspended sentence is aimed primarily at the offender whom it is not appropriate to send to prison for the first time and who is most likely to benefit from an exercise of the court's clemency.

> Admittedly there are no comprehensive specific criteria which tell a court when a case is one fit for a suspended sentence. But the perceived seriousness and the intrinsic character of the particular offence, and any element of persistence, can serve as important restraints on the choice of a suspended sentence. On the other hand, the likelihood that further criminal behaviour cannot reasonably be assumed is a matter which may well bring the offender within the scheme of the legislative policy which enables the rigours of a custodial sentence to be avoided. Apart from the matters which are specifically mentioned in s4(2a) of the *Offenders Probation Act* and to which a court must necessarily direct its attention before deciding that a sentence of imprisonment ought to be suspended, the considerations governing the choice between a custodial sentence and a suspended sentence cannot be identified by any constant ratio. The factors to be taken into account must invariably be different in the particular circumstances of each particular case."

In *Shueard* (1972) 4 SASR 36 at 43 the court (Bray CJ, Hogarth and Bright JJ) said:

> "The decision whether a sentence is to be suspended or not is an exercise of the discretion of the trial judge. As such it will not lightly be interfered with. The review of such a discretion involves the same principles as a review of the judicial discretion when exercised in the imposition of the sentence itself. This was considered by Dixon J, as he then was, and Evatt and McTiernan JJ in *House v. The King* (1936) 55 CLR 499, at pp 504-505:
>
> 'The manner in which an appeal against an exercise of discretion should be determined is governed by established principles. It is not enough that the judges composing the appellate court consider that, if they had been in the position of the primary judge, they would have taken a different course. It must appear that some error has been made in exercising the discretion. If the judge acts upon a wrong principle, if he allows extraneous or irrelevant matters to guide or affect him, if he

> mistakes the facts, if he does not take into account some material consideration, then his determination should be reviewed and the appellate court may exercise its own discretion in substitution for his if it has the materials for doing so. It may not appear how the primary judge has reached the result embodied in his order, but if upon the facts it is unreasonable or plainly unjust, the appellate court may infer that in some way there has been a failure properly to exercise the discretion which the law reposes in the court of first instance. In such a case although the nature of the error may not be discoverable, the exercise of the discretion is reviewed on the ground that a substantial wrong has in fact occurred.'
>
> Facts bearing upon the person of the prisoner, his age and history, his medical and psychiatric condition, his future prospects and his circumstances generally may be taken into account, and often are more appropriately taken into account, as subjective matters which will help a court to decide whether to suspend a sentence, rather than as matters bearing directly upon the appropriate term of imprisonment; though the two aspects are related and often cannot properly be considered separately and in isolation."

When looked at objectively the applicant's offences do not demonstrate substantial reasons for leniency. He was the ring leader in each; he organised each over a period of time and in the expectation of large monetary gain. His only real claim for leniency lies in his age. All this was recognised by the learned sentencing Judge in fixing the reduced head sentences he did and in making them partly concurrent. The guiding principle in sentencing is that stated by Napier CJ in the oft quoted passage in *Webb v O'Sullivan* (1952) SASR 65:

> "The courts should endeavour to make the punishment fit the crime, and the circumstances of the offender, as nearly as may be. Our first concern is the protection of the public, but, subject to that, the court should lean towards mercy. We ought not to award the maximum which the offence will warrant, but

> rather the minimum which is consistent with a due regard for the public interest."

Approaching the matter that way, and having extended leniency in fixing the head sentence such that the head sentences are not proportionate to the objective gravity of the crimes or the deserved retribution or appropriate deterrence, both general and personal, ordinarily called for, it is somewhat at odds to say that the objective gravity of the crimes and the need for general deterrence is good reason not to fully suspend the head sentence on this 79 year old man who had never been to prison before. Where advanced age is a factor justifying significant leniency - and the learned sentencing Judge so held in fixing the disproportionate head sentences he did - ex necessitate considerations of parity and proportionality of sentencing are irrelevant and the case is an inappropriate vehicle to give voice to general deterrence - as opposed to personal deterrence or deterrence to others of a like age. As to the latter, there is no reason to suppose other 79 year old Territorians need to be deterred from organising commercial drug crops; cf *Hunter*, supra, where a proper consideration was the general deterrence of other aged solicitors from filching trust funds. Some parallels may be drawn with sentencing offenders of mental abnormality, see eg *Anderson* (1981) VR 155, 160; *Thiele* (1986) 19 A Crim R 105 at 109; *Hurd* (1988) 38 A Crim R 454, 465; *Ninus Scognamiglio* (1991) 56 A Crim R 81; *Champion* (1992) 64 A Crim R 244. As previously noted, a suspended sentence is nevertheless a sentence and there is no reason to think that in the present case the public interest is not adequately protected by such a course. A suspended sentence has a known and certain consequence in the event of re-offending and is, or at least ought to be, an effective deterrent to the individual offender.

