CITATION:	*Cubillo v Andreou* [2017] NTSC 53
PARTIES:	CUBILLO, Angelina Ellen v ANDREOU, Andreas
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	APPEAL from LOCAL COURT exercising Territory jurisdiction
FILE NO:	LCA 9 of 2017 (21646689)
DELIVERED ON:	18 July 2017
DELIVERED AT:	Darwin
HEARING DATE:	14 July 2017
JUDGMENT OF:	BARR J

CATCHWORDS:

CRIMINAL LAW – Appeal against sentence – possession of trafficable quantity of methamphetamine - supply methamphetamine in less than commercial quantity – manifest excess ground – court fixed non-parole period rather than suspended sentence – appellant contends that court failed to sufficiently take into account her personal circumstances – length of non-parole period not in dispute – no error shown – appeal dismissed

CRIMINAL LAW – Appeal against sentence – procedural fairness – appellant contends that court failed to indicate intention to fix a non-parole period and seek further submissions from the parties – non-parole period was probable outcome – defence counsel made submissions referring to non-parole period – court entitled to assume counsel had dealt with all relevant matters – held no requirement for court to seek specific further submissions in relation to non-parole period – no error shown – appeal dismissed

Misuse of Drugs Act (NT)

R v Bernath [1997] 1 VR 271
Hanks v The Queen [2011] VSCA 7
Johnson v The Queen [2012] NTCCA 14
Pantorno v The Queen (1989) 166 CLR

REPRESENTATION:

Counsel:

Appellant:	T Jackson
Respondent:	L Hopkinson

Solicitors:

Appellant:	North Australian Aboriginal Justice Agency
Respondent:	Office of the Director of Public Prosecutions

Judgment category classification:	C
Judgment ID Number:	BAR1708
Number of pages:	8

IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

Cubillo v Andreou [2017] NTSC 53
No. LCA 9 of 2017 (21646689)

BETWEEN:

CUBILLO, Angelina Ellen
Appellant

AND:

ANDREOU, Andreas
Respondent

CORAM: BARR J

REASONS FOR JUDGMENT

(Delivered 18 July 2017)

Appeal against severity of sentence

[1] On 14 December 2016 the appellant entered pleas of guilty to one count of possession of a trafficable quantity of methamphetamine and one count of supply methamphetamine in less than a commercial quantity. The possession offence was committed on 7 October 2016 and the supply offence in the period between 6 September 2016 and 7 October 2016.

[2] Methamphetamine is a Schedule 1 dangerous drug under the *Misuse of Drugs Act* (NT). The maximum penalty for supplying methamphetamine in less than a commercial quantity is imprisonment for 14 years. The maximum penalty for possession of a trafficable quantity of methamphetamine is

imprisonment for seven years. A trafficable quantity of methamphetamine is 2 g or more. The appellant was in possession of approximately 2.5 g of methamphetamine.

[3] The evidence indicated that the appellant supplied an unknown quantity of methamphetamine to various persons between 6 September 2016 and 7 October 2016. During that period, the appellant communicated with 28 people in relation to the supply of drugs.[1] When the police searched the appellant's bedroom on 7 October 2016, in addition to finding methamphetamine, they found $5,000 in the appellant's handbag. They also found unused clip seal bags and scales. While police were carrying out their search, the appellant continued to receive messages on her mobile phone in relation to the supply of drugs.[2]

[4] Morris LCJ took as her starting point an aggregate sentence of approximately two and a half years, but allowed a discount of approximately one quarter for the early plea of guilty. Her Honour convicted the appellant on both charges and sentenced her to an aggregate sentence of 23 months imprisonment, backdated to 7 October 2016,[3] with a non-parole period of 13 months. Her Honour's reasons in relation to fixing a non-parole period were as follows:

> I then consider whether or not to suspend that sentence or place her on a non-parole period. Given that that she is in breach of a

1 Based on text messages sent and received on the appellant's mobile phone.
2 Exhibit 1 in the Local Court proceedings.
3 The effect of the backdating was that the 23-month sentence would be served concurrently with a fully restored sentence of one month in file 21600082 for cannabis possession in January 2016. Transcript 15/12/2016, p 11.7.

> suspended sentence from this court and the Supreme Court … and despite the fact that she has been found suitable for supervision, although I note that the supervision report does not appear to consider the fact that she did commit these offences whilst on a suspended sentence; however, I am not satisfied at this stage that it would be appropriate to put in place a suspended sentence, given her personal circumstances, the breach of her previous orders and the continued nature of her offending.
>
> In my view, it would be better suited for the Parole Board to take various matters into account upon release from parole in relation to rehabilitation programs and the like. So I intend to set a non-parole period of 13 months from 7 October 2016.

Manifest excess

[5] The appellant's contention in relation to manifest excess is not directed at the head sentence imposed, but rather at the fact that the judge imposed a non-parole period rather than suspending the sentence. Moreover, the appellant does not complain about the length of the non-parole period fixed.[4] The appellant's contention is that, although she was found suitable to be under supervision on a suspended sentence and had been accepted into a rehabilitation program, Morris LCJ gave excessive weight to her "previous matters".[5] On the hearing of the appeal, counsel for the appellant also argued that the judge had failed to take into account or sufficiently take into account the appellant's personal circumstances.