For reasons already stated neither retribution nor general deterrence required a custodial sentence in the present case. The learned sentencing Judge said that he thought that on the balance of probabilities, the applicant's prospects of rehabilitation were reasonably good. This is not a case where future misconduct is specifically feared. In the circumstances, there seems to be no good grounds for the learned sentencing Judge having committed the applicant to the rigours of prison for 21 months rather than fully suspending the sentence, or alternatively committing him to custody for a very short period, so as to let the applicant hear the "clanging of the prison gates". There can be no question but that a prison sentence, however short, would be a most unpleasant and unedifying experience for a man of the applicant's age. He is a man of otherwise good character and is not to be treated as a recidivist offender who is almost used to prison.

In all the circumstances, and as an act of mercy in this unusual case, I am of the view leave to appeal should be granted and the appeal should be allowed. I would vacate the minimum term set by the learned sentencing Judge and direct that the balance of the period of his sentences be suspended upon him entering into a good behaviour bond for the period of the unexpired balance of the sentences, $5000 own recognisance.

THOMAS J:

In this matter the appellant seeks the leave of the court, pursuant to s410(c) of the Criminal Code, to appeal against the severity of sentence imposed on the appellant.

To obtain leave to appeal against severity of sentence the appellant must show; "at least an arguable case" over "some real element of injustice" (*McDonald v The Queen* (1992) 85 NTR 1).

The court agreed to hear the application for Leave to Appeal and the merits of the appeal at the same time.

On 23 November 1993, Mr Braham pleaded guilty to the following two charges on indictment:

(1) Between 10 May 1984 and 5 June 1984 at Dorisvale Station in the Northern Territory of Australia did produce cannabis.

(2) Between 1 October 1992 and 13 November 1992 near Wombunji Homestead in the Northern Territory of Australia, unlawfully cultivated a prohibited plant specified in Schedule 2 of the *Misuse of Drugs Act*, namely cannabis, and the number of prohibited plants was a commercial quantity.

In respect of the first charge the facts found by his Honour, the learned sentencing Judge, are not subject to challenge and are as follows (pp 69 - 70 Appeal Book):

> " The facts of this matter are that in 1983 John Leslie Mackie was involved in cultivating cannabis at Borroloola. He'd in fact been arrested for that

activity and following his arrest there was considerable media publicity which attracted the attention of Mr Braham and, as a result of that, the prisoner sought him out in order to procure his services. He engaged Mackie and also his fiancee, Lynette Joan Howard, as well as Norman John Wright, in order to grow cannabis in remote bush country at Dorisvale Station at a place called Cow Eye Creek near Mount Pearce.

He took Wright and his Aboriginal wife to the location first, probably between 8 and 11 May 1984, in a Toyota 4-wheel drive which he then owned. The vehicle was loaded with fertilisers, fuel, Jiffy bags, food, a tent and personal belongings. The prisoner then took Mackie and Howard out subsequently. In addition to the items I've mentioned, a post hole digger, two Briggs and Stratton pumps, black plastic bags with seedlings, and a poison for white ants were also taken out.

The prisoner supplied these items and also supplied the cannabis seed. The prisoner was indeed the financier and organiser of the operation. He instructed the others to grow the crop and he said that he would pick them up in November of that year when the crop was harvested.

Due to some unexpected mustering activities in the area, these other people left the area in June of 1984 and were arrested by police. It is unnecessary to go into details of how that occurred. Subsequently, when police searched the area on 5 June 1984, they found 1500 cannabis seedlings in plastic pots, another 100 seedlings in the ground, a number of Jiffy pots, fertiliser and motorised post hole digger and several 60 litre fuel drums.

The plantation was undertaken as a commercial enterprise, but I note that it was somewhat amateurish, and it is not clear that the crop would've been successful.

The prisoner was later arrested and committed for trial, but the others involved would not identify him as being involved. Consequently, as there was no evidence, in the view of the Crown, fit to put the accused on his trial, a *nolle prosequi* was filed on

28 April 1985.

In March of 1985 Wright had pleaded guilty to the charge brought against him and he was sentenced to 2 and a half years imprisonment and an eight month non-parole period was fixed. He had prior convictions for related offences, including a conviction for cultivate cannabis in Western Australia in 1975. Possibly because of that, he faced a maximum of 14 years imprisonment at the time.

Later in 1985 when Mackie and Howard decided to plead guilty, they made statements to the police implicating the prisoner. Howard, who had no prior convictions, was eventually sentenced to 14 months' imprisonment and a non-parole period of five months was fixed in her case. Mackie was sentenced to 4 years' imprisonment for his Borroloola plantation and he was also given a 2 and a half year cumulative sentence for this matter, making a total of 6 and a half years, and a non-parole period of 20 months was fixed.

In January of 1986 the Attorney-General decided to issue an ex officio indictment against the prisoner, but believing that the matter was over, the prisoner had, in the meantime, left Australia to live in the Philippines where he remained for some five years. There is no suggestion the prisoner left Australia in order to escape criminal proceedings brought against him. It's common ground, it seems to me, that the prisoner was not aware of the ex officio indictment until November of 1992 when he was arrested by police at Katherine."

In respect of the second charge on indictment the facts found by his Honour following the plea of guilty are also not subject to challenge and are as follows (pp 74 - 78 Appeal Book):

" When you returned to Darwin you were living at the Salvation Army Red Shield Hostel. In about September of 1992 you met up again with Norman Wright and you told Wright that you were interested in growing cannabis again and you asked Wright if he would be interested as well. Initially, Wright's response was non-committal. You and Wright met on

about five subsequent occasions over the next three to four weeks, mostly in your room, and on these occasions the main topic of discussion was growing cannabis.

It emerged from these discussions that you would organise the supply of the cannabis seed, the necessary equipment including pumps and a post hole digger, food and transport. Wright says that there was no discussion as to how much cannabis was going to be grown until you actually got to the crop site, and that he took no part in collecting any of the necessary equipment other than purchasing a rifle which you asked him to get.

At some point during these discussions, Wright decided that he was definitely interested and that he would become involved in the plantation, and he so informed you. At this point, you suggested that they go and have a look at the area where a crop might be grown. You, Wright, and Wright's de facto then drove to Katherine in Wright's car and you went to Bill Harney's residence at 33 Pearce Street, Katherine.

There you transferred your gear onto a 4-wheel drive and, together with Harney, drove out to Wombunji Homestead. You knew Harney and so did Wright. According to Harney, this meeting was coincidental. Harney says that he was going out bush in any event at that time to check the conditions of some of the roads out Dorisvale way. He is a self-employed tour operator who runs 4-wheel drive tours throughout the area. He says that you asked him if he and his party could come along for the trip and that he agreed.

The party drove out to Wombunji and overnighted there. According to Wright there was no discussion of growing cannabis, during that trip. The following day was spent driving around exploring and reminiscing. The party returned to Katherine that evening and you, Wright and Wright's de facto then returned to Darwin.

Some time after that you told Wright that you would grow cannabis somewhere in the area where you had been with Harney. Wright wanted to get out of town and get on with the job but you, however, were not quite ready to go. Wright packed his camping gear

and, together with his de facto, drove out to the Dorisvale Crossing and he camped there. The arrangement was that you would pick them up on your way through to Wombunji. Wright was camped at Dorisvale Crossing for about a week before he was picked up by you.

In early October 1992, you arrived at the Dorisvale Crossing driving a white Toyota Troop Carrier which was loaded with food and all the equipment, including the water pumps subsequently found by the police at the campsite and the crop site. Wright says that the only items that he took were his swag, camping gear, gas cooker and rifle and that everything else was supplied by you. Wright says that you drove to Wombunji Homestead, camped there and looked for a suitable place near water to cultivate the crop.

After having settled in after about a week or so, Wright together with you set about the business of germinating seed. You soaked the cannabis seeds and laid them in cotton wool, keeping them moist. When the seeds began to germinate after a few days, the seeds were put in Jiffy pots and then transferred from the Jiffy pots into small plastic pots and then planted, two to a hole, in the ground. The plants were watered by Wright who carried water from the creek in 20 litre buckets and then manually watered the plants using a tin.