[6] I have considered the sentencing remarks of Judge Morris.[6] In my view, they demonstrate not only a full understanding of the facts of the appellant's

---

4 Appellant's Outline of Submissions, 4 July 2017, par 17.
5 Appellant's Outline of Submissions, 4 July 2017, pars 18-20.
6 Transcript 15/12/2016, pp 7-10.

offending, but also an appreciation of the appellant's record of prior offending in the context of her difficult life, including becoming a mother at a young age and being the victim of extensive and serious violence perpetrated by her partner or former partner. In response to submissions made by defence counsel that any sentence imposed should be suspended to enable the appellant to participate in a rehabilitation program, her Honour noted a previous failure to complete court-ordered rehabilitation at Banyan House, and the recent breach of suspended sentences imposed by both the Local Court and the Supreme Court. In remarks which I consider were reasoned and balanced, her Honour ultimately identified the sentencing objectives of general and specific deterrence as weighing very heavily in her consideration.[7]

[7] Where a ground of appeal (or a contention on appeal) is that a sentencing judge failed to give sufficient weight to particular factors (as the appellant asserts), in contrast to a ground asserting that the sentencing judge disregarded a factor altogether or took an irrelevant factor into consideration, an appellate court must be especially cautious not to substitute its own opinion for that of the judge in the absence of identifiable or manifest sentencing error.[8]

[8] The court's power to suspend the appellant's sentence is contained in s 40(1) *Sentencing Act*, which provides that the court "may make an order

---

7 Transcript 15/12/2016, p 10.4.

8 *R v Bernath* [1997] 1 VR 271 at 277 per Calloway J, approved by the Court of Appeal of the Supreme Court of Victoria in *DPP v Castro* [2006] VSCA 197 at [17]; cited with approval in *Johnson v The Queen* [2012] NTCCA 14 at [25].

suspending the sentence where it is satisfied that it is desirable to do so in the circumstances"; further, that the sentence may be wholly or partly suspended, subject to such conditions as the court thinks fit. The discretion is very broad.

[9] In my judgment, the decision of Morris LCJ to fix a non-parole period was an entirely appropriate exercise of her Honour's sentencing discretion. The appellant has not demonstrated that the decision to fix a non-parole period, rather than suspending the sentence, was unreasonable or plainly unjust, or "so far outside the range of a reasonable discretionary judgment so as to itself bespeak error".[9] Ground 1 must therefore fail.

The procedural fairness ground

[10] The appellant also contends that Morris LCJ denied procedural fairness to the appellant by imposing a non-parole period without notice and without seeking submissions from either party.

[11] In my assessment, however, the sentencing proceedings were conducted by the parties on the basis that the fixing of a non-parole period was on the cards. As the respondent's counsel points out,[10] the offence was serious; the appellant had a relevant criminal history in terms of like offending; and the appellant had a history of breach of court orders, whether bail orders, a good behaviour bond or suspended sentences. The appellant had previously not

---

9 *Hanks v The Queen* [2011] VSCA 7, per Bongiorno JA at [22], cited in *Truong v The Queen* [2015] NTCCA 5; 35 NTLR 186 at [26].

10 Respondent's Outline of Submissions, 4 July 2017, par 8.

complied with the rules of Banyan House (in relation to consumption of alcohol) and for that reason had been excluded from the residential rehabilitation program. Most relevantly, the appellant had commenced to supply methamphetamine in the one-month period commencing 6 September 2016, only weeks after the Supreme Court had suspended a sentence of imprisonment for possessing a traffickable quantity of methamphetamine.[11] In the circumstances, I agree with the submissions of counsel for the respondent that the fixing of a non-parole period was foreseeable. I would add that it was an obvious and arguably probable outcome.

[12] Moreover, the learned prosecutor closed her submissions to Judge Morris as follows:[12]

> The finding of guilt puts Ms Cubillo in breach of two suspended sentences here. She has had the chance to avoid imprisonment before and I would submit in the circumstances, your Honour, that a non-parole period would also be within range.

[13] Counsel for the appellant then made submissions in reply, urging the court to disregard the sentencing decisions referred to by the prosecutor, at the same time handing up other sentencing decisions in which similar offending to that of the appellant had resulted in suspended sentences or partially suspended sentences of imprisonment. The appellant's counsel did not deal directly with the possible imposition of a sentence incorporating a non-parole period, and make submissions *contra*. Rather, he chose to deal with

---

11 The suspension had taken effect on 14 August 2016.
12 Transcript 15/12/2016, p 5.8.

the issue obliquely. He referred to several sentencing decisions, including one case in which the court "gave consideration to a non-parole period … but [the offender] was released forthwith from remand into residential rehab".[13] This was, by clear implication, a submission that Judge Morris should do likewise, consistent with defence counsel's principal submission that the appellant's sentence should be immediately suspended, taking into account the period of nine weeks served on remand.[14]

[14] The court's duty was to give both the appellant and the respondent a reasonable opportunity to present their respective cases. The court was not under some general duty to specifically forewarn the appellant of the possibility of a non-parole period being fixed.[15] In any sentencing exercise, there is a risk of an adverse finding against an offender, or an adverse outcome to an offender, arising from a range of relevant factors. The onus is on counsel to address any matter or circumstance which he or she considers requires particular attention in the course of the sentencing submissions. The fact that the judge ordered an assessment pursuant to s 103 *Sentencing Act* (as to the suitability of the appellant to be under supervision if placed on a suspended sentence) does not change the principle.

[15] There was no failure to accord procedural fairness by reason only of the fact that the matter was not the subject of express reference by Morris LCJ in the course of sentencing submissions. Her Honour was entitled to assume that

---

13 Counsel's summary of the sentence – see transcript 15/12/2016, p 6.5.
14 Transcript 14/12/2016, p 7.5, p 9.8; Transcript 15/12/2016, p 4.5.
15 See, for example, *Pantorno v The Queen* (1989) 166 CLR 466, per Mason CJ and Brennan J at 472.9.

counsel for the appellant (1) was fully aware of the ‘suspended sentence vs non-parole period’ issue and (2) would have addressed all relevant matters to the extent that he considered necessary and appropriate.

[16] Ground 2 must therefore fail.

Conclusion

[17] The appeal is dismissed.