At the plantation site, there was some discussion as to the number of plants that were to be grown. Wright suggested that there be no more than 1000 or 1500 plants because of the possibility that a satellite could pick them up, but eventually you took the view that 3000 plants could fit into the area. Most of the hard manual labour at the plantation site was done by Wright. The post hole digger did not prove to be successful because it was continuously breaking down; eventually it was discarded. The water pumps were never run. The plan was that Wright was going to remain at the crop site for about six months. It's been put to me that no financial arrangements were made or discussed regarding the distribution of the profits from the disposal of the cannabis. The only discussions that took place about money were relatively non-specific. It was expected

that there would be a lot of cannabis and that you would each make yourselves a lot of money.

As time passed it transpired that you had omitted to bring a number of items and that further supplies would be needed. At your request, Wright began to keep a list of necessary items. All three of you remained at the crop site for about four or five weeks before you left to go and pick up some further supplies from either Katherine or Darwin. You departed the plantation site on the afternoon of Sunday 8 November 1992, five days before the site was located by the police.

You took with you a shopping list prepared by Wright. The lists were written by Wright on pieces of cardboard. The arrangement was that you would return to the site after having made the necessary purchases. Before leaving the site, you packed up all of your personal gear and took it with you in the Toyota Troop Carrier and you then drove to Katherine.

During the week commencing Monday 9 November of 1992, you went to a number of different places to purchase items which were listed in the shopping lists. I'll mention some of these places briefly; you first went to Bunnings where you were served by the manager and you purchased some items there for which you paid $300 cash. You went to G and P Disposals and you purchased some items there for which you paid $120 in cash. On the same day, you went to Elders Stock and Station agents and you purchased some items there at a cost of about $42.

Then you went to the bush order section at Woolworth's Katherine and you spoke to the supervisor. You told her that you wanted to place a bush order and was told that the order couldn't be collected until Tuesday morning. You gave the supervisor a shopping list written on the piece of cardboard and you told her that Mr Bill Harney would pick up the order. You then left. The following day you went back to the bush order section at Woolworth's and asked if the order was ready. You were told that it was being packed and you were informed of the cost; $883.85. You said then that you would have to go to Darwin to get the money and that you would be back on either Wednesday or Thursday

night, and you left.

On Tuesday 10 November, you went to the office of Travel North and you there purchased a bus ticket for travel from Katherine to Darwin that day and you purchased that ticket in the false name of J. Cole. You arrived in Darwin later that day. On the evening of 10 November, you went to the office of the Transit Centre Travel situated at Transit Travel Centre in Mitchell Street, Darwin, and you spoke to a travel consultant there. You spoke to her about arranging accommodation through the transit centre for travellers going to the Philippines. It's not necessary to go any further into that.

On Tuesday 10 November or Wednesday the 11th, you rang C and R Distributors in Reichardt Street, Winnellie, and you spoke to a clerk there and placed an order for 2000 poly bags. You gave your name as John Coles. You stated that you wanted delivery of the poly bags made at the transit centre as soon as possible. You were told that the cost was $31.30 and that the transaction was to be cash on delivery and you gave the name of the travel consultant at the transit centre as your contact point.

On Wednesday the 11th you returned to the Transit Travel Centre and again spoke to the travel consultant and you told her that you had a parcel being delivered to you at the transit centre, but that as you were going out of town you asked her whether she would accept delivery of it and pay for it on your behalf. She agreed to do so and you gave her the $31.30 in cash.

On Wednesday 11 November you purchased from the transit centre a bus ticket and you travelled from Darwin to Katherine in the name of J. Cole. On the same evening you went to Bill Harney's residence and you asked him to do a favour for you and go to Woolworths and pick up the food. Harney asked: 'What's wrong with you?', to which you replied that you could not be seen picking the food up outside of Woolworths in the Toyota.

You asked Harney to deliver the food to him behind the Katherine dump at 5 pm the following day. The place where the food was to be dropped was

approximately five kilometres outside of Katherine. You told Harney that you could then take the food out to Johnny and the girl at Wombunji. Harney asked what they were doing out there and you told him that they were growing dope. In response to Harney's further questions, you gave him an accurate description of where the plantation site was.

You told Harney that there were either 300 or 3000 plants growing, but Mr Harney can't recall which. You said that they'd been at Wombunji for about four or five weeks and he replied that he would see you the following day at the dump. On Thursday 12 November you attended the bush order section of Woolworths Katherine and you paid cash for the order which you'd placed earlier in the week. You told the staff there that Harney would come in later in the day and collect the order. On the afternoon of Thursday the 12th, Harney attended the bush order section at Woolworths Katherine to collect the order as requested, but, unbeknownst to you, the police had throughout the week been keeping a watchful eye on you and whilst Harney was waiting to collect the bush order, he was intercepted and conveyed to the Katherine Police Station where he was questioned by police and where he told police what you had informed him.

You were arrested on 12 November 1992 in relation to the first matter. The police then went to the campsite on 13 November where Mr Harney showed them where he believed the plantation site to be and they seized a number of items which were located at the campsite. A total of 1619 cannabis plants were located; 800 plants approximately 25 centimetres high were pulled out of the ground and 819 cannabis plants approximately 15 centimetres high were removed from Jiffy pots.

It's not necessary to go into all of the items seized, but I'll mention some of them. There were two water pumps, a post hole digger which had been found, and these had been purchased apparently by you using the name of other people.

After your arrest in relation to the Dorisvale matter, your conditions of bail required you to remain in Darwin and on Sunday 15 November 1992 you were arrested in relation to the present offence. You were then conveyed to the Berrimah Police Centre

> where you later that day took part in an interview which was recorded on both audio tape and video tape.
>
> Shortly after questioning began, you exercised your right of silence but before doing so you denied having any knowledge regarding the cannabis plantation, denied knowing Norman John Wright and stated that you'd never heard of Wombunji.
>
> Wright made full admissions as to his part in the offence and he was dealt with by Angel J, having pleaded to the charge, and on 4 March 1993 he was sentenced to a term of 4 years imprisonment and an 18 month non-parole period was set."

The maximum penalty in respect of the first offence is 7 years imprisonment.

The maximum penalty in respect of the second offence is 25 years imprisonment.

The learned sentencing Judge imposed a sentence of 18 months imprisonment on the first charge and a sentence of 3 years for the second charge. In respect of the second charge the sentencing Judge imposed a sentence of 3 years cumulative upon the sentence for the first offence. This was done after making a reduction for the accused's advanced age. His Honour then applied the totality principle and decided 4.5 years imprisonment was too much. Accordingly, he adjusted the sentences by making the first 12 months of the second sentence concurrent with the 18 month sentence on the first charge. This was a total effective sentence of 3.5 years imprisonment. His Honour then fixed a non-parole period of 21 months.

It is conceded by Mr Kilvington, counsel for the appellant, that the head sentence in respect of the first offence is not manifestly excessive.

Mr Kilvington also concedes in respect of the head sentence for the second offence that it is within the general range of sentences appropriate for the offence and is not open to challenge.

Counsel for the appellant argues that the sentence of imprisonment should be either fully suspended or alternatively a shorter non-parole period fixed.

It is the submission on behalf of the appellant that the learned Judge failed to give any, or proper consideration, to the antiquity of the first offence (*Shore* 1993 66 A Crim R 37 at 47). I do not accept this submission, the learned Judge clearly addressed his mind to that issue as a mitigating factor. I quote the following extract commencing p 72 of the Appeal Book:

> " Firstly, I note that you are a first offender. You have lived a very long and active and useful life. You've been in work all of your life. You are now a pensioner. You have served your country in World War II. These are all important matters. The next matter I note is the staleness of this offence. This offence was committed over nine years ago. It is a recognised sentencing principle that where a prisoner has had a charge hanging over his head for a long time, that is a mitigating factor - see the decision of the Court of Criminal Appeal of Victoria in the case of Guy, G-U-Y, (1991) 57 A Crim R 21 at 32.
>
> You were unaware that these proceedings were outstanding and therefore didn't have the anxiety of having these matters hanging over your head, for the simple reason that you were simply unaware of them. But I think the authorities also suggest that staleness is a factor regardless of what the reason for it may have been and regardless of whether or not

you were aware that you had these proceedings hanging over your head.

The reason for that is, and I quote from the judgment of Fox J in the case of Murrell (1985) 15 A Crim R 303 at 307 when he delivered the main judgment of the Federal Court of Australia in that case. 'If the commission of crime is to be deterred and punishment is to achieve its purposes, retribution should be as certain and as speedy as possible.' So I think I am entitled to and obliged to give you some benefit for that."

Similarly, the learned Judge gave careful consideration to the advanced age of the appellant when imposing sentence in both the first and second offence and again when looking at the principle of totality. His Honour referred to the relevance of advanced age (a) to ensure a sentence is not a crushing one (*R v Yates* (1985) VR 41 at 48) and (b) even if the sentence is not crushing, to accord mercy to a person with not many years left to live (*R v Hunter* (1984) 36 SASR 101).

The learned Judge referred to the seriousness of the offence and the fact the appellant was the ring leader. His Honour made this finding (p 78 Appeal Book) in respect of the second offence:

" I turn now to the relevant factors. Clearly this was a matter which was planned by you and in which you took great steps to ensure secrecy, to ensure that you were not detected, by using false names in purchasing equipment and using others to collect equipment and things for you. You did everything you could to cover your tracks. You were the ring-leader, it was your idea, you provided the money, the food, the equipment, the vehicle. You selected the location. You provided all the resources.

Clearly your motive was one of greed. It's a serious offence and principles of parity of

> sentencing suggest that I should not give you any less than Wright and, because of your being a principal in the matter, I should probably give you more. There are a number of mitigating factors which I should mention."

Mr Kilvington argues the learned sentencing Judge placed undue emphasis on general deterrence, and insufficient emphasis on the appellant's age and antecedents and his right to be treated as a first offender.

At p 79 of the Appeal Book in his Honour's reasons for sentence, he makes this comment in respect of this second charge; "On this occasion I can't treat you as a first offender ...". I do not agree with this statement and consider the learned sentencing Judge had a discretion.

The approach of the common law was to treat as a second or subsequent offence one which was committed after the earlier conviction had been recorded (*R v Miller* 1986 2 Qd R 518 Williams J 529).

This issue was raised in *Stanley Jungala Gallagher and Ian McKinlay* unreported decision of Asche CJ delivered 27 November 1987, Northern Territory Supreme Court No 101 and 102 of 1987. At p 5 of his reasons Asche CJ states:

> " It seems to me that His Worship was bound to treat each of these convictions seperately (sic) as if they were individually first convictions, and one rationale for that may be, as Mr Brown for the appellant, has suggested, that the accused has not been in any way warned of the severity of punishment which might be produced by his conduct if it continued, after an initial offence."

I recognise the matter of *Gallagher and McKinlay* (supra) involved offences relating to driving a motor vehicle

with a blood alcohol content in excess of .08 and proof of an offence affects the statutory minimum period of disqualification of licence for a second or subsequent offence. However, there still exists the general principle that the first offence, not having been dealt with prior to the commission of the second offence, the appellant, in the matter before this court, Edward Alfred Braham, had not experienced the salutary effect of a conviction and punishment for an offence committed many years prior to the commission of the second offence. Whilst it is true that in imposing sentence for the second offence the appellant was not a first offender, consideration could have been given to the fact that he had not been dealt with, or in fact, made aware that he was facing prosecution for the first offence at the time of the commission of the second offence. Although I consider the statement of his Honour is not entirely accurate, taken in the context of all his remarks on sentence and the careful consideration he gave to the mitigating factors, I am not persuaded that it resulted in a manifest error in the sentence imposed.

The thrust of the submissions by counsel for the appellant is that the sentence of imprisonment should be either fully suspended or alternatively a shorter non-parole period fixed.

I am not able to agree with this submission. The head sentences are clearly within the appropriate sentencing range. Similarly, I consider the non-parole period fixed by the learned Judge is within the appropriate range. In imposing a head sentence and deciding upon the non-parole period, the learned sentencing Judge carefully considered the fact of the appellant's advanced age, the reasonably good prospect of rehabilitation, the staleness of the first offence and his

previous good character as significant mitigating factors. His Honour then considered the principle of totality and further reduced the sentence.

I am not persuaded the learned sentencing Judge placed two much weight on the appellant's leading role in the commission of the offence, the aspect of general deterrence, which although a minor consideration in respect of a man of this age, is nevertheless a factor, and his apparent lack of contrition.

I would grant leave to appeal pursuant to s410(c) of the Criminal Code and dismiss the appeal.